January 1982

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

JANUARY

The following cases were Directed for Review during the month of January:

Western Steel Corporation v. Secretary of Labor, MSHA, Docket No. WEST 81-132-RM. (Judge Morris, November 27, 1981)

Secretary of Labor, MSHA v. Old Dominion Power Company, Docket Nos., VA 81-40-R, VA 81-65. (Judge Steffey, November 30, 1981)

Secretary of Labor, MSHA v. White Pine Copper Division, Docket Nos. LAKE 81-106-RM, LAKE 81-171-M. (Judge Laurenson, December 1, 1981)

Review was Denied in the following case during the month of January:

Marlene Finn v. Brown Badgett, Inc., Docket No. KENT 81-167-D. (Judge Fauver, Default Decision of November 21, 1981)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
On Behalf of BOBBY GOOSLIN	:	Docket No. KENT 80-145-D
v.	:	
KENTUCKY CARBON CORPORATION	:	

DECISION

This case arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp III 1979), and involves the single issue of a miner's entitlement to monetary relief for a discriminatory discharge by an operator. 1/ The administrative law judge concluded that Kentucky Carbon Corporation had discharged the complainant, Bobby Gooslin, in violation of the 1977 Mine Act. He ordered the company to rehire and reinstate Gooslin to his former position with full seniority rights. 2/ The judge denied Gooslin's

1/ Section 105(c)(2) provides in pertinent part:

> The Commission shall have authority ... to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

2/ We previously considered another aspect of Gooslin's complaint. After Gooslin filed his initial claim of unlawful discrimination, the Secretary, pursuant to section 105(c)(2), applied to temporarily reinstate Gooslin pending a final determination on the merits of Gooslin's complaint. The application for temporary reinstatement was granted. Kentucky Carbon sought review of the reinstatement order, claiming that the procedural rule which governed the temporary reinstatement proceeding denied it due process. We granted Kentucky Carbon's petition for review of the reinstatement order but specifically stated that proceedings on the discrimination complaint were not suspended. Two weeks later the judge issued his decision on the merits finding that Kentucky Carbon discriminatorily discharged Gooslin. Kentucky Carbon did not seek review of this finding and it became final by operation of law. Subsequently, in the proceeding reviewing the temporary reinstatement order, we found that our temporary reinstatement rule did not afford due process. Accordingly, we vacated the order. We noted, however, that in view of the judge's decision on the merits and the company's failure to seek review thereof, a remand was unnecessary. Kentucky Carbon Corp., 3 FMSHRC 1707, 1712 (1981).

claim for back pay, interest, or other monetary benefits. He found that Gooslin had failed to present any evidence to support his claim for such relief and, therefore, that Gooslin had "abandoned" the claim. Kentucky Carbon Corp., 3 FMSHRC 640, 662-663 (ALJ 1981). We granted the petition for discretionary review of the United Mine Workers of America. 3/ The petition raised only the issue of whether the judge properly denied monetary relief. Kentucky Carbon did not file a brief on review in opposition to the claim for monetary relief. For the reasons that follow, we hold that the judge erred in finding that Gooslin abandoned his claim.

The Mine Act's discrimination provision was intended to provide protection to miners similar to that in existing federal labor statutes. 4/ See Glenn Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463, 3465 (1980), (construing analogous provision in Federal Coal Mine Health and Safety Act of 1969). The purpose of awarding monetary relief is two-fold: to further the purposes of the Act by deterring retaliatory actions, and to put an employee into the financial position he would have been in but for the discrimination. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), cert. den., 384 U.S. 972 (1966). A finding of discriminatory discharge "is presumptive proof that some back pay is owed by the employer." Mastro Plastics, 354 F.2d at 178. "Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee." Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir. 1962).

The central purpose of the Mine Act is to promote safety and health among the nation's miners. To accomplish that goal it is essential that miners be encouraged to report unsafe conditions free from the threat of retaliation and subsequent economic loss. Thus, we are persuaded that upon a finding of discrimination, a presumption of the right to monetary relief arises and such relief should be denied only where "compelling reasons" otherwise dictate. Moreover, if monetary relief is denied, the bases for the failure to make the aggrieved party whole must be articulated.

3/ Although the union was not originally a party to the proceeding, it entered an appearance prior to the hearing on the merits and subsequently represented Gooslin.

4/ E.g., section 10(c) of the National Labor Relations Act (as amended), 29 U.S.C. § 160(c)(1976) (NLRA), and sections 15(a)(3) and 16(c) of the Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(c)(1976) (FLSA).

In this case, the presumption in favor of monetary relief was not rebutted, nor did the judge articulate compelling reasons for his denial of such relief. The judge stated that Gooslin failed to present evidence in support of the requested monetary relief. Gooslin established that he was discharged because of unlawful discrimination, alleged that the discharge resulted in monetary loss, and requested various types of monetary relief. In the circumstances of this case, we conclude that the judge erred in failing to determine what monetary relief, if any, is appropriate to make Gooslin whole.

Accordingly, we reverse that part of the judge's decision in which he found that Gooslin had abandoned his claim for monetary relief and remand for further proceedings.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 7, 1982

SECRETARY OF LABOR,	Docket Nos.	VINC 78-447-P
MINE SAFETY AND HEALTH		79-12-P
ADMINISTRATION (MSHA),		79-40-P
		79-176-P
v.		79-177-P
		79-231-P
OLIVER M. ELAM, JR., COMPANY		LAKE 79-11
		79-110
		79-281

DECISION

This case involves several alleged violations of mandatory standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). The sole issue before us is whether the facility operated by Oliver M. Elam, Jr., Company ("Elam") is a "mine" subject to the Act. The judge held that it is not. 1/ We affirm.

Elam owns and operates a commercial dock on the Ohio River. It also owns, for the purpose of leasing to others, approximately 50 pieces of construction equipment such as cranes, trucks, and bulldozers. Elam employs eleven persons who work interchangeably at both the dock and equipment rental operation. Usually three employees work at the dock when it is in use. At the dock facility, steel, ingot cars, pipe, tar pitch and coal are loaded onto barges; steel and slag are also unloaded. About 40 percent to 60 percent of the tonnage loaded at the dock is attributable to coal. 2/

Among Elam's customers are some four or five coal brokers who pay Elam to load coal onto barges at the dock. The brokers, who are not mine operators, arrange for delivery of the coal by truck to the dock, and then for delivery by barge to their customers. 3/ Elam's facilities for loading coal consist of a hopper, a crusher, and conveyor belts. The coal is first delivered to and stockpiled on Elam's property. The brokers' employees then weigh the coal and place it in the hopper.

1/ The judge's decision is reported at 3 FMSHRC 161 (1981).

2/ Elam loaded approximately 300,000 tons of coal onto commercial barges in 1978. During 1979, coal loading dropped to about 1,500 tons ever six weeks, i. e., approximately 13,500 tons per year.

3/ Elam does not mine coal, nor does it or any of its stockholders or officers own any mineral interest. It has no business arrangements, contracts, or dealings directly with the coal mine operators who initially extract the coal, nor does it have any contractual arrangements with the customers who ultimately accept delivery of the coal off the barges.

Occasionally, large pieces of coal must be broken by Elam's employees in order to pass through the hopper. From the hopper a conveyor carries the coal to an American Ring crusher where it is broken into essentially one size. The crusher cannot be adjusted for variable sizing and has no grates to sort the crushed coal. Crushing is done because the conveyor belts are covered and cannot always accomodate large pieces of coal; crushing therefore increases the ease of loading, and enables a larger amount of the same to be placed in a given space on the barges. From the crusher another conveyor carries the coal to the barges. Occasionally the crusher is by-passed and coal is loaded directly onto the barges. All coal whether crushed or not is loaded on the barges. Elam does not prepare coal to market specifications or for particular uses, nor does it separate waste from coal or add any material to it. Thus, all of Elam's activities with respect to coal relate solely to loading it for shipment.

Section 4 of the 1977 Mine Act states:

> Each coal or other mine, the products of which enter commerce ... shall be subject to the provisions of this Act.

30 U.S.C. § 803. Section 3(h)(1) of the Act defines "coal or other mine" in part as:

> (C) lands, ... structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in, or resulting from ... the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1)(C). The question in this case is whether Elam's loading operation constitutes the "work of preparing the coal", and, therefore, is a "mine." Section 3(i) of the Act provides:

> "[W]ork of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. § 802(i).

The legislative history of the 1977 Mine Act indicates that a broad interpretation is to be applied to the Act's expansive definition of a mine. S.Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor and Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602. See also Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980). While we acknowledge the inclusive nature of the coverage of the Act, we do not find Elam's activities to be covered.

The 1977 Mine Act's definition of coal preparation was taken unchanged from section 3(i) of the 1969 Coal Act, 30 U.S.C. § 802(i) (1976). The 1969 Coal Act's definition, in turn, was updated from the 1952 Coal Act. The 1952 Act in part provided:

> The term 'mine' means an area of land including everything annexed to it by nature and all structures, machinery, tools, equipment and other property, real or personal, placed upon, under or above its surface by man, used in the work of extracting bituminous coal, lignite or anthracite, from its natural deposits in the earth in such area and in the work of processing the coal so extracted. The term 'mine' does not include any strip mine.
>
> The term 'work of processing the coal' as used in this paragraph means the sizing, cleaning, drying, mixing and crushing of bituminous coal, lignite or anthracite, and such other work of processing such coal as is usually done by the operator, and does not mean crushing, coking, or distillation of such coal or such other work of processing such coal as is usually done by a consumer or others in connection with the utilization of such coal

30 U.S.C. § 471(a)(7) (repealed 1969) (emphasis added).

In the 1969 Coal Act's definition of coal preparation the word "preparing" replaced "processing", and the qualifying phrase "and does not mean crushing, coking, or distillation of such coal or such other work of processing such coal as is usually done by a consumer ..." was deleted. The phrase "and includes custom coal preparation facilities" was added to the definition of coal mine, and "breaking", "washing", "storing", and "loading" were added to the definition of the work preparing coal.

Although the legislative history of the 1969 Coal Act sheds no light on the reasons for the 1969 Act's modification of the 1952 Act's definition, 4/ we find it significant that the types of activities comprising "the work of preparing the coal" have consistently been categorized as "work ... usually done by the operator." Thus, inherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a "mine" subject to the Act.

4/ Of the many bills introduced at the time the 1969 Coal Act was being considered, two retained the language of the 1952 Coal Act pertaining to processing done by consumers and others in connection with the use of coal. The other bills substituted the language that eventually was included in the 1969 Coal Act. No explanation for the differing versions is provided in the legislative history. In any event, we do not read the relevant language of either version to differ substantively, nor, apparently, does the Secretary. Brief at 11.

Rather, as used in section 3(h) and as defined in section 3(i), "work of preparing coal" connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications. 5/ In the present case, although Elam performs several of the functions included in the 1977 Act's definition of coal preparation (i. e., storing, breaking, crushing, and loading), it does so solely to facilitate its loading business and not to meet customers' specifications nor to render the coal fit for any particular use. We therefore conclude that Elam's facility is not a "mine" subject to the coverage of the 1977 Mine Act.

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

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

5/ See, e.g., the following descriptions of coal preparation:

> Purpose of coal preparation is to increase the value of fuel by making it more suitable for uses of the consumer. This is done by: (a) screening or sizing; (b) mixing or blending; (c) cleaning. By combining any 2 or all of these methods, coal can be prepared to standard specifications. A preparation plant should produce clean coal, and refuse free of saleable coal.

R. Peele, ed., Mining Engineers' Handbook, Vol. II, at 35-02 (3rd ed. 1941). Also:

> coal preparation. a. A collective term for physical and mechanical processes applied to coal to make it suitable for a particular use.
> preparation. a. Treatment of ore or coal to reject waste....
> b. The process of preparing run-of-mine coal to meet market specifications by washing and sizing.

Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 226, 859 (1968).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 1982

CARROLL D. TENNEY, Complainant	:	
v.	:	Docket No. WEVA 80-279-D
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	

ORDER

The petition filed on behalf of Carroll D. Tenney on January 5, 1982, which seeks review of a judge's decision issued on November 27, 1981, is dismissed as untimely. 30 U.S.C. 113(d)(2)(A)(i); 30 C.F.R. 2700.70(a).

Rosemary M. Collyer, Chairman

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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JAN 5 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ROY GLENN, Employed by, and Agent of CLIMAX MOLYBDENUM COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-158-M MSHA CASE NO. 05-02337-05017 A MINE: Climax Mill & Crusher

DECISION

Appearances:

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For the Respondent

Before: Judge John J. Morris

Statement of the Case

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act) charges Roy Glenn with a violation of Section 110(c) of the Act.

Section 110(c) now codified at 30 U.S.C.§ 820(c) provides, in part, as follows:

> Whenever a corporate operator violates a mandatory health or safety standard ... any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fine, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Secretary alleges that Glenn, as an agent of Climax Molybdenum Company, (Climax), knowingly authorized, ordered, or carried out a violation of the mandatory safety standard set forth in 30 C.F.R. § 57.15-5. The relevant portions of this standard are as follows:

> Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling...

After notice to the parties, a hearing on the merits was held in Littleton, Colorado. The parties filed post-trial briefs.

Issues

Two preliminary issues raised by the respondent must be addressed before discussing the merits of the case. The first is whether section 110(c) of the Act violates the equal protection clause of the United States Constitution. The second question is whether the violation charged arose only from the actions of John Payne or whether the actions of Ronald Robinson and Chris Martinez are also to be considered.

The merits of the case present three issues for consideration. The threshold issue is whether there was a violation of 30 C.F.R. § 57.15-5. If there was, the next question is whether Glenn knowingly authorized, ordered, or carried out such violation. If Glenn is found to have done so, the final issue concerns the assessment of an appropriate penalty.

Applicable Case Law

In Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8 (1981), the Commission held section 110(c) to be constitutional and enunciated the critical elements which constitute a violation of this section. The corporate operator must first be found to have violated the Act. Further, if a person, such as a shift boss, is in a position to protect an employee's safety and health and if he fails to act on the basis of information that gives him knowledge or the reason to know of the existence of a violative condition he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Preliminary Issues

The constitutional issue raised by respondent in his motion to dismiss was decided by the Commission in Kenny Richardson. In applying the rational relationship test, the Commission held that the classification in section 109(c) of the 1969 Coal Act (identical to section 110(c) of the 1977 Act) is rationally related to the purposes of the Act and, therefore, is constitutional.

> The expressed fundamental purpose of the 1969 Coal Act is to "protect the health and safety of the Nation's coal miners." 30 U.S.C. § 801 (1976). Section 109(c) is intended to provide one vehicle for accomplishing this purpose by holding corporate agents who commit knowing violations individually liable. We believe that imposing personal liability on corporate agents furthers the overall goal of the Act by providing an additional deterrent to many of those individuals in a position to achieve compliance. Kenny Richardson, supra at 25.

The Commission recognized that much of the reasoning for placing individual liability on corporate agents would also be applicable to agents of non-corporate operators. However, consistent with the rubric enunciated by the U.S. Supreme Court in Williamson v. Lee Optical 348 U.S. 483 (1955) the Commission held that Congress may take one step at a time in remedying the problem of protecting the health and safety of miners. They followed the general rule of law that legislation is to be overturned on the grounds that it denies equal protection of the law only where "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 96-97(1979).

Section 110(c) has a legitimate purpose in providing a means of encouraging officers, directors and agents of a corporation to actively promote compliance with the mandatory standards. The fact that individuals in comparable positions who are employed by sole proprietors or partnerships are immune from personal liability does not render this section unconstitutional.

Another argument raised by respondent is that the merits of this case involve only the actions of one miner, John Payne, and not the actions of the other two miners who were on the girder at the time of the incident in question. The citation itself reads as follows:

> Three welders were observed working on an oxygen line about 30 feet off of the ground. One of them was observed walking a distance of about 30 feet on a steel girder without a safety line hooked up. Roy Glenn, shift boss, was directing the work from below.

To abate the citation the following action was taken:

> Lift truck was brought in to take the other two welders down in a safe way. The work was completed with the use of the lift truck.

At trial, the MSHA inspector, Richard King, testified that at the time the citation was written his only concern was with regard to the action of Payne (Tr. 58-68). However, a subsequent investigation revealed that the other two miners, Ronald Robinson and Chris Martinez, got to the area where they were welding in the same manner as Payne (Tr. 25).

The Act provides that "each citation ... shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated." 30 U.S.C. § 814(a). In construing a similar requirement in the Federal Coal Mine Health and Safety Act of 1969, the predecessor of the present Act, the Commission held that even if a notice is insufficiently specific, that defect alone would not render the notice invalid. Secretary of Labor v. Jim Walter Resources, Inc., 1 MSHC 2233 (1979). The Commission construed the requirement for specificity as follows:

> The primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter. Jim Walter Resources, Inc. supra at 2234.

Here, as in the case referred to above, the respondent did not claim any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor did Glenn contend that the notice prevented him from preparing a proper defense. The citation and notice of abatement apprised Glenn of the standard violated, the miners observed by the inspector and that Glenn was directing the work of the miners. For the reasons stated above, I deem the citation to have been sufficient notice of the allegedly violative actions of Robinson and Martinez, as well as Payne.

Findings of Fact

1. On January 5, 1979, Roy Glenn was the shift boss. He had been a supervisor since June 1976. He had been a welder and a Climax employee for 21 years (Tr 259, 288).

2. On the date of this incident Glenn was supervising a crew of ten miners including John Payne, Chris Martinez and Ronald Robinson (Tr. 263, 266).

3. Around noon Glenn instructed Martinez and Robinson to go up on a girder and to prepare to start to weld a valve on an oxygen line (Tr. 228, 267).

4. At the same time Glenn instructed Payne to open and bleed all of the oxygen valves which were three feet from the floor (Tr. 116, 271).

5. After assigning tasks to his crew, Glenn went around the back of the crusher and began checking the valves to make sure they'd been opened. Glenn considered this to be important because he didn't want to cut in on a line while it was under pressure (Tr. 272).

6. The oxygen line Martinez and Robinson were to work on was located next to a girder which was 20 feet above the floor. The girder was 20 1/2 inches wide and 15 feet long with 5-6 inch open spaces along its surface. Below the girder was a concrete floor with heavy equipment and various large objects in the area (Tr. 22-24, 287).

7. There were two ways to reach the area where the welding was to be done. There was a 20 foot extension ladder on the screen floor which was 40-50 feet away on another deck (Tr. 243, 269, 286). An alternative means, was to go up a staircase, get onto the girder and walk across the girder (Tr. 237, 269, 289).

8. Robinson had used the ladder on occasion to get up to the girder (Tr. 243).

9. On January 5, 1979, Robinson and Martinez walked 10-12 feet across the girder to reach the oxygen line (Tr. 230). They had safety belts on while walking on the girder, but the belts weren't hooked onto anything because there was no cable where they could tie off (Tr. 231, 287).

10. There were no handrails alongside of the girder (Tr. 24, 120).

11. Once they reached the oxygen line, Robinson and Martinez tied off their safety lines to an air line (Tr. 242, 252).

12. Glenn did not tell Robinson and Martinez how to get up to the oxygen line. At the time, he did not think about how they were going to get up to the area (Tr. 235, 251, 269, 270, 289).

13. Glenn was familiar with the construction of the girder (Tr. 295).

14. Glenn knew Robinson and Martinez were very experienced in climbing. Additionally, Robinson was a first class welder and Martinez was a first class mechanic. Robinson had worked on Glenn's crew since October 1974 (Tr. 251, 268, 289).

15. Martinez and Robinson had worked on a girder many times prior to the incident in question (Tr. 271).

16. Glenn relied on Martinez and Robinson to complete their assigned task safely (Tr. 263, 269, 270, 295).

17. Glenn had told his crew that morning to take their safety line with them (Tr. 241).

18. Payne also went up onto the girder to see if he could help Robinson and Martinez. He did not use his safety belt (Tr. 119, 131). Glenn did not instruct or authorize him to go up on the girder (Tr. 119, 131, 133, 273-276, 281).

19. Payne got halfway across the girder when he saw Glenn waving at him with a flashlight and indicating to him to come down. Glenn waved him down "because [he] didn't need him up there." (Tr. 133, 134, 280).

20. In the 21 years Glenn had been employed by Climax he hadn't had any lost time accidents involving himself or his crew (Tr. 283, 285).

21. Glenn gave routine instructions in safety precautions to his workers. He conducted many "mini-safety meetings" on the spot when a particular job was to be done. He'd tell the miners of the hazards and problems they might come up against (Tr. 195, 270).

22. Due to the construction and location of the girder, there was a danger that a miner walking on the girder could fall (Tr. 22-24, 287).

Corporate Violation

Respondent correctly contends that prior to the determination of the agent's liability it must be found that the corporation violated the Act. The Commission, in Kenny Richardson, supra, held that due process does not require a determination of the mine operator's violation in a proceeding separate from or prior to a proceeding involving the agent. "The operator's violation is merely an element of proof in the Secretary's case against the agent." Richardson, supra, at 10-11.

In the present case, it is undisputed that Payne, Robinson and Martinez walked across the girder without the use of a safety belt (Tr. 119, 231, 287). It is also uncontroverted that there was a danger of falling from the girder which was 20 1/2 inches wide and was located 20 feet above a concrete floor (Tr. 22-24, 287). There is, therefore, no question that Payne, Robinson and Martinez failed to comply with 30 CFR 57.15-5 which requires safety belts to be used when there is a danger of falling.

A mine operator is to be held liable for any violation of the Act that occurs at the mine regardless of fault. Sec. of Labor v El Paso Rock Quarries 2 FMSHRC 1132 (1981). I, therefore, conclude for the purpose of this proceeding that Climax Molybdenum violated 30 CFR 57.15-5.

Contentions of the Parties

The Secretary contends that Glenn, acting as an agent for Climax, authorized Martinez and Robinson to walk across the girder without the benefit of safety belts in violation of 30 C.F.R. 57.15-5. Petitioner's position is based on the following scenario: Glenn was a shift boss for Climax. He supervised a crew of ten miners which included Martinez, Robinson and Payne. Glenn was aware of the standard's requirement that safety belts be worn where there's a danger of falling. He was also familiar with the construction of the girder. He told Robinson and Martinez to work on the oxygen line. Glenn knew one way to reach the line was to walk across the girder, and he knew that in doing so a miner could not use a safety belt. Glenn failed to instruct the miners to use another means of getting to the line which would have been safer and in compliance with the Act.

In his post-trial brief, the Secretary admits that Glenn did not authorize Payne to go up onto the girder. Payne did so voluntarily without the knowledge of Glenn. The actions of Payne, therefore, are not a violation of which Glenn had actual knowledge, nor could he have had knowledge of such a violation.

Glenn maintains that he was not an agent in a position to have prevented the violation. In the alternative, he contends that if he is considered to have been an agent, he did not authorize the violation.

Glenn's argument that he was not an agent is premised on the allegation that Glenn's position at the mine was not within the scope of the Act's definition of an agent, 30 U.S.C. § 802 (e).[1/] He was not responsible for the operation of all or part of the mine or the supervision of miners. Rather, Glenn contends that he had only limited supervision over the job to be done. He assigned tasks to members of his crew but did not have the power or control over them as an officer or director would. Specifically, if he'd been notified of a violation he wouldn't have had the power to correct it. Such authority belonged only to an officer or director of the corporation.

Respondent bases his alternative position on the defense that he couldn't have foreseen the violative actions of Robinson and Martinez. Glenn had instructed them that morning on safety and told them to take their safety belts. He did not tell Martinez and Robinson how to get to the area where they were to weld and did not know how they got onto the girder. He simply relied on Robinson's and Martinez's experience as a first class welder and a first class mechanic, respectively, to perform their assigned tasks safely. The two miners could have reached the area safely by using a ladder.

It was not Glenn's practice to give detailed instructions to such experienced miners. As he put it, "I don't tell a doctor how to treat me." (Tr. 269). However, Glenn maintains that he was conscientious about safety as evidenced by the fact that in the twenty-one years he worked for Climax neither he nor his crew had had any lost time accidents. Essentially, Glenn contends that a supervisor should not be held to be an absolute insurer of the conduct of others over whom he had no control.

Discussion

On January 5, 1979, Glenn, in his capacity as a shift boss, was an agent of Climax. He was responsible for the supervision of ten miners on his crew. His duties included the instruction of the miners as to safety and their assignment to certain tasks. (Tr. 270, 297). This indicates that he did more than merely supervise the job to be done. He had some control over the actions of the miners themselves which brought him within the scope of the Act's definition of an "agent". I accordingly deny Glenn's contention that he was not the agent of Climax.

1/ (e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.

Glenn's liability under section 110(c) for the actions of Robinson and Martinez turns on whether he knew or had reason to know of the violation and whether he had the authority to prevent the violation. There is no evidence to support MSHA's allegation that Glenn himself carried out the violation or directly ordered the two miners to walk across the girder without the benefit of a safety belt.

Glenn's secondary argument concerns his view that he did not know of the violation. The evidence, however, supports MSHA's position that Glenn had reason to know that Robinson and Martinez might walk across the girder without the use of a safety belt and that there was a danger that they could fall. Glenn testified that he was familiar with the construction of the girder. He knew there were no handrails or a cable attached to the girder and, therefore, safety belts could not be used while walking across. Glenn stated that there were two ways the miners could have reached the oxygen line. They could have used a ladder which was on another deck or they could have walked across the girder. These facts establish that Glenn had sufficient information to give him reason to know of a possible violative condition, namely, that Martinez and Robinson could walk across the girder without the aid of safety belts.

The difficult issue to decide in this case is whether Glenn "authorized" the violation. It is undisputed that he did not tell the miners to walk across the girder. He did not see them on the girder until they were sitting down and had tied off their safety belts to the oxygen line. Glenn never gave any thought to how Martinez and Robinson would get to the area. At the time, he was concerned about the danger of cutting into a line which was still under pressure and he was following Payne and Gilbert Martinez (not to be confused with Chris Martinez) to make sure the lines were bled properly. Glenn relied on Robinson and Martinez with their experience and expertise to complete their assigned tasks in a safe manner.

The credible evidence also establishes that Glenn did not consider it to be unsafe for Robinson and Martinez to walk across the girder without using a safety belt because they were very experienced in their job. Glenn testified at the hearing: "I am sure if these two men felt any danger whatsoever they would have done something else" (Tr. 295). Additionally, when he saw Payne on the girder he waved him down because he didn't need him up there and not because he believed it was unsafe for him to be walking across the girder.

As discussed earlier there is no question that there was a risk of falling for any miner who walked across the girder without a safety belt. There was no room for judgment by any miner as to whether this danger existed. Glenn had the authority to instruct his crew on the safe means of completing a job. To this extent he had control over the actions of Robinson and Martinez and, therefore, could have prevented the violation.

Contrary to the Secretary's contentions, the record does not support a finding that Glenn presumed Robinson and Martinez would walk across the girder. Glen's testimony on this issue is ambiguous. However, because walking across the girder was at least as likely a means of getting to the oxygen line as using the ladder, I find that Glenn had a duty to instruct the miners to use the ladder. Based on the above facts, I find that Glenn indirectly authorized the violation by failing to caution Robinson and Martinez on the danger of walking on the girder and the need to use the ladder.

The circumstances of this case differ from that in Kenny Richardson because here the violative condition did not exist at the time Glenn had a duty to act. In Richardson, the respondent violated the Act by failing to remove from service equipment in an unsafe condition. However, it is consistent with the remedial nature of the Act to impose a duty on agents to prevent violations which they have reason to know are likely to occur as well as to abate existing violative conditions. Often those with the same supervisory capacity as Glenn are the only members of management that have sufficient direct contact with the miners to actually ensure compliance with the safety and health standards. The primary purpose of the Act is to urge all members of management to do everything within their power to protect the health and safety of miners. Glenn's testimony evidenced an attitude that is contrary to this purpose. Although he is to be commended for an excellent safety record, his policy in this instance of allowing the miners to evaluate the risks of the job and determine when precautions are to be taken creates an atmosphere itself which is conducive to the occurrence of falling-type accidents.

Assessment of a Penalty

The Secretary proposes that a penalty of $500.00 be assessed against Glenn. Petitioner bases this on the allegation that Glenn was grossly negligent in allowing the violation to occur. I disagree with MSHA's determination of the degree of negligence attributable to Glenn.

"Gross negligence" is defined in 30 C.F.R. § 100.3(d)(3) as causing the violative condition or practice by the exercise of a reckless disregard of mandatory standards or the reckless or deliberate failure to correct an unsafe condition or practice known to exist. Glenn did not actually know that Robinson and Martinez walked across the girder. He had previously instructed them on the need to wear safety belts and routinely discussed safety matters with his crew. His policy as to these experienced and highly skilled miners was to allow them to evaluate the dangers involved in a particular job, and he relied on them to take appropriate actions to protect themselves. Although this policy was not, under the circumstances in this case, the best means of protecting the miners, it is not when coupled with the routine safety meetings, indicative of a reckless disregard of the standards.

Another factor to be considered is the good faith efforts of Glenn in quickly abating the condition. He immediately had Robinson and Martinez safely removed from the girder. After considering all the criteria required to be examined in the assessment of a penalty, I deem a penalty of $40.00 to be appropriate.

ORDER

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

1. The citation is affirmed.

2. A penalty of $40 is assessed.

3. Respondent is ordered to pay said $40 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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JAN 5 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
v.	)	DOCKET NO. WEST 80-164-M
LOPEZ REDI MIX COMPANY, Respondent.	)	A/C No. 45-02404-05001 H
	)	MINE: Lopez Redi Mix Pit & Plant

DECISION

APPEARANCES:

Ernest Scott, Jr., Esq., Office of the Solicitor
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For the Petitioner

Michael W. Smith., Esq.
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Anacortes, Washington 98221
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The above-captioned civil penalty proceeding was brought pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter referred to as "the Act").

Pursuant to notice, a hearing on the merits was held in Seattle, Washington on April 28, 1981. The parties waived filing post-hearing briefs.

ISSUES

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised

are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

FINDINGS OF FACT

1. Richard Leonard Pickering, Jr., is the owner and operator of the Lopez Redi Mix Company, named as respondent in this case.

2. Respondent operates a sand and gravel pit and concrete redi mix business on Lopez Island, San Juan County, in the State of Washington.

3. Respondent operates the business with the assistance of one part time employee who usually drives the truck.

4. Respondent's gross dollar volume of sales per year is approximately $100,000.

5. The respondent's business involves selling sand, gravel and redi mix cement on Lopez Island and Shaw Island. This is accomplished by the extraction of sand and aggregate from a pit located on property owned by the respondent. This product is mixed with cement purchased from suppliers located in Seattle and Bellingham, Washington. The respondent uses a Caterpiller 922B front end loader to extract the material from his pit, purchases diesel oil and gasoline for use in his equipment from Standard Oil Company, delivers the redi mix cement to its customers traveling on county roads on the island, uses the telephone and United States mail service for business purposes and travels at times to Seattle, Washington via a ferry boat to the mainland and on the highways of the State of Washington looking at machinery and equipment (Tr. 10, 11 and 12).

6. Citation no. 354617 was issued to the respondent on September 20, 1979, for a violation of 30 C.F.R. § 56.3-2.

7. On September 20, 1979, during a regular inspection of respondent's pit, MSHA[1]/ inspector Vern Boston observed an approximately 80 foot high wall on the east side of the pit with fallen trees and loose brush hanging over the top edge. A roadway into the pit was sloped so that the loader would be facing downhill while it was extracting material from the east wall of the pit (Tr. 31).

1/ Mine Safety and Health Administration.

8. The east wall of the pit appeared stable but one tree had slid off the top and was laying on the sand where it had apparently fallen from the top.

9. Fresh tire tracks at the face of the east wall of the pit indicated that recent loading of material had been performed there (Tr. 37 and 38).

10. MSHA inspector Boston issued a section 107(a) withdrawal order to respondent closing the east wall of the pit until the material had been stripped back no less than 10 feet at the top.

11. After the inspector issued the citation, respondent "barricaded off" the area and stopped the removal of material from that area.

12. Respondent purchased an additional five acres of land behind the east wall in order to correct the situation and have additional gravel to mine. He hired a contractor to remove the tree stumps and the over burden from this land (Tr. 55).

13. Respondent returned to removing the gravel from the east wall after correcting the condition pointed out in the citation without notifying the MSHA inspector (Tr. 24).

DISCUSSION

Citation no. 354617[2]/ charges the respondent with having violated mandatory safety standard 56.3-2. The standard provides as follows:

> 56.3-2 Mandatory. Loose, unconsolidated material shall be stripped for a safe distance, but in no case less than 10 feet, from the top of pit or quarry walls, and the loose, unconsolidated material shall be sloped to the angle of repose.

The respondent does not argue that the condition described in the citation issued by inspector Boston did not exist. Instead, he argues that he, as owner and operator of the front end loader involved herein, was the only person exposed to danger and that he was extremely careful. Further, he did not at the time own the adjacent land next to his pit wall and had to get the material he did own out to supply his customers. He argued that his operation was small and did not involve shipments in interstate commerce and was not covered under the Act. Also, in his answer to the Secretary's petition for assessment of penalty, respondent argues that "Lopez Redi Mix Company" has no capacity to be sued as a Respondent.

2/ The citation reads as follows:

The east wall of the pit was approximately 80 feet high, vertically. It was not stripped back. The over-burden containing loose materials and trees were hanging over the rim. The loader that is used to extract materials from beneath the pit wall is a Cat 922B front end loader.

Relative to the last argument of the respondent, as described above, Richard Leonard Pickering, Jr., testified that he is the owner and operator of the business designated Lopez Redi Mix Company (Tr. 8). Pursuant to Section 3(d) of the Act an operator of a mine is described as follows:

> "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

In lieu of Mr. Pickering's statements in this case as to his being the owner and operator of the Lopez Redi Mix Company, I find there is no merit to his argument that he cannot be charged with a violation of the Act.

The respondent further argues that his mine is not subject to regulation under the Act as the products produced by the sand gravel pit are not destined for shipment in interstate commerce. The undisputed facts show that respondent sells sand, gravel and concrete to customers on the island where the pit is located and on one other island nearby. Admittedly, the products of respondent's mine do not move across state lines but they do affect Commerce under definition of that term in Section 4 of the Act which states as follows:

> Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect Commerce, and each operator of a mine, and every miner in such mine shall be subject to the provisions of the Act.
>
> Section 3(b) of the Act defines "Commerce" as trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or *** between points in the same State but through a point outside thereof.

I find the law well settled on this question and conclude that respondent's mine operations come within the Commerce coverage of the Act. In Fry v. United States, 421 U.S. 542, 547 (1975), the Supreme Court said "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with Foreign Nations." See

Heart of Atlanta Motels, Inc. v. United States, 379 U. S. 241, (1964); Wickard v. Filburn, 317 U.S. 111, (1942). In the oft-quoted case of Wickard v. Filburn, supra, the Supreme Court held that wheat grown by an individual farmer for his own consumption is subject to federal regulations if it exerts a substantial economic effect on interstate commerce. The Court said that, even though the farmer's contribution to the demand for wheat may be trivial, that is "not enough to remove him from the scope of federal regulations where, as here, his contribution taken together with that of many others similarly situated, is far from trivial." At p. 127.

Turning to the merits of the issued citation in this case, the facts show that a violation of standard 56.3-2 occurred. Respondent testified that he knew of the overhang and loose material at the top of the east pit wall and that it was dangerous to work under it. However, he stated that he had to get the gravel out (Tr. 15, 16 and 53). He argued that only his life was endangered and that he was careful (Tr. 17). This, of course, is not enough. There was a part time employee who drove a truck into the pit to be loaded and could, conceivably be endangered while in the pit. Further, the Act provides protection for all miners including the owner-operator herein, in spite of himself.

The remaining question is what penalty should be assessed? This requires an analysis of six criteria. 30 U.S.C. § 820(i). Respondent is a small mine operator, but by his own statement, his ability to continue in business would not be affected by any penalty I may impose.

During testimony, there was mention of a prior violation of a similar type as involved herein. However, no proof was forthcoming on this matter and it was denied by the respondent. Counsel for the Secretary, in final argument, stated that he was unclear as to any prior violations as shown on the statement from the assessment office and therefore, appropriate penalty for this violation should not be increased for this reason. The respondent demonstrated good faith by going ahead and barricading this section of the pit, and purchasing additional land next to the pit in order to facilitate correcting the overhang on the east wall. He spent considerable money on having the land "logged" and for the removal of loose material on the top.

I find that the respondent's failure to notify the inspector when he had corrected the condition involved herein was wrong, but that oversight apparently resulted from a lack of understanding of what was required under the Act. The respondent's operation is small and he is not experienced in matters of this type.

Based on the above findings and discussions, I conclude that the appropriate penalty for the violation found is $150.00.

Conclusions of Law

1. I have jurisdiction over the subject matter and the parties to this proceeding.

2. Respondent violated 30 C.F.R. § 56.3-2 as alleged by the Secretary of Labor.

3. The appropriate penalty for the violation is $150.00.

ORDER

Respondent is ORDERED to pay the sum of $150.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 7 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceedings
	Petitioner	Docket No. CENT 81-102-M A.C. No. 23-00458-05016
v.		
OZARK LEAD COMPANY,	Respondent	Docket No. CENT 81-133-M A.C. No. 23-00458-05017
		Frank R. Milliken Mine and Mill

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Gerard T. Carmody, Esq., Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging 10 violations of mandatory standards. The general issues are whether the Ozark Lead Company (Ozark) has violated the regulations as alleged in the petitions filed herein, and, if so, the appropriate civil penalties to be assessed for the violations.

Contested Citation

Citation No. 543834 charges a violation of that part of the mandatory safety standard at 30 C.F.R. § 57.3-22 that provides that "[l]oose ground shall be taken down or adequately supported before any other work is done." The citation reads as follows:

> Loose was observed in the back in the L-1 213-6775 heading. Mucking had progressed beyond the loose toward the face creating a hazard for persons working or walking under it. The amount of loose involved was sufficient enough to cause serious injury.

It is not disputed that during the course of a regular inspection of the Frank R. Milliken Mine on July 30, 1980, MSHA inspector William Burich observed a mass of loose, unconsolidated material in the brow of the cited heading. The material was discolored and whitish in appearance indicating to Burich that it had been dried out for a period of between 4 hours to 24 hours. There were also cracks in the material. Burich concluded that it was just "waiting to fall." There was also a muck pile at the face of the cited heading and tire tracks leading to that muck pile but there were no miners in the immediate area and no other evidence that any work was underway. Burich did not know when anyone had last worked in the subject heading and did not bother to inquire. He nevertheless issued the citation based solely on the speculation that the tire tracks demonstrated that work had taken place in the cited heading after the "loose" had been created. Burich had also been informed (though the operator now contends, erroneously) that the cited heading was among those considered "active" and there were no signs, barricades, or other indication to suggest that the cited entry was inactive or off-limits.

Barry Conway, the mine foreman in charge of the cited area, testified that the subject heading was indeed considered by him to have been "inactive" as of July 18, 1980. He admitted, however, that neither the general mine map nor any other official document reflected this status even as late as July 30, 1980, the date of the inspection, and that not even Company Safety Inspector Roderman or mine foreman, Ron Thomas, were told of the closing. Conway further admitted that no physical evidence existed to show that the subject heading was "inactive" and that nothing would have prevented an employee from entering that heading. Conway testified that as of July 18, 1980, he had not observed any "loose" in the heading. Conway admitted, however, that blasting had thereafter continued in the general vicinity of the cited area and, on at least one occasion, only 35 feet from the cited loose. This blasting continued until July 24, 1980. Conway admitted that a reasonably prudent mine foreman would have barricaded an inactive area such as the heading at issue.

Since it is undisputed that the cited "loose" did in fact exist, the specific question to be decided is whether that "loose" was "taken down or adequately supported before any other work [was] done" within the requirements of the cited standard. In this regard, I find the Secretary's case to be lacking. The Secretary's own evidence shows that the "loose" had existed for not more than 24 hours before its discovery by Inspector Burich around 1:30 on the afternoon of July 30, 1980, and no credible evidence exists to show that any work had been performed in that section of the mine during that period of time. Indeed, the only credible evidence of work performed in that area was shown by company records to have been performed on July 24, 1980--5 days before the "loose" would have even existed. Evidence that tire tracks and a muck pile existed in the cited entry without evidence establishing the time at which they were placed there does not of course prove that work had been performed in the cited entry after the "loose" had come into existence. While a clearly dangerous condition did in fact exist here, under the unique facts of this case I can find no violation of the particular standard that was cited. The citation must accordingly be vacated.

Proposal for Settlement

In an amended joint motion to approve settlement filed at hearing, the parties requested the disposition noted below. Sufficient evidence has been presented, including evidence relating to the criteria set forth in section 110(i) of the Act, from which I am able to determine that the proposed settlement is appropriate. The motion is accordingly approved.

ORDER

Docket No. CENT 81-102-M

Citation No. 543834 is VACATED. The Ozark Lead Company is ORDERED to pay a civil penalty of $320 within 30 days of the date of this decision, to be apportioned as noted below:

Citation No.	Date	Standard	Original Assessment	Approved Settlement Amount
544407	07/29/80	57.14-1	$52	$45
543835	07/31/80	57.15-5	78	78
544608	07/31/80	57.9-54	66	50
543836	08/05/80	57.6-57	98	98
544408	08/05/80	57.14-1	98	49

Docket No. CENT 81-133-M

Citation Nos. 543846 and 543848 are VACATED. The Ozark Lead Company is ORDERED to pay a civil penalty of $170 within 30 days of the date of this decision, to be apportioned as noted below:

Citation No.	Date	Standard	Original Assessment	Approved Settlement Amount
543845	10/28/80	57.11-1	$ 66	$ 48
543849	10/27/80	57.6-106	122	122

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

JAN 7 1982

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
	)	DOCKET NO. WEST 79-391
	)	A/C No. 05-02898-03008 V
	)	DOCKET NO. WEST 79-408
Petitioner,	)	A/C No. 05-02898-03023
	)	DOCKET NO. WEST 79-52
	)	A/C No. 05-02898-03015 V
	)	DOCKET NO. WEST 79-327
	)	A/C No. 05-02898-03021
v.	)	DOCKET NO. WEST 79-344
	)	A/C No. 05-02898-03022
	)	DOCKET NO. WEST 79-160
	)	A/C No. 0502898-03017 V
	)	DOCKET NO. WEST 80-77
	)	A/C No. 05-02898-03025
COLORADO WESTMORELAND, INC.,	)	DOCKET NO. WEST 79-199
	)	A/C No. 05-02898-03020
	)	DOCKET NO. DENV 79-511-P
Respondent.	)	A/C No. 05-02898-03012
	)	DOCKET NO. WEST 79-99
	)	A/C No. 05-02898-03016
	)	DOCKET NO. WEST 79-209
	)	A/C No. 05-02898-03018
	)	
	)	MINE: Orchard Valley

DECISION AND ORDER

Appearances:

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Sherman & Howard
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Before: Judge John A. Carlson

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought by the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], seeking the assessment of civil monetary penalties against Colorado Westmoreland, Inc. [hereinafter "Westmoreland"], for alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the Act"]. Pursuant to notice, the matters came on for hearing in Denver, Colorado, at which time the parties proposed a negotiated settlement on the record for approval by the Commission.

DISCUSSION

In the interest of clarity and convenience, I will address the docket numbers and citations as they were presented to me on the record.

WEST 79-391

This case involves one citation, no. 242340, alleging a violation of the mine's roof control plan. Originally a § 104(d)(1) citation with a proposed penalty of $350.00, the Secretary moved to amend the citation to reflect a § 104(a) action, with the proposed penalty to remain at $350.00. Westmoreland stipulated to the amendment. I find the amendment to be consistent with the purposes of the Act and therefore grant the motion.

WEST 79-408

This case involves one order of withdrawal no. 243527, alleging a violation of the mine's roof control plan. The proposed penalty is $305.00. Westmoreland moved for approval to withdraw its notice of contest and pay the proposed penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 79-52

This case involves one citation, no. 242557, alleging a violation of the auxiliary fans and tubing standard. The action is a § 104 (d)(1) citation with a proposed penalty of $1,000.00. Westmoreland moved for approval to withdraw its notice of contest and pay the proposed penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 79-327

This case involves two citations, nos. 9945783 and 9945803, both alleging violations of the respirable dust reporting standard. The proposed penalties are $66.00 and $60.00, respectively. The Secretary moved to vacate both of the citations for lack of sufficient evidence of a violation. Westmoreland had no objection. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 79-344

This case involves one citation no. 9945834, alleging a violation of the respirable dust reporting standard. The proposed penalty is $44.00. The Secretary moved to vacate the citation for lack of sufficient evidence of a violation. Westmoreland had no objection. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 79-160

This case involves one order of withdrawal, no. 242193, alleging a violation of the accumulation of combustible materials standard in that sloughage from the ribs was allowed to accumulate. The proposed penalty is $1,500.00. The Secretary moved to vacate the order on the grounds that there was substantial uncertainty as to whether or not there was a provable violation. Additionally, the inspector who issued the order is no longer employed by the Mine Safety and Health Administration and the Secretary anticipated some difficulty in obtaining his services for trial. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 80-77

This case involves one citation, no. 786452, alleging a violation of the mechanical equipment guards standard. The proposed penalty is $140.00. Westmoreland moved for approval to withdraw its notice of contest and pay the proposed penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 80-199

This case involves four citations, nos. 786331, 786337, 786343 and 786344, each involving independent contractors of Westmoreland. The proposed penalties are $170.00, $122.00, $150.00 and $56.00, respectively. Westmoreland stated that the notices of contest to the citation were filed prior to the promulgation of standards relating to citation of independent contractors and that it had no desire to litigate the legal issue. Westmoreland moved for approval to withdraw its notices of contest and pay the proposed penalties. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

DENV 79-511-P

This case involves six contested citations. The first citation, no. 9945648, alleges a violation of the respirable dust reporting standard and carries a proposed penalty of $84.00. The Secretary moved to vacate the citation for lack of sufficient evidence of a violation. Westmoreland had no objection. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

The second citation, no. 9945673, alleges a violation of a respirable dust reporting standard in that Westmoreland failed to provide dust samples for four miners. The proposed penalty is $84.00. The facts indicate that samples were provided for three of the four miners. The Secretary moved to amend the citation and the proposed penalty to reflect that only one miner was not sampled. The sum of $21.00 was stipulated to be an appropriate penalty.

With the modification of the citation and proposed penalty, Westmoreland moved for approval to withdraw its notice of contest and pay the amended penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motions.

The third citation, no. 245993, involves an issue as to the denial of Westmoreland's walk-around rights by virtue of the activities of the inspector, though there is no dispute over the subject matter of the citation. The proposed penalty is $78.00. The Secretary moved to amend the proposed penalty to $39.00 in the interest of insuring some enforcement of the citation. With the modification of the proposed penalty, Westmoreland moved for approval to withdraw its notice of contest and pay the amended penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motions.

The next citation in that same docket number is no. 242556, an imminent danger order of withdrawal with a proposed penalty of $395.00. The parties would stipulate that the facts indicate that there was no imminent danger and move that the citation reflect a § 104(a) action. The parties stipulate that the proposed penalty of $395.00 is appropriate for the violation. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

The next citation, no. 245933, alleges a violation of the ventilation system and methane and dust control plan standard. The proposed penalty is $38.00. Westmoreland moved for approval to withdraw its notice of contest and pay the proposed penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

The final citation in this docket, no. 245992, also alleges a violation of the standard just referenced. The proposed penalty is $38.00. Westmoreland moved for approval to withdraw its notice of contest and pay the proposed penalty. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

WEST 79-99

This case involves three citations. The first citation, no. 9945717, alleges a violation of the respirable dust reporting standard and carries a proposed penalty of $52.00. The Secretary moved to vacate the citation for lack of sufficient evidence of a violation. Westmoreland had no objection. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

The second and third citations in this docket, nos. 242696 and 245934, allege violations of the ventilation system and methane and dust control plan standard. The proposed penalties are $84.00 and $130.00, respectively. Westmoreland moved for approval to withdraw its notices of contest and pay the proposed penalties. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

This case involves two citations, nos. 9945705 and 242191, both alleging violations of a respirable dust standard. The proposed penalties are $180.00 for each alleged violation. Westmoreland moved for approval to withdraw its notices of contest and pay the proposed penalties. I find the request to be consistent with the purposes of the Act and therefore grant the motion.

ORDER

The negotiated settlement proposed on the record is APPROVED. The respondent, Westmoreland, shall pay civil penalties in the total amount of $3,398.00 within 30 days of the date of this Decision.

SO ORDERED.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 11 1982

GERALD D. BOONE,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. WEVA 80-532-D
REBEL COAL COMPANY,	:	
Respondent	:	Rebel Coal No. 2 Mine

DECISION AND ORDER AWARDING DAMAGES AND COSTS

Appearances: Larry Harless, Esq., United Mine Workers of America, Charleston, West Virginia, for the Complainant; Frederick W. Adkins, Esq., Cline, McAfee & Adkins, Norton, Virginia, for Respondent.

Before: Judge Melick

On July 8, 1981, a decision was issued in this case holding that Mr. Boone was discharged by the Rebel Coal Company (Rebel) in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter the "Act"). A subsequent hearing was held in Abingdon, Virginia, on December 15, 1981, limited to the issue of the amount of damages and costs that should be awarded the Complainant as a result of that unlawful discharge. This decision is likewise limited to that issue.

Back Pay

It has been determined that Mr. Boone was unlawfully discharged by Rebel on May 28, 1980. The evidence shows that at the time of his discharge, he was working a regular 5-day work week with periodic overtime on Saturdays. According to John Lockhart, assistant superintendent of the Rebel No. 2 Mine, the Saturday work was alternated among the employees so that each would work one or two Saturdays a month. I find this testimony to be credible and conclude that Mr. Boone was performing overtime work on alternate Saturdays. Boone's regular rate of pay at that time was $9.81 an hour and the time-and-a-half rate was accordingly $14.72 an hour. On his regular work days, Boone earned his regular rate for 7-1/4 hours and the time-and-a-half rate for 45 minutes each day. For his Saturday work he received 7-1/4 hours of pay at the time-and-a-half rate. Mr. Boone was paid for 4 hours' work on the day of his discharge, May 28, 1980, and was reinstated by Rebel on July 23, 1980.

He requests back pay for the work lost between those dates. I find that he is entitled to such pay in the amount of $3,670 plus interest at the rate of 12 percent per annum computed from the dates such pay would ordinarily have been due to the date such payment is made.

The credible evidence further shows that after Mr. Boone was reinstated on July 23, 1980, he continued to work for Rebel only until August 20, 1980. On the latter date, he was injured on the job and was treated and released from a local hospital. Even though he was subsequently able to return to work, he never did. Boone never filed for any benefits to which he may have been entitled as a result of those work-related injuries and I do not therefore find that he is entitled in this proceeding to any additional pay for lost work due to those injuries. I also find that by leaving his job on August 20, 1980, and never returning Boone waived and abandoned entitlement to back pay from that date until October 9, 1981, the date he was ordered permanently reinstated following a hearing and decision on the merits. 1/ This determination is consistent with decisions under the National Labor Relations Act wherein the employer is released from back pay obligations as of the date the employee rejects an offer of permanent reinstatement. NLRB v. Huntington Hospital, Inc., 550 F.2d 921 (4th Cir. 1977).

I reject Mr. Boone's contention that he refused to return to work only because of mistreatment. He alleges that the operator forced him to walk back to the job site from the hospital that day. The credible evidence supports the operator's position that it was necessary to send Complainant to the hospital in an ambulance and that it was a well-established practice to reimburse the employee's taxi fare from the hospital. There is no evidence that Boone was mistreated.

I therefore find, commencing as of October 9, 1981, and continuing thereafter for each regular work day for which Mr. Boone is not reinstated by Rebel that he is entitled to the amount of $96.40 (to reflect the new hourly rate of $11.51 per hour) and for each alternate Saturday commencing with October 10,

1/ I find that this action by Boone also constituted a waiver by him to temporary reinstatement but not to permanent reinstatement. Likewise, I do not find that Boone's subsequent express written waiver of temporary reinstatement (see transcript of temporary reinstatement proceedings dated September 2, 1980, and written waiver signed by Boone) had any effect on his right to permanent reinstatement. The rights are separate and distinct and it could work inappropriately and oppressively against the miner should a waiver of temporary reinstatement be also held a waiver of permanent reinstatement. In the case of a temporary reinstatement, there is no guarantee that the miner will obtain permanent reinstatement after hearing on the merits and should he wish to obtain other employment during that interim period he should not be discouraged from doing so by risking his rights to permanent reinstatement. As the Commission has said, "unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee." Secretary ex rel. Gooslin v. Kentucky Carbon Corporation, 4 FMSHRC ____ (January 6, 1982), citing Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962).

1981, until Mr. Boone is reinstated, he is entitled to back pay of $125.21. Interest is to be paid on those amounts at the rate of 12 percent per annum computed from the date he would have ordinarily have been paid to the date he is actually paid those amounts.

Evidence has been produced which suggests that Mr. Boone has performed occasional work assisting in his father's restaurant business since August 30, 1980, which might ordinarily be considered as an offset to the back pay award. The evidence shows, however, that this work was not performed in an ordinary employer-employee relationship and was sporadic. Boone received no fixed income from that work but took cash from the cash register for his expenses as needed. No receipts or other records were kept with respect to the amounts withdrawn in this manner and Boone conceded that he filed no income tax returns with respect those monies. It appears under the circumstances that this "expense" money was actually not related to any employment relationship but rather constituted a form of parental support or charity and therefore should not be considered as "earnings" deductible from the back pay award. Such expense money should be treated in the same manner as welfare, unemployment benefits and other collateral benefits which are not generally considered "earnings" to be deducted from back pay awards. Cf. NLRB v. Marshall Field & Company, 318 U.S. 253, 255 (1943); NLRB v. Gullet Gin Company, Inc., 340 U.S. 361, 369 (1951).

Costs

a. Travel, Meals, and Lodging for Complainant to Attend Hearings:

In a petition filed by Daniel Hedges, Esq., on August 28, 1981, Complainant seeks reimbursement for $138.64 in expenses for attending the hearing in this case on April 28, 1981. Complainant also seeks expense reimbursement for attending the December 15, 1981, hearing. That claim is $142.54. These amounts are not contested.

b. Attorney's Fees and Expenses:

Daniel F. Hedges, Esq., an employee of the Appalachian Research and Defense Fund, Inc., petitioned on August 28, 1981, and September 17, 1981, for a fee of $1,650 plus expenses of $139.84 for representing Complainant at the April 28, 1981, hearing. Larry Harless, Esq., petitioned on December 24, 1981, for fees and expenses of $882.05 for representing Complainant at the December 15, 1981, hearing. I have examined the claims and do not find them to be unreasonable. However, since the necessity of conducting a second hearing in this case was the direct result of the failure of Complainant's first counsel to be prepared to present evidence as to damages and costs at the initial hearing in this matter, I am deducting from the award to that attorney the fees and expenses incurred by Complainant and Respondent at the second hearing. Since the latter fees and expenses ($882.05 for Attorney Harless and $677.50 for Attorney Adkins) exceed the amount billed by Mr. Hedges for the first hearing, I do not find Rebel to be responsible for Mr. Hedges' fee. Mr. Harless is entitled to a fee of $882.05 to be paid by Rebel.

ORDER

Rebel Coal Company is ORDERED to pay Gerald D. Boone, within 30 days of this date, the following amounts:

a. Back Pay (May 28, 1980 - July 22, 1980): $3,670.

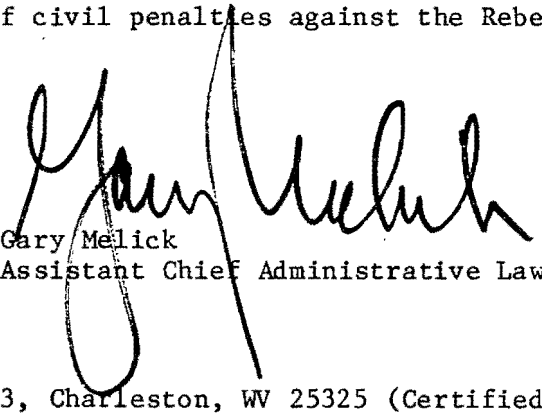
b. Back Pay (October 9, 1981, and continuing through date of actual reinstatement): $96.40 for each regular work day and $125.21 for each alternate Saturday.

c. Interest on the above amounts computed at 12 percent per annum from the date these amounts were due to the date actually paid:

d. Expenses: $276.18.

Rebel Coal Company is further ORDERED to pay Larry Harless, Esq., within 30 days of this date, attorney's fees and expenses of $882.05.

It is further ORDERED that the Secretary of Labor commence review of this case for consideration of assessment of civil penalties against the Rebel Coal Company.



Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 13 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-74-M A/O No. 47-02554-05002
v.	:	Stress Pit
HAYWARD READY MIX COMPANY, INC., Respondent	:	

DECISION

Appearances: Eva L. Clarke, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Ronald G. Poquette, Esq., Betz, LeBarron & Poquette, Eau Claire, Wisconsin, for the Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820(a) (hereinafter the Act), to assess civil penalties against Hayward Ready Mix. The contested citations in this case and the disposition are as follows:

Number	Date	30 C.F.R. Standard	Assessment	Disposition Settlement
295815	8/08/79	56.12-13	$90.00	Withdrawn
295816	8/08/79	56.12-13	$90.00	Withdrawn
295817	8/08/79	56.12-13	$90.00	$90.00

At the onset of the hearing held in the above-captioned proceeding on August 6, 1981, in Eau Claire, Wisconsin, the parties stipulated that the administrative law judge has jurisdiction in this matter; at all times relevant in this matter Inspector Nelson Walter was a duly authorized representative of the Mine Safety and Health Administration; the operator is a small size operator and that the operator will be able to pay penalties if imposed.

After the testimony of the inspector, the issue as to whether two of the citations involved the log washer, the scalper drive motor, or the scalper conveyor drive motor was not resolved. The parties conferred off the record and agreed that two citations would be withdrawn and the full assessed penalty would be paid for the remaining citation.

Based on the testimony of the parties, the information furnished and an independent review and evaluation of the circumstances, I find the settlement proposed is in accord with the provisions of the Act.

ORDER

The settlement negotiated by the parties in the above-captioned proceeding is APPROVED.

Respondent is ORDERED to pay the amount of $90.00 within 20 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 13, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-24
	:	A/O No. 46-05769-03011F
v.	:	
	:	Deep Ford No. 1 Mine
LOGAN-MOHAWK COAL COMPANY, INC., Respondent	:	
and	:	
H.M.N. & S. COAL COMPANY, INC., Party Respondent	:	

DECISION APPROVING SETTLEMENT

ORDER TO PAY

The Solicitor has filed a motion to approve a settlement in the above-captioned proceeding. The original assessment for the alleged violation of 30 CFR 75.200 was $10,000. The proposed settlement is $500.

The citation in question provides as follows:

> The roof control plan was not being followed in the No. 2 entry working place on the No. 1 unit (001-0), in that the plan stipulates that a minimum of six temporary roof supports shall be installed prior to roof bolting. Evidence indicated and statements received by the eyewitnesses to the accident revealed that Lewis M. Craddock, Foreman, was installing roof bolts in an area known to contain loose roof without the use of temporary roof supports, which resulted in a fatal injury to Craddock. Also, reflectors were not being used to indicate that places had not been bolted.
>
> It was further revealed that a practice of using only three to four temporary roof supports during roof bolting operations prevailed at this mine on the No. 1 unit (001-0), second shift. Also, the investigation revealed that personnel required to install roof supports were not adequately trained to insure that such persons are familiar with the functions of the support being used and proper installation procedures.

The circumstances surrounding the violation are summarized in the "Commentary" portion of MSHA's investigation report as follows:

> At 3:15 p.m., Monday, December 31, 1979 the No. 1 section crew, under the supervision of Lewis M. Craddock, Foreman (victim), entered the mine and walked to the active working areas of the section. According to Mark L. Taylor, electrician, after an examination of the working areas was made by Craddock (victim), normal operations began and continued until the accident occurred. Taylor explained that Craddock assisted him in repairing the No. 4 shuttle car trailing cable. Shortly thereafter, Taylor stated that the No. 2 shuttle car became inoperative and while making repairs to the car, he (Taylor) noticed Craddock walking towards the working faces. Taylor stated that shortly thereafter he heard the roof bolting machine being operated. According to Taylor, after completing the repairs to the shuttle car, he proceeded to the No. 2 entry face where Craddock was operating the roof bolting machine. Taylor stated that Craddock (victim) was in the process of installing the second row of roof bolts when he (Taylor) noticed that there were no temporary roof supports installed in the place. Taylor continued to state that Craddock instructed him to assemble some additional roof bolts for the completion of the bolting cycle. According to Taylor, he went to the back of the roof bolting machine to assemble the bolts when the roof fall occurred.
>
> Taylor stated that he ran around the machine and attempted to lift the rock from Craddock. Being unsuccessful, Taylor explained that he summoned assistance from the other miners in the section. Craddock was removed from under the rock, placed on a stretcher, and transported to the surface where he was taken to the Man Appalachian Regional Hospital. Craddock expired at 8:10 p.m.

After setting forth the foregoing, the Solicitor's motion explains that the operator should not be found negligent for the following reasons:

> The victim's behavior could not have been anticipated by the Respondents for three reasons. First, as was revealed in MSHA's investigation, Foreman Craddock's actions on the day of his death were an aberrational departure from his normal behavior. Craddock had a reputation as a very safety conscious miner. As is reflected in the inspector's statement prepared by MSHA's accident investigator, Craddock would not permit crew members to bolt roof without the use of temporary supports. He had the necessary temporary supports available to perform the job; however, he failed to use them. Second, Craddock's behavior could not have been anticipated because at the beginning of the shift on which the fatality occurred, the mine superintendent told Craddock to limit the activity of his shift to loading coal in four entries. He told Craddock to leave all roof bolting work for the midnight shift. Third, as was normally the case on the afternoon shift, there were no supervisory employees other than Craddock who were at the mine when the accident occurred.

The Solicitor further explains that other conditions set forth in the order in addition to the failure to set temporary roof supports are not especially significant, stating in this respect:

> The cause of the accident was Craddock's failure to have temporary roof supports in place while he was roof bolting. As the citation indicates, other apparent violations of the roof control plan were discovered during the investigation. The first is that reflectors were not being used to identify places in the mine where roof bolts had not been installed. In the context of Respondent's operations, this infraction was technical in nature because there was only one mining crew and it was advised at the beginning of the shift as to areas which were not bolted. MSHA also charged that a "practice" of using three to four temporary roof supports "prevailed" at the mine on the second shift. The investigation simply revealed that one individual, a roof bolter helper, had on some occasions prior

> to the accident set only four, or as few as three jacks. This individual knew that six jacks were required by the roof control plan, and would only set fewer jacks when he was concerned about prolonged exposure to unbolted roof. On those occasions when he did set four jacks, he set them in a manner which he felt was safer than the six jack pattern. Finally, MSHA alleged that this employee was not adequately trained in the requirements of the roof control plan. In fact, two days prior to the accident the safety director for the mine had presented a full day of roof control training, which included a film on the need for the use of temporary roof supports. According to the mine superintendent, this employee was extremely nervous during his interviewing session. All of the employees interviewed were aware of the roof conditions at the mine and stated that management constantly made them aware of the roof conditions.

The Solicitor cites Nacco Mining Company 2 FMSHRC 1272 (April 29, 1981) affirming VINC 76X-99 (December 17, 1976) as a basis for his position that in this case the operator was not negligent. In Nacco a section foreman, while supervising two miners who were cutting the roof belt trench, proceeded alone past the last row of permanent supports under loose, unsupported roof, where a large rock fell on him causing the injuries from which he later died. There were no temporary supports in that location and the foreman was not installing temporary supports or inspecting the roof prior to such installation. In that case, I found that the gravity of the violation was very serious but that the operator was not negligent under the circumstances because it had not been remiss in selecting and training the foreman who previously had exercised good judgment. I further found the operator should not be held responsible for negligence which was part of the unexpected and inexplicable behavior of its foreman whose actions created the potential of harm only to himself but not to any of the miners working under him. In affirming, the Commission stated:

> Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for "negligence." Such an approach might well

> discourage pursuit of a high standard of care because regardless of what the operator did to insure safety, a negligence finding would automatically result. We therefore approve the judge's finding of no negligence.

The facts in the instant case support the Solicitor's assertion that this case involves a well-trained foreman with a reputation as a very safety conscious miner who unexpectedly endangered himself without jeopardizing any member of his mining crew. As the Solicitor points out, reference to the photograph in the investigation report reveals that the electrician who came onto the scene just prior to the fatal accident was well back from the danger zone in his position behind the roof bolting machine. According to the Solicitor, the electrician was in that location because the foreman told him to stay back there because the roof was bad.

In light of the foregoing, I accept the Solicitor's position that this case is governed by Nacco. In Nacco I assessed a $500 penalty which was approved by the Commission. That penalty amount which is the recommended settlement here, also comports with the other statutory criteria. The recommended settlement is therefore, approved.

ORDER

The operator is ORDERED to pay $500 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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Arthur Sammons, President, H.M.N. & S. Coal Company, Inc., 413 E. McDonald Ave., Man, WV 25635 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 21, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. WEVA 81-24
	:	A/O No. 46-05769-03011F
	:	Deep Ford No. 1 Mine
LOGAN-MOHAWK COAL COMPANY, INC., Respondent	:	
and	:	
H.M.N. & S. COAL COMPANY, INC., Party Respondent	:	

AMENDMENT TO ORDER TO PAY

The ORDER in the above-captioned action is hereby amended to read as follows:

Each Respondent is ORDERED to pay $250 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

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Arthur Sammons, President, H.M.N. & S. Coal Co., Inc., 413 E. McDonald Ave., Man, WV 25635

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 18 1982

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Order
v.	:	Docket No. PENN 81-106-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 845125
	:	Renton Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Pittsburgh, Pennsylvania, for Contestant;
David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

On March 4, 1981, MSHA inspector Gerald Davis issued Order of Withdrawal No. 845125 pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" for an alleged violation at the Consolidation Coal Company (Consolidation) Renton Mine. 1/

1/ Section 104(d)(1) of the Act reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation did not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator the cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Consolidation thereafter filed a notice of contest under section 105(d) of the Act and a motion for summary decision under Commission Rule 64, 29 C.F.R. § 2700.64, challenging the validity of that order. Hearings were conducted in this case on December 2, 1981, in Pittsburgh, Pennsylvania, at which I issued a bench decision granting a partial summary decision modifying the order to a citation under section 104(d)(1) of the Act. Following hearings on the merits of the case, I issued a bench decision upholding that citation. Those decisions, which appear below with only nonsubstantive changes, are affirmed at this time.

Partial Summary Decision

> On March 4, 1981, MSHA inspector Gerald Davis issued Order No. 845125 pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 for an alleged violation at the Consolidation Coal Company Renton Mine. Consolidation thereafter filed a notice of contest and a motion for summary decision arguing therein for the vacation of the order.
>
> It is undisputed that the section 104(d)(1) citation set forth in the order at bar, as the precedential citation required by that section, had been modified to a section 104(a) citation as a result of a final decision of this Judge on September 24, 1981. 2/ In an effort to salvage the order in this case, the Secretary has in effect moved to amend or modify the order to substitute another section 104(d)(1) citation for the one held invalid. In order to establish such a substitute citation, the Secretary also now seeks to amend or modify an earlier section 104(d)(1) order (Order No. 843499 issued February 26, 1981), to a section 104(d)(1) citation. It is undisputed, however, that Order No. 843499 had previously, on July 10, 1981, been the subject of a valid settlement agreement between the parties.
>
> Now, a settlement agreement is actually a contract and the construction of such an agreement is accordingly governed by the same legal principles applicable to the construction of any other contract. 3/ In construing and determining the effect of a valid settlement, just as with any contract, the primary objective is to effectuate the intention of the parties and in determining the intention of the parties past practices between them are a relevant consideration. 4/ In this regard, I find that there was certainly no express reservation in the settlement agreement to allow MSHA to

2/ Consolidation Coal Company v. Secretary of Labor, 3 FMSHRC 2207.
3/ 15A Am.Jur.2d, Compromise and Settlement, § 23.
4/ 3 Corbin on Contracts § 556; 15A Am.Jur.2d, supra.

subsequently reinstate or modify that order to a section 104(d)(1) citation, and no such reservation can be implied from past practices. To the contrary, it was understood by Consolidation officials at the time that they entered into this settlement agreement (and MSHA agrees that the practice was indeed uniformly followed in the past) that MSHA would not and had never previously modified a settled section 104(d)(1) order to a section 104(d)(1) citation. MSHA had, at most, converted those settled section 104(d)(1) orders to section 104(a) citations and this was the practice that Consolidation officials understood and had relied upon in their settlement of Order No. 843499.

It is, of course, well established law that a valid settlement agreement is final, conclusive, and binding on the parties. It is just as binding as if its terms had been embodied in a final judgment of the court. 5/ Under the circumstances, it would be a violation of that agreement for the Secretary to now modify Order No. 843499 to a section 104(d)(1) citation.

The Secretary's reliance on the decision of Commission Judge Cook in the Youngstown Mines case (Youngstown Mines Corporation v. Secretary, 3 FMSHRC at pp. 1807 and 1808) is misplaced. In that case, Judge Cook modified a section 104(d)(1) order to a section 104(d)(1) citation but the order there at issue, unlike the order herein, had not been settled by the parties.

Under all the circumstances, I find that Order No. 845125 is without an essential precedential section 104(d)(1) citation and therefore cannot be sustained as a valid order. To the extent that I find Order No. 845125 invalid, I grant the motion for summary decision filed by Consolidation. Commission Rule 64, 29 C.F.R. § 2700.64. The order is accordingly modified to a section 104(d)(1) citation. Inasmuch as there does remain a factual dispute concerning the validity of this citation, however, which can only be resolved through an evidentiary hearing, the motion for summary decision in that regard is denied.

Decision on the Merits

This case is before me upon the notice of contest filed by Consolidation under section 105(d) of the Federal Mine Safety and Health Act of 1977 in which Consolidation had challenged the validity of a section 104(d)(1) order of withdrawal. Since that order has been modified to a section

5/ 15A Am.Jur.2d, Compromise and Settlement, § 25.

104(d)(1) citation as a result of my partial summary decision in this case, it is the validity of that remaining citation that is now at issue.

In contesting that citation, Consolidation now admits that there was indeed a violation as alleged and claims now only that: (1) the violation was not one that could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard, and (2) the violation was not due to the unwarrantable failure of the operator to comply with the standard.

The citation before me alleges a violation of the standard at 30 C.F.R. § 75.701-3. In relevant part, that standard reads as follows:

> For the purpose of grounding metallic frames, casings and enclosures of any electrical equipment, the following methods of grounding will be approved * * * (b) a solid connection to the grounded power conductor of the system, * * *.

More specifically, the citation before me alleges that "the ten Labour 300 Volt DC pump in the rock dust chute [was] not properly frame grounded [and] the return feeder was corroded into where the pump return conductor clamped to the DC return feeder." As I have already noted, Consolidation has conceded that the violation did in fact occur as alleged. Whether that admitted violation is significant and substantial, however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822at 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury.

It is undisputed in this case that in order for an electrical shock or electrocution to have occurred under the situation presented by the admitted violation, there must in addition have been some electrical failure in the system. MSHA inspector Gerald Davis testified without contradiction that the most likely source for such a failure would have been from uninsulated and exposed wiring contacting metal on the pump frame. In this regard, Davis had indeed found that the 300-volt power cable on the very same pump cited herein had pulled out of its clamp at the point where it entered the metal connection box on the pump motor and that, as a result, some tape insulation on one of the wires spliced

inside that box had been partially stripped. A portion of that wire was thereby exposed. If this exposed wire were to come into contact with the small metal frame of the connection box, it is clear, based on the undisputed testimony of Inspector Davis, that a hazard of serious shock or electrocution did exist.

Now, there is also undisputed testimony that the primary wire entering the connector box was at about knee level in an area where at least one miner would be present each shift. It is reasonable to infer from that evidence that at least one person could accidentally brush against those wires or trip over those wires and, in any event, come into contact with those wires sufficiently to cause the exposed wire inside the box to come into contact with the box itself thereby creating the shock hazard. Indeed, there is also undisputed evidence in this case that the vibration in the pump itself could have caused the exposed wire to come into contact with the metal box.

Now, the operator's chief witness on this issue, Stanley Kretoski, claims that the pump was situated on a metal grate which, in turn, was attached to a metal rail embedded into the mine floor. He further asserts that this arrangement provided enough grounding to prevent any serious shock. Kretoski admits, however, that in order to be certain of the sufficiency of the grate and rail system, it would be essential to know its actual resistance. He further admits that he does not know what that resistance was. Indeed, Kretoski, as with the other witness presented by Consolidation, was not present at the time of the issuance of the citation, and relies primarily on his understanding of the cited conditions from other persons. Inspector Davis also testified that even if the grate and rail system had existed, that would not in itself have been sufficient to prevent serious shock. In light of Mr. Davis' well established credentials as a skilled and experienced electrician and the fact that he has been qualified and certified at both the Federal and state level in the field of electrical maintenance, I find his testimony on this point to be the more credible.

The undisputed facts in this case warrant a conclusion, in my opinion, that serious shock was reasonably likely to occur under the circumstances. I find, moreover, that the hazard of shock or electrocution was reasonably serious. Under the circumstances, I conclude based on my own de novo analysis of the facts, that the violation was "significant and substantial" under the National Gypsum test.

Determination must next be made then as to whether the instant violation was a result of the unwarrantable failure

of the operator to comply with the law. A violation is the result of unwarrantable failure if the violative condition was one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280.

For the reasons that follow, I find that the violation here was one which the operator should have known existed. Indeed, I find it quite likely that one of the operator's agents had actual knowledge of the corroded and deteriorated condition of the return feeder wire. The operator's electrician, identified here only by the name of Jerry, who accompanied Inspector Davis on the inspection, admitted that the new feeder wire that was found lying adjacent to the old corroded one had been lying there for several weeks. The company maintenance foreman or safety inspector, Bill Simpson, admitted to Mr. Davis that they had simply not gotten around to hooking up the new wire. I find that it may be inferred from this evidence that the operator knew of the deteriorated condition of the cited grounding wire for at least that 2 weeks before the citation was issued.

When that evidence is considered with Mr. Davis' testimony that it would have taken at least 6 weeks for the cited wire to have reached the condition of deterioration found by him, the conclusion is inescapable that the operator indeed had actual knowledge of the violative condition, and when I say operator, I am talking about one of the operator's responsible agents.

Now, I find in any event that the operator should have known of the condition even if it did not have actual knowledge. Consolidation, at the time of this violation, was admittedly performing inspections of all its pumps on each shift, and these inspections were admittedly being conducted by qualified electricians who were to determine the safety of these pumps on each shift. It is apparent that Inspector Davis was readily able to discover the cited defects in the grounding system visually and by simple common sense techniques without the use of any sophisticated instrumentation. It may be inferred therefore that the operator's inspections were either not being performed as required or that they were being sloppily or negligently performed. Thus, I find that Consolidation should, for this additional reason, have known of the violative condition. Indeed, the condition here cited was apparently so obvious that Mr. Simpson himself admitted to Inspector Davis that he was embarrassed by it.

I also consider in this case that Consolidation officials had twice before, on February 10 and February 26, only a few

weeks before the citation here, been alerted to deficiencies in their pumps, and that therefore should have heightened their awareness of any problems with the pumps.

Under all the circumstances, I find that the violation was one which the operator knew or certainly should have known of and therefore the violation was the result of the unwarrantable failure of the operator to comply with the law. The section 104(d)(1) citation before me must accordingly be affirmed.

ORDER

Order No. 845125 is MODIFIED to a citation under section 104(d)(1) of the Act and that citation is AFFIRMED.

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 19 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 81-210-M
	:	A/O No. 29-00173-05021-V
v.	:	
	:	Docket No. CENT 81-211-M
POTASH COMPANY OF AMERICA, DIVISION OF IDEAL BASIC INDUSTRIES, INC., Respondent	:	A/O No. 29-00173-05022
	:	PCA Mine and Mill
POTASH COMPANY OF AMERICA, DIVISION OF IDEAL BASIC INDUSTRIES, INC., Contestant	:	Notices of Contest
	:	Docket No. CENT 81-87-RM
v.	:	Citation No. 161755
	:	November 26, 1980
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 81-88-RM
	:	Citation No. 161756
	:	November 26, 1980
	:	Docket No. CENT 81-89-RM
	:	Citation No. 173957
	:	November 26, 1980
	:	PCA Mine and Mill

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Charles C. High Jr., Esq., Kemp, Smith, Duncan and Hammond, El Paso, Texas, and Roy H. Blackman, Esq., Carlsbad, New Mexico, for the Respondent.

Before: Judge Stewart

The civil penalty proceedings were filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act) 1/ to assess civil penalties against the Potash Company of America. The notices of contest filed by the Potash Company of America were brought under section 105 of the Act.

The position of Potash Company of America, a division of Ideal Basic Industries, Inc. ("hereinafter PCA"), was that Citation No. 161755, issued by the Secretary of Labor, Mine Safety and Health Administration ("Secretary" or "MSHA") on November 26, 1980, for allegedly failing to "immediately" report an "accident" in violation of 30 C.F.R. § 50.10 is without merit and should be vacated. 2/

This case arises out of a special inspection by MSHA at PCA's potash Mine in Carlsbad, New Mexico, on November 24, 1980, following notification from Respondent that it incurred a partial loss of electrical power for a short period of time during the night of November 23, 1980. As a result of that inspection, PCA was issued three citations for alleged violations of various regulations, including Citation No. 161755 for failure to "immediately" notify MSHA of the incident.

1/ Sections 110(i) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

2/ Section 105(d) of the Act provides:

"(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for

Each of these citations were timely contested by PCA and assigned to Judge Virgil E. Vail with the following docket numbers:

Citation No.	Docket No.
161755	CENT 81-87-RM
161756	CENT 81-88-RM
173957	CENT 81-89-RM

These cases were subsequently consolidated and stayed by Judge Vail pending assessment of penalties. Thereafter, on July 14, 1981, the Secretary filed a complaint proposing penalty for each of these citations under the following docket numbers:

Citation No.	Docket No.
161756	CENT 81-210-M
173957	
161755	CENT 81-211-M

PCA answered the complaint on July 29, 1981, and the civil penalty cases were assigned to the undersigned. By agreement of the parties, the notice of contest cases pending before Judge Vail were consolidated with the civil penalty cases for hearing and decision. The hearing on these consolidated cases was held in Carlsbad, New Mexico, on October 7, 1981.

Disposition of Proceedings in Docket Nos. CENT 81-210-M, CENT 81-88-RM, CENT 81-89-RM

At the beginning of the hearing, Docket Nos. CENT 81-210-M, CENT 81-88-RM, and CENT 81-89-RM were disposed of by stipulation and motion. The Secretary moved to vacate Citation No. 161756, Docket Nos. CENT 81-210-M, and CENT 81-88-RM (Tr. 5) for the reason that after further investigation,

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fn. 2 (continued)
abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

there appeared to be insufficient evidence to support the citation (Tr. 7). This motion was granted and the proceedings in regard to this citation were dismissed.

In addition, the Secretary moved to amend Citation No. 173957, Docket No. CENT 81-89-RM and Docket No. CENT 81-210-M, to change the characterization from an order of withdrawal to a citation issued pursuant to section 104(a) of the Act, to delete the language that the alleged violation was substantial and serious, and to change the language of the citation to read: "The power outage occurred on November 23, 1980 in the North Mine, the company failed to test air quality for compliance with 30 C.F.R. Part 57.5 within two hours of the power failure" (Tr. 5). PCA agreed to withdraw its notice of contest to the citation as amended and to pay the proposed penalty of $250 (Tr. 5, 10). The terms of the agreement were approved at the hearing.

The dismissal of the proceedings in Docket Nos. CENT 81-210-M and CENT 81-88-RM with regard to Citation No. 161756 is AFFIRMED. The amendment of Citation No. 173957 in Docket No. CENT 81-89-RM and Docket No. CENT 81-210-M and the agreement that PCA will pay the full proposed penalty of $250 are AFFIRMED.

Docket Nos. CENT 81-211-M and CENT 81-87-RM

Stipulations

The facts forming the basis of Citation No. 161755 were tried at the hearing; however, there was little material disagreement on what occurred. The disagreement centers on how to interpret what occurred.

The parties entered into additional stipulations that:

> The violations as alleged and amended involved a mine that has products, that is, potash, which enter commerce.
>
> The penalties assessed for the violation of 30 CFR Part 50.10 was $66 and for 57.11-50 it was $250. Payment of the assessed penalties would have no effect on the operator's ability to continue in business.

The PCA Mine and Mill is an underground potash mine owned and operated by PCA. The operation is located approximately 24 miles northeast of Carlsbad, New Mexico. It is a single-level mine located approximately 1,000 feet underground and it covers a 7- by 8-mile area. It is divided into two segments, the North and South Mines (Tr. 6). It employed 583 persons in 1979 and produced approximately 750,000 tons of ore (Tr. 7).

Citation No. 161755

In Citation No. 161755 alleging a violation of 30 C.F.R. § 50.10, the inspector stated:

This citation was issued after completion of the investigation 11-26-80. A fire under the power plant control room caused a power failure that affected the use of the No. 1 and No. 2 hoist for a period of more than 30 minutes. The power outage occurred at 2140 hours and was not restored until 2335 hours. The No. 2 man hoist (the one normally used to hoist men) was not energized until 0130 hours 11/24/80 due to circuit modification that was necessary to utilize outside power. Mr. Don Roberts, mine superintendent, stated [that] he felt that this was not criteria for immediate reporting.

In a subsequent action issued on November 26, 1980, the inspector noted that: "At 0730 hours on 11/24/80 Mr. Bob Snow called the local Mine Safety and Health Administration office to notify Sidney R. Kirk, Supervisory Mine Inspector, of the accident."

30 C.F.R. § 50.10 provides:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C. by telephone, toll free at (202) 783-5582.

An accident is defined in 30 C.F.R. § 50.2 to mean:

> (1) A death of an individual at a mine;
>
> (2) An injury to an individual at a mine which has a reasonable potential to cause death;
>
> (3) An entrapment of an individual for more than thirty minutes;
>
> (4) An unplanned inundation of a mine by a liquid or gas;
>
> (5) An unplanned ignition or explosion of gas or dust;
>
> (6) An unplanned mine fire not extinguished within 30 minutes of discovery;
>
> (7) An unplanned ignition or explosion of a blasting agent or an explosive;
>
> (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

(9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;

(10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;

(11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and

(12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

It was not alleged by the Secretary, and in his testimony the inspector stated that it was not his contention, that there was an unplanned mine fire not extinguished within 30 minutes of discovery under the definition in paragraph (6). The principal issue addressed at the hearing was whether the power failure in the transmission line to the power substation constituted damage to hoisting equipment in a shaft which interfered with use of the equipment for more than 30 minutes as defined in paragraph (11). 3/

Mr. Earl Diggs, the MSHA inspector who issued the citation, indicated in his testimony that it was his understanding that an "accident" under 30 C.F.R. § 50.2(h)(11) occurs any time a hoist is "down" for more than 30 minutes for any reason, without regard to damage (Tr. 38:15-18; Tr. 39:18-24) and that a hoist is "damaged" within the meaning of 30 C.F.R. § 50.2(h)(11) whenever there is "an unplanned [hoist] outage for any reason" (Tr. 38:15-18).

3/ In a posthearing brief the Secretary stated that the issue presented is "[w]hether an unexpected fire causing disruption of power to a hoist for more than thirty (30) minutes is an 'accident' requiring immediate notification pursuant to 30 C.F.R. § 50.10." That statement of the issue is too broad as it could encompass a fire at the hoist itself or in the 440-volt feeder line to the hoist rather than in the 2300-volt transmission line to the mine voltage-reducing facilities. The broad issue urged by the Secretary is not reached in this decision. In its posthearing brief PCA stated this issue to be "was the power outage that occurred on November 23, 1980, an 'accident' within the meaning of 30 C.F.R. § 50.2(h)(11)?" PCA contends that "where, as here, a hoist is not damaged but, instead, is simply disabled by a loss of electrical power that effects the mine in general, no 'accident' within the meaning of 30 C.F.R. § 50.2(h)(11) occurs and, therefore, no obligation to immediately report the loss of power arises under 30 C.F.R. § 50.10."

The resolution of this case depends upon the specific facts developed rather than upon the broad and divergent contentions in the Secretary's posthearing brief and in the inspector's testimony.

PCA gets its power from two sources. It generates approximately 50 percent of its own power and it buys 50 percent of its requirements from Southewestern Public Service (Tr. 77). Southwestern Public Service power for the North Mine comes to PCA from Southwestern's Route 31 Substation.

There are five shafts and four hoists at PCA (Tr. 101). In the North Mine, there are two hoists; hoist No. 1 is normally used for production, hoist No. 2 is normally used to carry personnel (Tr. 102). Hoist No. 1 is normally powered by Southwestern Public Service power which is brought in at PCA's powerhouse and is controlled by breaker No. 3 (Tr. 88-89). Hoist No. 2 is normally powered by PCA-generated power. The hoists cannot be operated if power is absent.

On November 23, 1980, at 9:40 p.m. in the powerhouse, Mark Christesson noticed lights flashing, the generators pulling down, and smoke (Tr. 69). He immediately shut down the power plant and all of the power (Tr. 69). Then he went into the basement and discovered and put out a fire (Tr. 69). This meant there were no lights in the North Mine and that hoist No. 2 was inoperable (Tr. 70). In addition, because breaker No. 3 had been thrown, hoist No. 1 was inoperable (Tr. 76). Finally, Southwestern Public Service power had been tripped at the substation on Highway 31 (Tr. 75-76).

In order to restore power to the No. 1 substation and hoist No. 2, the circuitry was modified to allow hoist No. 2 to be powered by Southwestern Public Service power (Tr. 83, 116-118). Rather than power from the powerhouse going down into the North Mine through the shaft of hoist No. 2, Southwestern Public Service power was put up through the shaft from other parts of the underground mine where power was still available. Both the above ground and below ground electrical work was fairly simple (Tr. 93-94, 119); however, Mr. Duren who has been employed by PCA for 35 years and who was the mine maintenance foreman, testified he had never performed this changeover before (Tr. 118-119).

Southwestern Public Service was notified that the power had tripped so that they could restore their power. They restored power by 11:35 p.m. (Tr. 87, 97-98, 101, 120). Hoist No. 2 was energized at 2 p.m. (Tr. 100, 120). Only one witness was able to testify concerning when hoist No. 1 was energized. Mr. Kilgore testified that he was "pretty sure" hoist No. 1 was energized after hoist No. 2 had been energized (Tr. 114).

The fire referred to in the citation was discovered in PCA's powerhouse at approximately 10 p.m. on Sunday night, November 23, 1980, and extinguished within 15 to 20 minutes (Tr. 31:8-13; Tr. 68;18-21). Upon observing smoke

in the powerhouse, and as a safety precaution, the powerhouse operator shut down all electrical power circuits entering or leaving the powerhouse prior to investigating the cause of the smoke (Tr. 69:2-22).

The mine has five shafts, four of which are equipped with hoists (Tr. 101:13-20). These hoists are known as the No. 1, No. 2, Eddy, and South Shaft hoists (Tr. 102:2-10; Tr. 107:14-18).

Mine Electrical Supply and Distribution
Parallel Electrical Supply

The electrical power required for mining operations is provided by a combination of self-generated power and power purchased from Southwestern Public Service Company, the public utility serving the Carlsbad, New Mexico, area. About one-half of the required power is generated by PCA and the remaining one-half is purchased from Southwestern Public Service (Tr. 77:7-20).

The generators used by PCA are located in a powerhouse at the mine site and supply power to a 2300-volt electrical bus system in the powerhouse. This 2300-volt bus system provides power to various substations through 2300-volt feeder cables (Tr. 78:14-23).

The power purchased from Southwestern Public Service is synchronized and utilized in parallel with that generated by PCA (Tr. 92:7-12). This power is received at the mine through several feeder cables, some of which are independent from each other and PCA's own power supply.

The Southwestern Public Service power serving the North Mine area is provided through three separate feeder circuits all originating through a Southwestern Public Service substation located on Route 31 several miles from the mine site (Tr. 92:13-21; Tr. 121:1-16). One of these circuits enters the powerhouse and supplies power directly to the 2300-volt bus system in parallel with the power from PCA's generators. Another circuit bypasses the powerhouse and enters the North Mine area through what is known as 2 East Borehole and connects to the 12470 2 East Substation (Tr. 121:1-9]) Still another bypasses the powerhouse and enters the north area of the mine through the 24 East Borehole (Tr. 121:1-4).

The Southwestern Public Service power serving the south area of the mine, including the power for the Eddy and South Shaft hoists, is independent from circuits serving the north area of the mine and does not originate through the Southwestern Public Service substation on Route 31. Similarly, these circuits, like two of those serving the north area of the mine, bypass the powerhouse (Tr. 105:21-25; Tr. 106:1-20).

Electrical Distribution and Power Circuits For the No. 1 and No. 2 Hoists

The parallel Company/Southwestern Public Service power 4/ from the 2300-volt bus system in the powerhouse is distributed through feeder cables to similar 2300-volt bus bars in various substations on the mine site. Breakers to deenergize the substations are located in the powerhouse (see Joint Exh. 1).

One of these substations, substation No. 1, is located about 100 yards from the powerhouse and is powered through breaker No. 7 in the powerhouse with 2300 volts (Tr. 73:5-13; Joint Exh. 1). From this 2300-volt bus bar, numerous other circuits receive power ranging from 2300 volts to 480 volts. One circuit (No. 1 Bank on Joint Exhibit 2) passes through a transformer that reduces the 2300 volts to 480 volts and then provides power to the following locations:

1. Electric Shop;
2. Electrical Panel in No. 2 Hoist Room;
3. Commissary;
4. Research;
5. Carpenter Shop;
6. Office Machine Shop;
7. Pre-Fab Shop; and
8. Powerhouse auxiliary.

(Joint Exh. 2; Tr. 79:7-25; Tr. 80:1-5).

The electrical panel in the No. 2 hoist room, in turn, supplies power to numerous other circuits, including the No. 2 hoist, 5/ lighting, control circuits, and recharging circuits for miner headlamps (Tr. 80:20-25; Tr. 81:1-22).

Other circuits powered from the No. 1 substation include street lights and various electric motors. (Joint Exh. 2; Tr. 116:15-21; Tr. 117:12-20).

Other substations are similarly supplied with power (Tr. 86:15-23). However, the No. 1 hoist is not powered from a substation. The 2300 volts supplied from the powerhouse is reduced to 440/480 by a motor-generator set. The reduced voltage is then supplied to the hoist motor through a switch. (Joint Exh. 1; Tr. 23-25; Tr. 89:1-4; Tr. 89:5-13).

4/ The power generated by the company is sufficient without Southwestern Public Service power to operate the hoists (Tr. 96:19-22).

5/ The No. 2 hoist shaft is located about 75 to 100 yards from the No. 1 substation (Tr. 86:4-14).

The Events of November 23, 1980

The Discovery of Smoke and Deenergizing of all Circuits

Around 9:40 p.m. on Sunday night, November 23, 1980, Mark Christesson, a powerhouse operator, observed smoke in the basement of the powerhouse and immediately began deenergizing all electrical circuits entering and leaving the powerhouse (Tr. 69:3-8). This was done as a safety precaution before entering the basement to determine the cause of the smoke (Tr. 69:13-14; 92:16-21). A small fire was thereafter discovered around 10 p.m. and quickly extinguished (Tr. 68:18-25; Tr. 69:1).

The deenergizing of all circuits by the powerhouse operator, which included the Southwestern Public Service circuit to the powerhouse, interrupted electrical power to the No. 1 substation (breaker No. 7), the No. 1 hoist (breaker No. 3), and all other circuits in the north area of the mine receiving power through the powerhouse (Tr. 70:5-12; Tr. 76:11-24).

In addition, when these circuits were deenergized, the breaker at the Southwestern Public Service substation on Route 31 tripped resulting in the loss of power originating through this substation and entering the north area of the mine directly through the 2 East Borehole and 24 East Borehole (Tr. 76:2-7; Tr. 121:18-25).

The south area of the mine, including the Eddy and South Shaft hoists, was unaffected by this interruption in power. Similarly, the direct current trolley power used for underground transportation was unaffected (Tr. 122:13-17).

Inspection of Electrical Cables and Restoration of Power

Shortly after discovery of the fire, Mr. John Wright, PCA's electrical shop foreman, along with other individuals also called in, arrived at the mine to assist on-duty employees in restoring power. Upon inspecting the cables, in the powerhouse, it was determined that the fire had damaged the 2300-volt cable feeding the No. 1 substation bus bar (Tr. 73:1-13). The 2300-volt cable supplying power to the No. 1 hoist was not damaged in any way (Tr. 84:15-21). Accordingly, the No. 1 hoist could have been energized by closing breaker No. 3, which had been opened along with other circuits by the powerhouse operator upon observing the smoke, as soon as the breaker at the Southwestern Public Service substation on Route 31 was reset (Tr. 92:22-25). Once this was done, the No. 1 hoist could have been restored to operation in 15 minutes at the most (Tr. 92:2-6; Tr. 91:1-22).

In an effort to restore power as soon as possible to the No. 1 substation, which, in turn, supplied power to the No. 2 hoist room and the No. 2 hoist, Wright testified that electricians were sent to the No. 1 substation to disconnect the 2300-volt feeder cable coming from the powerhouse. This involved nothing more than untaping and unscrewing a "kerny" and pulling the wires back from the 2300-volt bus bar (Tr. 83:14-25; Tr. 84:1-5). This was

the only work required on the surface to restore power to the No. 1 substation and, in turn, the electrical panel in the No. 2 hoist room that provided power to the No. 2 hoist [Tr. 84:6-14].

Once this powerhouse feeder cable was disconnected, PCA planned to reenergize the No. 1 substation by bringing power from underground up the No. 2 shaft through the existing 2300-volt feeder cables between the No. 1 substation and underground (Tr. 117:6-20; Joint Exh. 2]. These feeder cables, prior to the fire, were used to provide power from the No. 1 substation down the No. 2 shaft to the underground electrical system (Tr. 117:15-17). The only work required to obtain power in this manner, as explained by Mr. Frances Duran, PCA's underground mine maintenance foreman, was to close some disconnects and the circuit breakers at the bottom of the No. 2 shaft (Tr. 117:21-25; Tr. 118:1-3). This would change the source of power and energize the No. 1 substation by using the Southwestern Public Service power that entered the mine through the 2 East Borehole. This feeder cable was already tied into the underground electrical system through the 12470 2 East Substation at the bottom of the 2 East Borehole and the 3 West Substation (Tr. 121:5-16). The total time necessary to reverse this electrical flow and energize the No. 1 substation from underground, as explained by Mr. Duran, who performed the task, was 10 to 15 minutes (Tr. 119:13-18). When this change was made around 10 p.m., Mr. Duran testified that there was no power from Southwestern Public Service through the 2 East Borehole circuit so he waited for this power to be restored before closing the breaker (Tr. 119:19-25; Tr. 120:1; Tr. 121:18-25).

Southwestern Public Service Temporary Substation And Delay in Restoring Power

The three Southwestern Public Service circuits providing power to the north area of the mine through the powerhouse, 2 East Borehole and 24 East Borehole, all originated through the Southwestern Public Service substation on Route 31 (Tr. 96:2-7; Tr. 121:1-4; Tr. 78:1-13). On November 23, 1980, this substation was under construction and power to the mine was fed from a temporary substation, "a truck mobile unit on the back of a tractor/trailer" (Tr. 98:1-7). For this reason, PCA was instructed by Southwestern Public Service not to reset the breaker if it ever tripped but, instead, to call them and they would dispatch someone to reset it (Tr. 98:8-14).

Accordingly, when it was discovered on November 23, 1980, that the Southwestern Public Service breaker had tripped, Mr. Ronald G. Kilgore, a surface electrician, testified that he arrived at the mine between 10:15 and 10:30 p.m. and called Southwestern Public Service to dispatch someone to reset the breaker (Tr. 112:25; Tr. 113:1-2; Tr. 113:18-21). This was a Sunday night so the individual on call had to be notified by Southwestern Public Service and then drive to the substation (Tr. 113:1-5).

This breaker was reset and Southwestern Public Service power restored to the mine through the 2 East Borehole and 24 East Borehole circuits around 11:30 p.m. (Tr. 114:1-3). This power was then available to the No. 1 hoist

by closing breaker No. 3 in the powerhouse and to the No. 2 hoist through the No. 1 substation by closing the breaker at the bottom of the No. 2 shaft (Tr. 89:14-18, Tr. 90:9-25; Tr. 91:1-12; Tr. 119:19-25; Tr. 120:1). Both breakers were thereafter closed and power to the hoists restored.

Notification to MSHA and Issuance of Citation

During the process of restoring power, Mr. Robert W. Snow, surface maintenance superintendent, testified that he discussed with Mr. Don Roberts, mine superintendent, whether the power outage was a reportable accident and both concluded it was not (Tr. 105:1-15). Similarly, it was concluded that the fire was not reportable because of its short duration (Tr. 105:6-8). 6/

Definition of Accident

The Secretary urges that in a lay sense the fire and loss of power to the hoists were "accidental" and that the hoisting equipment was "damaged" because its usefulness was impaired. As support for this argument, the Secretary relies on The American Heritage Dictionary of the English Language (1976), which defines "accident" as: "1. An unexpected and undesirable event; a mishap. 2. Anything that occurs unexpectedly or unintentionally." It defines "damage" as "Impairment of the usefulness or value of person or property; loss; harm."

It is clear that it was not the intention of 30 C.F.R. § 50.10 to require the reporting of every unexpected and undesirable event or mishap. The definition of "accident" in 30 C.F.R. § 50.2(h)(11) as "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes" is not set forth in the abstract. That definition as well as the requirement for reporting accidents is included in Subchapter M, Part 50, entitled "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment, and Civil Production in Mines." Accidents of the 12 types listed in section 50.2(h) are clearly the kinds of accidents which must be reported and there is no requirement in section 50.10 to report accidents of other types. Even without reference to the headnote title of Part 50, it is obvious, when those two sections are read in context, that the only accidents required to be reported by section 50.10 are those defined in section 50.2(h).

Aside from the "lay definition" of accident, the posthearing brief of the Secretary urges that "[m]ost importantly the triggering alternative element for the definition of 'accident' as defined in the MSHA regulations,

6/ An "accident" is defined in 30 C.F.R. § 50.2(h)(6) as including "An unplanned mine fire not extinguished within 30 minutes of discovery." However, there is no contention in this case that the fire lasted 30 minutes [Tr. 31:11-13].

'or which interferes with use of the equipment for more than thirty minutes,' existed here because there was no power for the hoists from 9:40 p.m. to 11:35 p.m. and the hoists were not energized until 2 p.m."

Section 50.2(h)(11) does not define a reportable accident as an occurrence where there is no power for the hoists for a period of time. Its definition, as pertinent to this case, is damage to hoisting equipment in a shaft which interferes with use of the equipment for more than 30 minutes. There is no question that there was an interference with the use of hoisting equipment in a shaft for more than 30 minutes but the pivotal question is whether the interference was due to damage to the hoisting equipment.

In this case, it is undisputed, and even conceded, that neither the No. 1 nor No. 2 hoists were physically damaged as a result of the powerhouse fire and loss of power on November 23, 1980 (Tr. 50:12-16). Nevertheless, the Secretary contends that the loss of electrical power to the hoists, without more, was a reportable accident within the meaning of 30 C.F.R. § 50.10 and 30 C.F.R. § 50.2(h)(11) because the loss of power interfered with the use of the hoists for more than 30 minutes.

There is evidence that MSHA had promulgated guidelines which, in effect, indicated that not every occurrence causing a hoist to be shut down for more than 30 minutes is an occurrence which must be reported. A document with a caption including the phrase: "Information Report on 30 C.F.R. Part 50" (Respondent's Exh. 1), published by the MSHA Health and Safety Analysis Center in February 1980, indicated that a natural occurrence, such as ice in the shaft causing a hoist to be shut down for more than 30 minutes, is not a reportable accident. 7/

Mr. Earl Diggs, the inspector who issued Citation No. 161755, identified PCA's Exhibit 1 as being published by the Department of Labor, Mine Safety

7/ An information report on 30 C.F.R Part 50 (revised February 1980), issued by the U.S. Department of Labor's Mine Safety and Health Administration (Technical Support) by the Health and Safety Analysis Center, Denver, Colorado, contains the following question and answer on page 28:

"Q. What constitutes "Damage to hoisting equipment . . . which interferes . . . for more than 30 minutes?

"A. Damage may be caused (1) by some accident that includes the hoisting equipment or (2) damage may result from hoisting equipment failure. All of the mining community interested in preventing serious injuries and fatalities know that potential injuries may result from any hoisting accident or hoisting equipment failure. The real potential hazards make it imperative that the mining industry and MSHA learn about and analyze causes of hoisting accidents and failures of hoisting equipment to preclude future occurrences at the same or a different mine.

"A natural occurrence such as ice in the shaft may cause a shaft and hoist to be shut down for more than 30 minutes. However, where no accident occurs, equipment is not damaged, and no individuals were endangered, the natural occurrence would not of itself be reportable."

and Health Technical Support and stated that Technical Support "* * * is where we get support from. When we have problems, we go to them for assistance" (Tr. 41:14-18). However, he stated that he disagreed with the answer given by Technical Support in response to Question 28 (Tr. 45:9-12).

The guidelines in the publication by the MSHA Health and Safety Analysis Center are not binding in this proceeding in a determination of whether there was a reportable accident. They do indicate, however, that the inspector had no reason to be misled into believing that every occurrence causing a hoist to be shut down for more than 30 minutes was reportable. The inspector testified that he had not previously read the document. If he had, it is possible that he would not have testified so readily that he believed that every power failure for 30 minutes, for any reason, was reportable. While I cannot agree with PCA's characterization of a fire in the powerhouse as a natural occurrence no different from the disabling of a hoist due to an electrical failure, Exhibit 1 does establish that one branch of MSHA did not believe that without exception an occurrence causing a hoist to be shut down for more than 30 minutes must be reported.

The inspector testified that he subsequently referred the question involved in this case to the MSHA subdistrict office for an opinion. The answer to the July 2, 1981, memorandum (several months after the date of the citation) indicated in general that no time in addition to 30 minutes was allowed for troubleshooting but that personnel could be allowed to remain underground under certain conditions. 8/ It was not definitive as to whether interference with hoisting, other than by a hoist malfunction, for 30 minutes was reportable. Even if the memorandum had been prepared prior to the date the citation was issued, and even if it were deemed to have significant probative value, there would be a remaining issue as to whether a general power outage was a hoist malfunction.

8/ The text of the July 29, 1981, memorandum to the Supervisory Mine Inspector from the Subdistrict Manager (Petitioner's Exhibit 7) was as follows:

"The questions raised in your July 2, 1981 memorandum were forwarded to the Chief of Safety (see attached memorandum) for determination.

"Concerning reporting hoist malfunctions, the Chief of Safety agrees that once hoisting has been interfered with for thirty minutes, the incident must be immediately reported to MSHA. No additional time is allowed for trouble shooting.

"Concerning compliance with Standard 57.11-50: When a mine has two hoists and one is down for repairs for more than thirty minutes, the Chief of Safety stated that a program directive has been prepared regarding this standard which has been forwarded to the Solicitor's office for approval. Therefore, until this program directive is released, continue the current policy of allowing personnel to remain underground the remainder of the shift providing that all personnel are notified and are in agreement but not to allow the next shift to go underground until the hoist is repaired.

"Feel free to distribute this memorandum to any interested party."

Thus, the exhibit does not aid in the resolution of the question as to whether a remote power failure in a transmission line can be classified as damage of a nature to make the power outage a reportable accident. No basis can be found to support the inspector's belief that a power outage for any reason (which would have included even a failure of the commercial lines or equipment supplying high voltage to the mine) constitutes damage to the hoisting equipment when no physical damage to the equipment occurs as a result of the outage.

The power outage under the circumstances of this case is clearly not reportable under the requirements of 30 C.F.R. § 50.10.

Here, 2300 volts were supplied through transmission lines from two sources, a commercial line and a PCA line. The high voltage supplied by the transmission line was reduced to 440 volts by transformers at a substation for use by one hoist and by a motor generator set for the other. It was established that there was no actual physical damage to either the hoist equipment or the 440-volt lines supplying the hoists. The record clearly establishes that the general power outage due to a failure in the transmission line is simply too remote to be considered as damage to a hoist in a shaft which would constitute a reportable accident. This determination leaves unanswered such questions as whether a failure of the 440-volt line at the point where it leads into the hoist motor or into the starting panel is a reportable accident or whether a failure of the 440-volt line 100 feet from the hoist is a reportable accident but it does dispose of this case in the only reasonable way that the specific issue involved herein can be resolved.

A violation of 30 C.F.R. § 50.10 was not established by the preponderance of the evidence. Citation No. 161755 is VACATED. Proposed findings of fact and conclusions of law in the posthearing briefs filed by the parties which are not expressly or impliedly adopted herein are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

The proceeding in regard to Citation No. 161755 is DISMISSED. With regard to Citation No. 173957, Potash Company of America is ORDERED to pay the agreed upon sum of $250 within 30 days of the date of this order.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

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JAN 19 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-45
	:	A.C. No. 46-03805-03055
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

SUMMARY DECISION

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA) (hereinafter "the Secretary"), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), 1/ to assess civil penalties against Southern Ohio Coal Company (hereinafter SOHIO).

The petition filed by the Secretary on November 29, 1979, included the following citations for which a civil penalty was sought:

Citation or Order No.	Date	Standard	Penalty
00630044	5-29-79	103(f)	$114
00630045	5-29-79	103(f)	114

Notations by the inspector on the citations issued, in subsequent action in the citations, and on his statements included the following:

1/ Section 110(i) of the Act provides:

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

A. Citation No. 0630044

Joe S. Barber, representative of the miners, was not compensated with pay on the 05/08/79, 05/10/79, 05/11/79 and 05/14/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine.

Inspector's Statement

The condition or practice cited was known by the operator and should have been corrected. It was a technical violation. No dangers were involved.

The condition was corrected within the time specified for abatement. Management took extraordinary steps to gain compliance by paying the man.

Subsequent Action, Citation No. 0630044-1, June 8, 1979

Joe S. Barber, representative of the miners was fully compensated with pay.

B. Citation No. 0630045

Charles F. Yost, representative of the miners was not compensated with pay on the 05/08/79 and 05/09/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine.

Inspector's Statement

The condition or practice cited was known by the operator and should have been corrected. It was a technical violation. No dangers were involved.

The condition was corrected within the time specified for abatement. Management took extraordinary steps to gain compliance by paying the man.

Subsequent Action, Citation No. 0630045-1, June 8, 1979

Charles F. Yost, representative of the miners was fully compensated with pay.

SOHIO's answer to the petition for assessment of civil penalty filed on December 31, 1979, was as follows:

1. Southern Ohio Coal Company, Respondent, denies that its actions constituted a violation of Section 103(f) of the Federal Mine Safety and Health Act of 1977 as alleged by the authorized representative.

2. Southern Ohio Coal Company, Respondent, states that the authorized representative acted in an arbitrary and

capricious manner contrary to the intent of the law in finding that there had been the alleged violations and in issuing Citation Nos. 630044 and 630045.

WHEREFORE, Southern Ohio Coal Company requests that the Office of Administrative Law Judges deny the Petition for Assessment of Civil Penalty.

Pursuant to Rule 2700.10 of the rules of the Federal Mine Safety and Health Review Commission, 29 C.F.R. Part 2700, SOHIO also filed a motion on December 31, 1979, for an order vacating Citation Nos. 0630044 and 0630045 and for dismissal of the proceeding upon the following grounds:

(1) That Citation Nos. 630044 and 630045, copies of which are attached hereto as Exhibit A, alleged that two representatives of the miners were not compensated with pay when accompanying an authorized representative of the Secretary on a physical inspection of the mine, in violation of Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the "Act").

(2) That the subject citations were issued during a "CCB" type of inspection.

(3) That a "CCB" type of inspection constitutes a haulage inspection which is not a part of a regular inspection, MSHA Citation and Order Manual, I-122, a copy of which is attached hereto as Exhibit B. [2/]

(4) That representatives of the miners are not entitled to compensation pursuant to the Act when accompanying authorized representatives of the Secretary during a physical inspection of the mine, unless said inspection is a part of a regular inspection, Secretary of Labor v. The Helen Mining Company, Docket No. PITT 79-11-P, 1 MSHC 2193, 2198, 2199 (Federal Mine Safety and Health Review Commission, November 21, 1979).

On January 22, 1980, the Secretary filed a Motion to Hold in Abeyance requesting an order holding in abeyance Respondent's motion to dismiss. As grounds therefore, the Secretary submitted:

1. The Citations allege violations of §103(f) of the Federal Mine Safety and Health Act of 1977 resulting when

2/ Exhibit B contained the following information:
"CCB - Haulage Technical Inspection. Inspection of a haulage system. A haulage inspection which is part of a regular inspection shall not be reported under this code."

two employees of Respondent suffered a loss of pay when accompanying an authorized representative of the Secretary on other-than-regular inspection of the mine.

2. This issue is now pending an appeal from the Review Commission's decisions in Helen Mining Company, 75-2518, 79-2537 (D.C. Cir.,), and Kentland-Elkhorn 79-2503, 79-2536 (D.C. Cir.).

WHEREFORE, the Secretary requests that Respondent's aforesaid Motion be held in abeyance until a decision is rendered in the above-mentioned cases.

Following the January 22, 1980, Motion to Hold in Abeyance, no further action was taken until December 1, 1980, when pursuant to Rule 2700.64 of the Federal Mine Safety and Health Review Commission's Rules of Procedure, SOHIO filed a motion for summary decision in the above-captioned case to dispose of the entire subject proceeding. In support of this motion, SOHIO enumerated the following statement of facts, statement of reasons presented, and discussion:

STATEMENT OF FACTS:

On May 29, 1979, Charles J. Thomas, authorized representative of Petitioner, served upon Respondent Citation Number 630044. Said Citation alleged that "Joe S. Barber, representative of the miners, was not compensated with pay on 05/08/79, 05/10/79, 05/11/79 and 05/14/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine." On that same date and during that same inspection, which was a "CCB" (haulage) inspection and not a part of a regular inspection, Inspector Thomas issued Citation Number 630045, which Citation alleged that "Charles F. Yost, representative of the miners, was not compensated with pay on 05/08/79 and 05/09/79 when accompanying an authorized representative of the Secretary on a physical inspection of the mine." Both of the subject citations were later terminated following Respondent's compensating Messrs. Barber and Yost.

On December 27, 1979 Respondent filed a Motion to Dismiss the subject action. Said Motion stated in part that the citations were not issued during a regular inspection and that the representatives of the miners were not entitled to compensation pursuant to the Federal Mine Safety and Health Act of 1977, according to Secretary of Labor v. The Helen Mining Company, 1 MSHC 2193, 2198, 2199 (Federal Mine Safety and Health Review Commission, November 21, 1979).

Subsequently, on January 15, 1980, Petitioner filed a Motion to Hold in Abeyance in which Petitioner admitted that the two subject employees were engaged in an "other-than-regular inspection of the mine" at the subject times and locations. Petitioner further stated that the issue in the subject action was pending appeal from the Review Commission's decisons in Helen Mining Company, supra, and Kentland - Elkhorn, 1 MSHC 2230 (Federal Mine Safety and Health Review Commission, November 30, 1979). Thus far, no formal ruling has been made concerning the above motions.

ISSUES PRESENTED:

(1) Whether Section 103(f) of the Federal Mine Safety and Health Act of 1977 provides for compensation to representatives of the miners who accompany a federal inspector during a non-regular inspection.

(2) Whether the precedential effect of Federal Mine Safety and Health Review Commission decisions in The Helen Mining Company, supra, Kentland - Elkhorn Coal Corporation supra, should be stayed in the instant action pending judicial review.

DISCUSSION:

(1) It is undisputed that both Citation Numbers 630044 and 630045 concern Respondent's refusal to compensate representatives of the miners during a non-regular inspection, see Section 1 of Petitioner's Motion to Hold in Abeyance. It is further undisputed that the issue of whether representatives of the miners are entitled to compensation when accompanying an authorized representative of Petitioner on a non-regular inspection is now pending an appeal from the Review Commission's decisions in Helen Mining Company, supra, and Kentland - Elkhorn, supra, see Section 2 of Petitioner's Motion to Hold in Abeyance. Both of the above cases stand for the proposition that walkaround pay is limited to regular inspections, Helen Mining Company, supra, at 2198; Kentland - Elkhorn, supra, at 2231.

(2) Since the filing of Respondent's Motion to Hold in Abeyance, numerous cases have been decided regarding the validity of citations such as those in the instant action. In Helen Mining Company, the United Mine Workers of America moved for an order staying the effect of the Review Commission decisions in the Helen Mining Company and the Kentland - Elkhorn cases, among others, pending judicial review. The Commissioner's denied this motion. Commissioner Backley in his concurring option stated that the UMWA was seeking "a

stay of the precedential value of the Commission's opinions." Commissioner Backley further stated that "[t]o stay the precedential effect of [the Commission's] decisions would not merely result in the issuance of final Commission decisions contrary to what the Commission has found to be the intent of Congress, but it would be inconsistent with the role assigned to the Commission under the Act," Helen Mining Company, 1 MSHC 2331 (Federal Mine Safety and Health Review Commission, March 21, 1980). Commissioner Backley further stated that "[t]o temporarily overrule our precedent pending judicial review of our final orders . . . would be in derogation of our function."

Subsequently numerous other cases have come before Federal Mine Safety and Health Review Commission judges in which the operators have moved for summary decision and such motions have invariably been granted. In Princess Susan Coal Company, an inspector conducted a "free silica technical investigation" and the representative of the miners who accompanied the inspector was not compensated for the time he spent accompanying the inspector. Because the "free silica technical investigation" was not a regular inspection, the motion for summary decision was granted and the citation vacated, Princess Susan Coal Company, 1 MSHC 2367 (March 7, 1980). In Alabama By-Products Corp., miners were not compensated for accompanying inspectors during a "blitz" inspection. Citing Helen Mining Company, the Administrative Law Judge granted the Motion for Summary Decision and vacated the citation, Alabama By-Products Corporation, 1 MSHC 2395 (February 14, 1980). Similarly, in Island Creek Coal Company, the Administrative Law Judge vacated citations issued because compensation was denied to representatives of the miners who accompanied inspectors during spot inspections, Island Creek Coal Co., 1 MSHC 2521 (July 30, 1980).

WHEREFORE, RESPONDENT, SOUTHERN OHIO COAL COMPANY HEREBY REQUESTS:

(1) That its motion for Summary Decision be granted;

(2) That Citation Numbers 630044 and 630045 be vacated;

(3) That the civil penalty proceeding captioned Docket No. WEVA 80-45 be dismissed; and

(4) That the court grant such other and further relief as the court may deem proper.

On December 29, 1980, the Secretary filed a Memorandum in Opposition to Motion for Summary Decision to respond to SOHIO's motion for summary decision, stating:

The issue before this Tribunal is whether or not the instant action should be stayed pending the decisions of federal courts in Helen Mining Company, BNA 1 MSHC 2193 (FMSHRC, November 21, 1979), and Kentland-Elkhorn, BNA 1 MSHC 2230 (FMSHRC, November 30, 1979).

Respondent has urged that the instant case should not be stayed, and that a summary decision in its favor should be entered. As its only grounds for this position, Respondent notes that Commissioner Backley stated in his concurring opinion in Helen Mining Company, 1 MSHC 2331 (FMSHRC, March 21, 1980) that to stay the effect of that decision would result in the issuance of final Commission decisions contrary to Commission precedent and that staying the Helen decision would be inconsistent with the role assigned to the Commission under the Act. Helen Mining Company, supra.

Petitioner respectfully submits that Commissioner Backley's dicta in the Helen decision has no application to the instant case. If the Commission had stayed the Helen decision, the effect of its action would have been to subvert its own final order in that very case. In contrast, in the case at bar a stay is appropriate to preserve Petitioner's position so that in the event the courts rule in the Secretary's favor in Helen and Kentland-Elkhorn, the presiding administrative law judge may quickly reach a decision on the merits of the instant case. Otherwise, if Respondent's Motion is granted and the courts do rule in the Secretary's favor, Petitioner would have to begin his entire case again from scratch by issuing new Citations. Clearly the most economical course would be to stay the instant proceedings pending the courts' decisions.

The presiding administrative law judge may, in his discretion, exercise his authority to stay proceedings where issues raised in the proceedings will be substantially affected by other pending litigation.

> [T]he power to stay proceedings is incidental the to power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. Landis v. North American Co., 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (Cardozo, J.). In the exercise of its sound discretion, a court may hold one law suit in abeyance to

abide the outcome of another which may substantially affect it or be dispositive of the issues. Cf. American Life Ins. Co. v. Steward, 300 U.S. 203, 215, 57 S. Ct. 377, 81 L. Ed. 605 (1937).

Bechtel Corp. v. Local 215, Laborers' International Union, 544 F.2d 1207, 1215 (3d Cir. 1976).

WHEREFORE to serve the interests of judicial economy, Petitioner respectfully opposes Respondent's Motion and requests that the presiding Administrative Law Judge continue to stay these proceedings in accordance with Petitioner's Motion to Hold in Abeyance, filed January 15, 1980.

IN THE ALTERNATIVE, Petitioner requests that if Respondent's Motion is granted, that the Secretary's case be dismissed without prejudice.

Citation Nos. 0630044 and 0630045

This case involves two citations charging violations of section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act). Section 103(f) reads in part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103](a) * * *. [O]ne such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

In Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833 (November 30, 1979), appeal pending No. 79-2536 (D.C. Cir., December 21, 1979), the Federal Mine Safety and Health Review Commission interpreted the section 103(f) so-called walkaround pay provision to apply to section 103(a) "regular" inspections only. In reaching this decision, the Commission relied on its reasoning in Helen Mining Company, 1 FMSHRC 1796 (November 21, 1979), appeal pending No. 79-2537 (D.C. Cir. December 21, 1979). In Helen Mining Company, the Commission held that a miner was not entitled under section 103(f) to walkaround pay for spot inspections pursuant to section 103(i) of the Act and noted that compensation was due only for a miner's accompaniment of a Federal inspector during a section 103(a) "regular" inspection. The Commission concluded therein that "regular" inspections were those described in the third sentence of section 103(a) of the Act, i.e., the four required annual inspections of underground mines and the two required annual inspections of surface mines.

There is no disagreement between the parties in this case that the inspections giving rise to the citations were haulage inspections and not "regular" inspections within the framework of the Kentland-Elkhorn and Helen Mining decisions. Under the rule of law set forth by the Commission in Kentland-Elkhorn and Helen Mining, SOHIO is entitled to summary decision as a matter of law.

ORDER

Citation Nos. 0630044 and 0630045 are VACATED. The proceeding is DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 21 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 80-306-M
Petitioner	:	A/O No. 41-00038-05007
v.	:	
	:	Docket No. CENT 80-354-M
KAISER CEMENT CORPORATION,	:	A/O No. 41-00038-05008-I
Respondent	:	
	:	Longhorn Cement Plant

ERRATA

This is to correct a typographical error on Page 14 of the decision and order. An assessment of $100 was shown for Citation No. 172311, included in a list of four Citations, and Respondent was ordered to pay a total sum of $400. This assessment is deleted since Citation No. 172311 was dismissed because of inadequacy of proof as discussed on Pages 8 and 9 of the decision.

The order is amended to read "Respondent is ORDERED to pay Petitioner the sum of $300 within 30 days of the date of this order".

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 22 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DANIEL G. JENKINS, and, THOMAS S. PERRY, Complainants,	COMPLAINT OF DISCRIMINATION
	DOCKET NO. WEST 80-463-DM
v.	MD 80-87 MD 80-88
KAISER CEMENT CORPORATION, Respondent.	MINE: Kaiser Cement

DECISION

APPEARANCES:

Phyllis K. Caldwell, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294
For the Complainants

Roger Zeltmann, Director Labor Relations, Kaiser Building
300 Lakeside Drive, Oakland, California 94612
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The Secretary of Labor (hereinafter the Secretary) brought this action on behalf of Daniel G. Jenkins and Thomas S. Perry alleging that Jenkins and Perry were unlawfully discharged. Respondent contends that Jenkins and Perry were discharged for insubordination.

Pursuant to notice, a hearing was held on June 3, 1981, in Helena, Montana. During the initial proceedings the complainant Thomas S. Perry and respondent entered into a settlement agreement which was presented to the undersigned and approved. This settlement agreement was subsequently reduced to writing and approved in a partial settlement order dated September 18, 1981.

At the hearing, Daniel G. Jenkins testified on his own behalf. Carl Lane and Wes Banta, both employees of the respondent testified on respondent's behalf. The respondent also offered the testimony of Thomas D. Short and Bill LaVelle.

Post-hearing and reply briefs were filed by both parties.

STIPULATIONS

At the hearing the parties offered the following stipulations:

1. The Federal Mine Safety and Health Review Commission has jurisdiction in this proceeding.

2. Kaiser Cement is a surface metal, non-metal mine.

3. Kaiser Cement has not previously had a discriminatory discharge case before the Commission.

4. Kaiser Cement produces 350 to 400 thousand tons of cement annually and employed 95 people, including 71 hourly employees.

ISSUES

1. Is the complaint of Daniel G. Jenkins barred by the time restrictions, as contained in § 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act)?

2. Was Daniel G. Jenkins unlawfully discharged in violation of § 105(c) of the Act, now codified at § 30 U.S.C. 815(c)(1)?

FINDINGS OF FACT

Based on the testimony and evidence presented at the hearing, I make the following findings of fact:

1. Daniel G. Jenkins was employed by the respondent from 1963 until the time of his discharge on February 14, 1980. (Tr. 28). At the time of his discharge, Jenkins was employed as a heavy equipment operator.

2. On February 14, 1980, Carl Lane, the quarry superintendent, told Jenkins that he was to load holes with explosives (Tr. 113).

3. Jenkins refused to load the holes, relying on a union safety agreement, allegedly entered into at a union meeting in August 1979 (Tr. 33 and 113). Jenkins introduced at the hearing a copy of notes he had taken at the meeting (P's Exhibit 2).[1/]

4. After Jenkins refusal, he and Lane went to Wes Banta's office, the industrial relations superintendent, to discuss Jenkins refusal to load the holes.

5. The following people were present at the meeting: Jenkins, Perry, Banta, Lane and the union president, Bryon Johnson (Tr. 30).

1/ Jenkins notes state as follows: Heavy Equipment loading holes. Cannom will tell Carl from safety factor nobody will load holes but the powder man unless he is sick or on vacation.

6. At the meeting, Jenkins reiterated his position that he was not required to load explosives, based on a Step III grievance meeting. However, Banta could find no reference to such an agreement in his notes, nor did complainant offer any testimony other than his own to support his position (Tr. 136).

7. Banta told Jenkins he would have to produce evidence of the agreement and suggested that he go ahead and load the holes and then file a grievance with the union.

8. Jenkins still refused to load the holes and asked Banta how long a suspension he would receive for his refusal. Banta told him that his actions were more serious than a suspension and he would probably be discharged. At that time, Jenkins told Banta he was going to MSHA because of safety reasons. (Tr. 137) Banta requested Jenkins tell him what he thought was unsafe about the loading, but Jenkins did not offer a reply (Tr. 137).

9. Jenkins did not express any fear to either Lane or Banta (Tr. 48 and 138). The only reference to safety was made when Jenkins said he was going to MSHA (Tr. 138).

10. Jenkins was discharged on the ground of insubordination.

DISCUSSION

The complaint of discrimination on behalf of Jenkins was filed by the Secretary on September 8, 1980 alleging that the act of discrimination occurred on or about February 15, 1980. Respondent contended that the Commission therefore did not have jurisdiction because the complaint was not filed within 90 days, as required by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., Sept 1, 1977 (hereinafter referred to as the Act).

The relevant part of the Act provides as follows:

> § 105(c)(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary,

shall order the immediate reinstatement of the miner pending final order on the complaint ...

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred.

At the hearing, the undersigned ruled that the Commission had jurisdiction. It has been held that filing deadlines are jurisdictional in nature and failure to comply with the filing requirements should not result in dismissal of discrimination proceedings. Secretary of Labor, on behalf of Gary M. Bennett v. Kaiser Aluminum and Chemical Corporation 2 MSHA 1424 (1981), Christian v. South Hopkins Coal Co., 1 FMSHRC 126 (1979) and U.S. CODE CONG. & AD. NEWS at 3436. Therefore, I held that the delay in filing the complaint in this matter did not deprive the Commission of jurisdiction.

Turning to the merits of this case the statutory provision, Section 105(c)(1) of the Act, now codified at § 30 U.S.C. 815(c)(1), provides as follows:

§ 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and

(2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone, David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980). Rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981).

The first question to be addressed is whether complainant, Jenkins, was engaged in a protected activity. There is no doubt that many mining activities are inherently dangerous. This is particularly true in a situation such as the one presented here, where employees are handling explosives. However, the fact that there is a danger presented by the job assignment does not automatically bring it within the bounds of "protected activity."

There was conflicting testimony presented as to whether Jenkins had ever voiced his concern over the safety hazards presented by loading explosives. Jenkins had been given on the job training on how to load holes. In fact Jenkins, through his own testimony, stated that he had assisted the powderman and done actual loading of explosives a total of 156 hours through June 23, 1979 (Tr. 52-53). He further testified that he had loaded shot 9 times when he had been the "head man" (Tr. 53). Jenkins also testified that his refusal to do the work on February 14, 1980, was based on the alleged union agreement (Tr. 46). The agreement was never proven and the fact that Jenkins thought that there was an agreement that heavy equipment operators did not have to load holes does not bring him within the sphere of protected activity, as defined in the Act.

Jenkins testified that because the respondent had made changes in the type of explosives used, he was concerned over his own safety and the safety of other employees. The evidence proves, however, that Jenkins did have experience with the new types of explosives and just one month prior to his discharge had worked with the new style of boosters and primadets (Tr. 32 and 122). The respondent's on the job training program had received MSHA approval (Tr. 126). Jenkins had received the required amount of training and had in fact complained to Lane that he was doing too much of the loading and that the job should be equalized between himself and Thomas S. Perry, the other heavy equipment operator.

It was proven that Jenkins had never been in charge of loading since the change in products had been made. In January of 1980 he had assisted the powderman, which meant helping to haul the powder and explosives out and tying knots. Being in charge meant that he would supervise the loading and follow the 'shot plan' prepared by Lane (Tr. 132). Lane testified that after 3 or 4 shots someone is qualified to load (Tr. 128). Jenkins never asked for assistance or expressed any fear of doing the work.

I cannot conclude that Jenkins refusal to do the assigned task was protected activity. The preponderance of the evidence shows that Jenkins refusal to load explosives was based on an agreement he actually thought was in existence that would have excluded anyone within his job classification from doing such work. The existence of such an agreement was never substantiated. The complainant did produce his notes he alleged were taken at the August 1979 meeting. However, no notes were found in the official records of respondent of such an agreement and testimony by respondent's witnesses denied knowledge of such an agreement. Jenkins did not express any fear regarding his refusal to work with explosives to Lane or Banta on the day involved herein (Tr. 48 and 94). It was after Jenkins refused to comply with the instruction of Lane and Banta to load explosives, that Banta said, "as far as I am concerned you are through" (Tr. 95). It was following this statement by Banta that Jenkins indicated he would contact MSHA. The uncontroverted chain of events shows that the reason for the discharge of Jenkins was his continued refusal to work after respondent had looked for the alleged agreement that heavy equipment operators were exempt from such work. I find, in view of Jenkins past experience in handling explosives, that this was unreasonable and not protected activity. If the discharge had been based upon Jenkins threat to contact MSHA, I would find that to be protected activity. However, as stated above, the complainant was on his way out the door after being told he was through when he voiced this remark.

After the hearing, respondent submitted a copy of the arbitration decision concerning Jenkins discharge. The Secretary moved to strike the decision from respondent's brief. The Secretary's motion is hereby GRANTED and the undersigned states that he has not read nor is his decision in anyway influenced by the arbitrator's findings or conclusions.

CONCLUSIONS OF LAW

1. Complainant's action is not barred by the time limitations in the Act.

2. Respondent did not violate § 105(c) when it discharged complainant for insubordination.

ORDER

It is ORDERED that the complaint of Daniel G. Jenkins be and is hereby DISMISSED.

Virgil E. Vail
Administrative Law Judge

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JAN 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner-Respondent	:	Civil Penalty Proceedings Docket Nos. BARB 78-609-P BARB 78-609-P(B) BARB 78-610-P
v.	:	
	:	Applications for Review
SCOTIA COAL COMPANY, Respondent-Applicant	:	Docket Nos. BARB 78-306 through BARB 78-333

DECISION AND ORDER

In the aftermath of the twin methane gas explosions of March 9, 11, 1976 that took the lives of 23 miners and 3 mine inspectors at the Scotia Mine in Ovenfork, Letcher County, Kentucky, the Secretary of the Interior cited Scotia Coal Company, a wholly owned subsidiary of Blue Diamond Coal Company, Knoxville, Tennessee for 71 violations of the Federal Coal Mine Health and Safety Act of 1969. 1/ Two years later, civil penalties were assessed in the amount of $266,404.

The 43 less serious violations were settled in December 1980 for $33,400, subject to approval of the trial judge. By order of February 25, 1981, the trial judge, with the

1/ In March 1978, responsibility for enforcement was shifted from the Secretary of the Interior to the Secretary of Labor and from the Mining Enforcement and Safety Administration (MESA) to the Mine Safety and Health Administration (MSHA). 30 U.S.C. § 801, et seq., (Supp. I 1977).

consent of the parties, increased the settlement amount to $36,400 and dismissed these 43 charges.

The 28 captioned review-penalty proceedings cover the 15 conditions and practices believed by the Secretary to have contributed directly to the lethal accumulation of methane gas and the ignition that caused the first explosion, 2/ plus one combustible and 12 electrical violations uncovered during the course of the departmental investigation that were believed to be indicative of a pervasive indifference to safe mining practices.

These 28 unwarrantable failure to comply violations were initially assessed at $230,500. On Thursday, November 12, 1981, the parties entered into a settlement agreement under which Scotia offered to pay the lump sum of $200,000, or 87% of the amount initially assessed, which sum was allocated by the Secretary in accordance with his evaluation of the "individual meaning and collective significance of the violations" for the 1976 disaster.

2/ Responsibility for the second explosion, at a time when the government was in control of the mine, is the subject of separate litigation between Blue Diamond and the Department of Justice. Claims brought by the survivors of the miners killed in the first explosion were settled for approximately 6 million dollars in 1980 and by survivors of the victims of the second explosion for approximately 2 million dollars in 1981. Boggs v. Blue Diamond Coal Company, 590 F. 2d 655 (6th Cir. 1979). In the pending criminal case, the United States seeks the imposition of $240,000 in criminal penalties against the corporate mine operators. United States v. Blue Diamond Coal Company, ___ F. 2d ___, No. 80-5084, 6th Circuit, decided December 17, 1981.

The sum offered in settlement will be the largest ever paid by a mine operator for civil penalties assessed as the result of a single coal mine disaster. 3/

Except as other indicated, my evaluation and allocation of the $200,000 accords with that recommended by the Secretary. 4/

I fully concur in the Secretary's overall evaluation of the gravity of these violations, namely, that "When viewed in the light of the underlying mine practices and the events of March 9, 1976 . . . the violations, individually and collectively are seen as extremely grave, occuring through culpable negligence, the products of reckless management attitudes and a method of operation which demonstrated indifference to federal safety standards." 5/

3/ When the present settlement proposal, $200,000, is added to the sum already paid, $36,400, the mine operators will have paid a total of $236,400 in civil penalties which is 89% of MESA's initial assessment for the 71 violations charged.

4/ The Secretary's evaluation appears in counsel's motion to approve settlement which incorporated by reference counsel's earlier response to the trial judge's pretrial order of May 1, 1980. Counsel for the Secretary is to be commended for the clarity of expression and organization of these pleadings and for the diligence demonstrated in their preparation.

5/ It is the Secretary's position that both Blue Diamond Coal Company and Scotia Coal Company were responsible for the safety violations at the Scotia Mine.

I.

A.

For the 15 contributory violations, which include the six violations covered by the pending criminal indictment, 6/ the Secretary assessed the maximum statutory amount of $10,000 each, finding that "The violations cannot be viewed in isolation, but must be considered within the context of mine management's attitude, which condoned and even fostered the simultaneous existence of so many serious, related violations. The deadly interaction of these violations produced the tragic results."

6/ On June 25, 1979, a Federal Grand Jury in Pikeville, Kentucky handed down an indictment charging Blue Diamond and Scotia Coal Companies with six criminal violations of the Mine Safety Law. Four counts charge a willful failure to comply with the ventilation plan for the Scotia Mine and to make required inspections and examinations for potentially explosive concentrations of methane gas. The mine operators are also charged with two counts of making knowingly false statements in records required to be maintained with respect to its ventilation and examination practices.

On February 19, 1980, Judge Hermansdorfer of the United States District Court for the Eastern District of Kentucky granted the mine operators motion to suppress evidentiary records on the ground that their seizure violated the mine operators' rights under the Search and Seizure Clause of the Fourth Amendment. The United States appealed the suppression order and on December 17, 1981, the Court of Appeals for the Sixth Circuit reversed the decision of the District Court finding that the warrantless seizure of statutorily required records from the office of a coal operator is not violative of the Fourth Amendment. United States v. Blue Diamond Coal Company, supra. The mine operators will reportedly petition the court for a rehearing and may seek a review of the matter by the Supreme Court. Past and prospective delays in the criminal proceeding vindicate the Commission's decision to deny the mine operators a stay of the civil penalty proceedings pending final resolution of the criminal proceedings. Scotia Coal Mining Company, 2 FMSHRC 622; 1 MSHC 2327 (1980).

I concur in this finding and in the Secretary's further finding that:

> The ultimate illustration of the destructive reinforcement of related violations occurred in the explosion area of 2 Southeast Main. To begin with, Scotia failed to comply with its approved Ventilation Plan when starting the 2 Left Section off 2 Southeast Main. Ventilation in the area was questionable, at best, and had not received MESA approval, although Scotia knew that such approval was required. (The proposal, had it been submitted, would not have been approved.) Production in 2 Left Section should have proceeded only after positive, permanent ventilation controls had been installed. By using a makeshift temporary curtain before it completed construction of overcasts, Scotia ignored prudent ventilation methods, as well as federal standards, for the sake of a short-term production gain -- a gain as it turned out, achieved at a terrible price.
>
> Even assuming (as Scotia claims) a check curtain was hung at the intersection of 2 Left Section with 2 Southeast Main, the lack of permanent ventilation controls at that point created the potential for a dangerous short-circuit of intake air and a ventilation 'dead end' at the inby end of 2 Southeast Main. If the check curtain was installed, it was reportedly maintained in such a haphazard manner as to provide little, if any, ventilation control, thus enhancing the potential for a short-circuit of air. Then, the night before the explosion occurred, plastic curtains were hung in the Nos. 4 and 5 entries (the intake aircourses) of 2 Southeast Main inby the 2 Left Section, thus aggravating the risk of methane accumulation in the area.

Another violation of Scotia's Ventilation Plan, together with another ventilation dead end was found at the inby end of Northeast Main. The Secretary assessed maximum penalties for these violations as well as for a violation which charged that on March 1, 1976, Scotia knowingly submitted to MESA a

mine map which concealed those conditions and compounded the hazards created by the violations of Scotia's Ventilation Plan. When considered in the context of Scotia's pattern of violations, I find this action fully warranted.

B.

To its hazardous ventilation practices, the Secretary found Scotia added a reckless indifference to its obligation to inspect and examine idle or dead end areas for explosive accumulations of methane gas. Another violation maximally assessed charged that on the morning of March 9, 1976, the dead end area of 2 Southeast Main, an area which had been idle since February 9, 1976, was not examined for a deadly methane accumulation prior to the time two miners were ordered to haul a load of steel rails into the area using two locomotives with electrical connections capable of causing an incendive spark. 7/ The Secretary's evaluation, in which I concur, states:

> Scotia's failure to examine 2 Southeast Main inby 2 Left Section on March 9, 1976, is particularly glaring since management knew that the entire 2 Southeast Main, including 2 Left Section, was being ventilated in violation of Scotia's approved Ventilation Plan, and the potential existed for a dangerous short-circuit of intake air and a ventilation 'dead end'.
>
> * * * * * * * * * *
>
> . . . the management foreman who ordered the workmen to enter the area had a duty to verify that the area had been examined before the miners

7/ An incendive spark is an electrical spark of sufficient intensity to ignite a gas or other flammable material.

were to enter, or that the workmen were qualified and equipped to make such examinations. The failure to so verify or to have the examinations done constituted an unwarrantable failure on the part of mine management to comply with the standards, especially in view of the specific knowledge of management that the ventilation system in the 2 Southeast Main area posed a potential for methane accumulation inby 2 Left Section. When the violation of Order No. 4 LDP is viewed in context with other major violations also present, this management failure to grasp the last chance to avoid culmination of the hazards it had created, starkly illustrates Scotia's reckless indifference to federal safety standards.

Violations of the preshift examination (methane checks) requirement were found in three of the five working sections of the Scotia Mine. The Secretary's view, in which I concur, was that:

> Taken together, and along with other examination violations, these violations reflect clear indifference to safety. Buttressing this disturbing conclusion is the evidence that Scotia employed only one regular fireboss to make the preshift examinations required to be performed in the widely-dispersed working sections within three hours before beginning the 7:00 a.m., day shift. This employee's normal work shift ended at 5:00 a.m., allowing only one hour of regular work time (between 4:00 a.m. and 5:00 a.m.) to perform all the examinations required before the day shift began.

C.

The constraints on the time and availability of a Fireboss resulted in a charge that it was allegedly the practice of the Fireboss to certify to preshift examinations that were not made or certainly not made by him. It was, of course, the alleged failure to make preshift or onshift methane

checks in the idled section (the dead end) of 2 Southeast Main that set the stage for the explosion that occurred when the two locomotives came to a stop at the 31st crosscut at 11:45 a.m., Tuesday, March 9, 1976.

The final ingredient of the lethal mix that resulted in the disaster of March 9 was introduced when the Scotia mine's underground construction foreman arranged to have a motor crew pick up a load of rails with the Nos. 6 and 8 battery-powered locomotives for delivery to the dead end of 2 Southeast Main. This was the area in which ventilation had been totally blocked for six or seven hours on the evening shift the day before by the installation of check curtains across the Nos. 4 and 5 (intake air) entries. 8/

8/ This was done to achieve temporary compliance with a notice of violation issued by a MESA inspector between 3:30 and 4:00 o'clock that afternoon. This citation issued when the inspector found less than 9,000 cubic feet of air per minute was sweeping the last open crosscut of the 2 Left Section. The notice was terminated about two hours later when the inspector remeasured the air flow and found it to be 10,472 feet per minute. The inspector, who was on the section for approximately seven hours, never attempted to determine how the additional 2,360 feet of air flow was achieved. MESA and the Secretary claim he was not authorized to inspect any area of the mine other than the 2 Left Section and therefore did not concern himself with the adequacy of the ventilation controls or with the short-circuit of the ventilation into the dead end area of 2 Southeast Main. Had he done so he might have discovered that in order to achieve compliance with his citation the operator had robbed air from 2 Southeast Main and that the entire section was being operated in violation of the approved Ventilation Plan. This arbitrary and somewhat incredible limitation on inspection activity deprived the miners of a last clear chance for the federal regulatory presence to intervene and to avert the disaster.

Although ventilation of some sort was restored around midnight on March 8, it was inby this ventilation stoppage that an explosive concentration of methane occurred before 11:45 a.m., March 9. To my mind the intentional interruption of the air flow into an area known to liberate explosive concentrations of methane gas was an act of reckless endangerment that finds no excuse in the claimed negligence of MESA in failing to detect the action. For these reasons, I fully concur in the assessment of maximum penalties for these violations.

D.

When high enough concentrations of methane gas, 5 to 15 percent, in an underground coal mine are associated with inadequate ventilation and an ignition source, a violent coal mine explosion is very likely to occur. 9/

9/ The legislative History of the Mine Safety Law reflects congressional concern for the danger of explosions resulting from ignition of undetected accumulations of methane in coal mines:

> The most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts. Methane can be ignited with relatively little energy and there are, even under the best mining conditions, numerous potential sources always present . . . Men working in the face areas where coal is mined and where fresh methane can be emitted in large volumes due to the disturbance of the coal bed, are required to take numerous safety precautions to insure that methane is not present in explosive amounts. All equipment inby the last open crosscut must be of a permissible type, and frequent examinations, both preshift and onshift, are made to determine methane concentrations. The

According to the Secretary the "evidence is conclusive" that the ignition source in the case of the first explosion was on one of the battery-operated locomotives, and most likely the No. 6, (Goodman) locomotive. As the Secretary points out, "The evidence, which includes positive laboratory tests demonstrates that, on or within each locomotive, there were several potential ignition sources for an explosive methane-air mixture."

In the case of the No. 6 (Goodman), locomotive, the Secretary claims a "copper wire 'bridge' was deliberately inserted in order to reactivate the circuit after the fuse element had broken." In the case of the No. 8, (Westinghouse) locomotive the Secretary's representatives claimed they "observed that electrical connections to the terminals of the locomotive batteries and between the batteries themselves, were neither mechanically nor electrically efficient, a condition chiefly due to the absence of suitable connectors."

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fn. 9 (continued)
present bill requires examinations for methane onshift at least once each coal producing shift, at the start of each coal producing shift before electrical equipment is energized, at least every 20 minutes during a shift when electrically operated equipment is energized, before intentional roof falls are made, before explosives are fired, and before welding is done. When, on examination, methane concentrations exceed 1 volume percentum, changes must be made in the ventilation to reduce the methane content. When the methane concentration exceeds 1.5 volume per centum, the electricity must be shut off in the section affected, and men withdrawn from the section until the methane content is reduced. H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 21.

Neither of these violations, however, is believed by MSHA's experts to have been "the actual cause of the spark which ignited the methane gas of March 9." What the experts hypothesize is "that the accumulated methane gas was ignited by the arcing created by the open-type controller on the No. 6 Goodman locomotive when the controller was turned to the 'off' position by the locomotive operator after reaching his destination at the inby end of 2 Southeast Main."

The controller, of course, is the device on electrically-powered locomotives that regulates speed and direction. Counsel for the Secretary suggests that the absence of a permissible, explosion proof controller on the No. 6 locomotive was not a violation because it was not taken inby the last open crosscut of 2 Southeast Main on March 9. Recent decisions by the Commission indicate that if the locomotives were manufactured as permissible equipment, as apparently they were, they may be deemed intended for use inby the last open crosscut and should, therefore, have been maintained in a permissible, i.e., explosion proof condition. 30 C.F.R. 75.503, Peabody Coal Co., 1 MSHC 1700 (1978); Solar Fuel Company, 3 FMSHRC 1384; 2 MSHC 1359 (1981).

I concur in the maximum assessments for the two electrical violations on the locomotives because their presence (1) was indicative of a knowing disregard for voluntary compliance and (2) they or similar conditions completed the triad of circumstances that contributed directly to the explosion of March 9.

II

A

The Secretary allocated $42,500 of the proffered settlement sum among 12 electrical violations. These, while not believed to have contributed to the conditions which caused the explosion of March 9, 1976, created severe electrical shock hazards and potential sources for explosive ignitions. In his prehearing submission, the Secretary found these violations were "part of a pervasive failure" to comply and stated he believed,

> these violations were caused not only by a systemic failure in electrical maintenance, but also by the systemic failure to carry out examinations required by the Coal Act and its standards. A close look at these violations demonstrates they did not result from mere happenstance. Most were clear, unmistakable breaches of the electrical protections of the standards, and ironic evidence of Scotia's 'production at all costs' attitude; ironic because the investigation revealed that the mine electrical system, as originally purchased and installed, was high-grade.

While the $42,500 allocated amounted to a 42% reduction in the amount initially assessed for these 12 violations, I find that when viewed in the context of the total settlement 10/ the allocation made was reasonable.

B

The last violation covered by the proffered settlement involves an alleged excessive accumulation of float coal dust. Investigators found excessive float coal dust, which

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10/ The average per violation for the 28 violations is $7,142.85 which is the highest average ever paid for a comparable number of violations.

is highly explosive, deposited on rock-dusted surfaces for a distance of approximately 2,500 feet in the 1 West Main, running from the mouth of the main inby along the conveyor belt entry. The accumulation covered the layer of white rock dust to such an extent that the area appeared black in color. The belt roller, of course, provided a potential source of heat and ignition that could have caused a fire or explosion. The existence of this violation is another example of the operator's reckless disregard for voluntary compliance. The Secretary allocated $7,500 to the settlement of this violation which was the amount initially assessed by MESA. I concur in this action.

III

Had the result in these proceedings been achieved within two years after the Scotia disaster, it might have been cited as a triumph of effective enforcement. Coming as it does at this late date, in the context of new, multiple mine disasters, it may be further proof of the adage that laggardly enforcement and justice delayed is tragedy invited. 11/

11/ Existing and prospective budgetary restrictions raise the specter of a de facto, if not a de jure, repeal of the Act. Despite conventional political wisdom to the contrary, experience teaches that in the mining industry, and especially underground coal mining, voluntarism is no substitute for compulsory enforcement. The history of mine safety shows a federal regulatory presence is required to reduce disasterous accidents and achieve even a modicum of safety.

The enormity of the social and economic cost of these mine disasters compels I take note of the great and continuing hazards that both operators and miners face twelve years after enactment of the mandatory safety standards and almost six years after the Scotia Mine disaster. The latest news bulletins disclose that during the five-day period between December 3 and 8, 1981, 27 miners were killed in coal mine accidents and explosions and that deaths among underground coal miners in 1981 were the highest in seven years. Even as this is written a mine explosion at the R.F.H. Coal Company in Craynor, Kentucky is reported to have killed seven more miners for a total of 33 miners killed in less than two months.

Meanwhile, MSHA has indicated that it intends to comply with the administration's budget-cutting plans by projecting the elimination of up to 150 underground coal mine inspectors, reducing the number of enforcement personnel from 1,629 to 1,479. 12/ At least 153 miners were killed on the job in U.S. coal mines during 1981, compared with 133 in all of 1980. To reduce the enforcement effort by 10% when fatal accidents are up 15% represents the kind of callous illogic that few intimately engaged in coal mine health and safety can endorse.

12/ Due to action of the Congress, another 210 metal and nonmetal mine inspectors have been furloughed.

I also take cognizance of the fact that for no discernable reason the 1982 budget for the Federal Mine Safety and Health Review Commission was slashed by 28%, from $4.3 million to $3.1 million, and that the Commission, which is a vital link in the enforcement effort, suffered a 28% reduction in its support staff and administrative law judges. This crippling blow to the prompt adjudication of enforcement cases will seriously disrupt the Commission's already limited ability to protect miners and to afford operators a forum for expedited determination of their challenges to erroneous closure orders and other enforcement actions.

In the face of the rising rate of institutional manslaughter, the calls for further deregulation and relaxation of the enforcement effort seem unreal, if not morally irresponsible. 13/ Several statistical studies have found that safety improves with the frequency of federal inspections. 14/ A study of 539 bituminous underground coal mines producing more than 100,000 tons annually indicated a

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13/ The importance of the federal enforcement effort is well recognized by the miners, especially the nonunion miners. As one West Virginia miner put it, "The only thing keeping the rock off your back when you're two miles underground is Government regulations." See "Miners, Mr. President, Are Not Slag", Op. Ed. Page, N.Y. Times, Sunday, January 24, 1982.

14/ Low Productivity in American Coal Mining: Causes and Cures, GAO Rpt. EMD 81-17, March 3, 1981, at 55-56.

50% increase in federal inspection rates would result in 11 fewer fatalities, 2,400 fewer disabling injuries, and 3,800 fewer nondisabling injuries per year. 15/

The staggering fact is that over 2,000 miners have been killed since Congress passed the Mine Safety Law in 1969. The statistics show this is the worst occupational safety record of any major industry and that laxity in the enforcement effort has resulted in a sharp reversal of the improvements of the last few years. It is time we stopped regarding the rising tide of deaths and disabling injuries with complacency. Something must be done and done quickly to correct the low level of morale at both the inspectorate and adjudicatory levels.

IV

Notwithstanding my misgivings and the absence of any assurance that corporate management's attitude toward mine safety has changed, 16/ an independent evaluation and de novo review of the entire administrative record including

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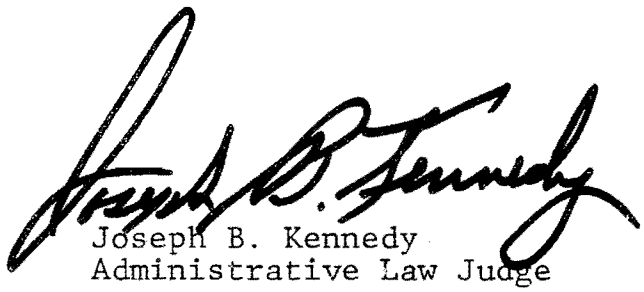
15/ The Direct Use of Coal, Office of Technology Assessment, Congress of the United States, (1979), at 283.

16/ Counsel for Scotia have always stoutly maintained that because MESA was in pari delicto, the operator culpability, if any, was extremely low. Counsel have made clear that the settlement is proffered solely in the interest of conserving their clients financial resources and not out of any sense of social remose or responsibility.

the MESA "Report of the Scotia Mine Disaster," 17/ the Secretary of Labor's Verified Statement to Judge Hermansdorfer concerning the same and the mine operators' comments thereon, leads me reluctantly to conclude the settlement proposed is in accord with the purposes and policy of the Act.

17/ This report was received in camera and has never been publicly released because of an outstanding suppression order issued by Judge Hermansdorfer in January 1978. Since the report is not admissible in the criminal case and most of the civil litigation has been settled, I strongly recommend the Department of Justice seek vacation of the suppression order. My independent review of the matter leads me to conclude that while the report, as supplemented, is not perfect, it is trustworthy. Furthermore, the conclusions reached at p. 57 are supported by a preponderance of the reliable, probative and substantial evidence in the administrative record considered as a whole. This is not to say that ventilation problems were not either undetected or ignored by MESA or could not have been, by the exercise of greater diligence or suspicion, discovered. Nevertheless, two wrongs do not make a right, nor is the public interest served by suppressing the report because a court arguably believed MESA tried to coverup its own wrongdoing at the expense of the mine operators. The law places primary responsibility for compliance on the mine operators. With all due deference to Judge Hermansdorfer, my independent review of the administrative record leads me to conclude that actors other than God and MESA were primarily responsible for the concentration of methane gas that exploded at the 31st crosscut of the 2 Southeast Main Section of the Scotia Mine at 11:45 a.m., Tuesday, March 9, 1976.

Accordingly, it is ORDERED that the motions to approve settlement and to withdraw the challenges to the validity of the orders be, and hereby are, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $200,000, on or before Monday, March 1, 1982, and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5205 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-368
	:	A.O. No. 46-01968-03077
v.	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner; Jerry E. Palmer, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with three alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing regarding the petitions was held on July 29, 1981, before Judge John F. Cook, in Oakland, Maryland and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, but were afforded the opportunity to make arguments on the record. Subsequent to the conclusion of the hearing, the case was reassigned from Judge Cook to me for completion. Accordingly, I have decided this case on the basis of the record made before Judge Cook, including full consideration of all of the evidence of record and the arguments made by the parties at the hearing.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties

filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

Citation No. 852152, issued on January 5, 1981, and alleges a violation of 30 CFR 75.601. Judge Cook approved a settlement payment in the amount of $195, which is for the full amount of the original assessment (Tr. 11).

Citation No. 852149, issued on January 5, 1981, and alleges a violation of 30 CFR 75.400. Petitioner's counsel proposed a settlement for the full amount of $275 which was assessed for this violation, and in support of the proposed settlement presented arguments concerning the six statutory criteria found in section 110(i) of the Act on the record (Tr. 11-13). Judge Cook rejected the proposed settlement (Tr. 14, 20). The parties then re-submitted the proposed settlement on the record by means of an amendment to reflect an agreed upon settlement payment of $400 for this citation, and Judge Cook advised the parties to file a motion with him (Tr. 24). Subsequently, by motion filed with Judge Cook on August 13, 1981, the parties seek an approval of the proposed settlement in the amount of $400.

With regard to Citation No. 852151, which was issued on January 5, 1981, for an alleged violation of 30 CFR 75.200, Judge Cook rejected the proposed settlement and directed the parties to proceed with the hearing on this citation and testimony and evidence was presented in this regard (Tr. 27-53). The parties waived the filing of written post-hearing proposed findings and conclusions, but were permitted to make oral arguments in support of their respective positions on the record. They also stipulated as to certain matters on the record, and presented evidence concerning the six statutory criteria found in section 110(i) of the Act (Tr. 24-27). These stipulations are as follows:

1. The Blacksville No. 2 Mine is owned and operated by the respondent and it is subject to the provisions of the Act.

2. The presiding Judge has jurisdiction in this matter and the subject citation was properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statement asserted therein.

3. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

4. The appropriateness of the penalty, if any, and the size of the coal operator's business should be based on the fact that the size of the company is 42,357,271 production tons, and the size of the mine is 2,264,105 production tons annually.

   With regard to the history of Respondent, with respect to Citation 852151, there were 586 prior violations during the 24 month period preceding the issuance of the citation. There were 719 inspection days. During the same period there were 23 violations of 30 CFR 75.200.

5. The parties further stipulate the authenticity of their exhibits but not the truth of the matters asserted therein.

Findings and Conclusions

Citation No. 852152, January 5, 1981, 30 CFR 75.601

I adopt Judge Cook's previous approval of the settlement proposed by the parties for the full amount of $195 initially assessed for this citation.

Citation No. 852149, January 5, 1981, 30 CFR 75.400

I have fully considered the motion and supporting arguments filed by the parties on August 13, 1981, seeking approval of a proposed settlement in the amount of $400, for this citation and it is APPROVED.

Citation No. 852151, January 5, 1981, 30 CFR 75.200

Fact of Violation

Respondent is charged with a violation of the roof control requirements of mandatory safety standard section 75.200, in that the inspector observed some roof conditions which required additional roof support in a cross-cut in the 5 South section. Inspector Fred Rundle testified as to the conditions which he found and confirmed that he issued the citation after inspection of the areas described in the citation which he issued on January 5, 1981. He stated that he tested the roof,

found it to be "drummy", and instructed the section foreman to danger the area off until additional support could be installed (Tr. 28-29). He also confirmed that he measured the distances referred to in the citation, and testified that the area in question was a travelway used by miners for work and travel (Tr. 30). In his view, the conditions which he observed failed to provide adequate roof protection, but that once the conditions were corrected they did. He also stated that at the time he observed the roof it was "working", that is, some of the roof strata had broken loose and was dripping. If the roof posts had not been installed, he believed the roof would have fallen in and caused serious injuries. He gave the respondent an hour to abate and eight posts were installed to support the roof. He also believed that the conditions should have been detected during the preshift or onshift inspections (Tr. 31-32).

On cross-examination, Mr. Rundle testified that the roof control plan was not being complied with, that he saw two men traveling in the unsupported roof area. He also indicated that no mining was taking place, that abatement was achieved rapidly, and that four men out of the seven man crew were used to abate the citation. He also confirmed that the section had been idle for five days prior to the time of his inspection, and that while adverse roof conditions can occur at any time, he believed the roof conditions in question were present at least three days or possibly shorter (Tr. 32-35).

Respondent offered no rebuttal testimony or evidence with regard to the citation, and upon careful review and consideration of the testimony and evidence adduced by the petitioner in support of its case I conclude and find that petitioner has established a violation of section 75.200, and the citation is AFFIRMED.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Continue in Business.

I find that the respondent is a large mine operator and I adopt the stipulation by the parties that the penalty assessed in this case will not adversely affect respondent's ability to remain in business.

Good Faith Compliance

The record supports a finding that respondent achieved rapid compliance in correcting the adverse roof conditions once they were brought to its attention and this is reflected in the penalty assessed by me in this case.

Gravity

I find that the adverse roof conditions described by the inspector in this case presented a hazard of a possible roof fall and endangered at least two or more miners who would have been in danger had the roof area cited in this case fallen before the inspector acted and dangered it off. Accordingly, I conclude that the violation was very serious and this is reflected in the penalty assessed by me in this case.

Negligence

I conclude that the record supports a finding that the respondent failed to exercise reasonable care to prevent the conditions cited by the inspector and that its failure in this regard constitutes ordinary negligence. While it is true that the section may have been idle, as soon as the shift in question began working again any preshift or onshift inspection should have detected the adverse roof conditions cited by the inspector.

History of Prior Violations

The parties have stipulated to the respondent's history of prior violations during the preceding 24-month period prior to the issuance of the citation in question. The record reflects 23 citations of the roof control requirements of section 75.200 during 719 inspection days, and a total of 486 prior violations during this same time period. I am not persuaded that this history entitles respondent to any special consideration in the penalty assessed for this violation, and absent any analysis as to the circumstances surrounding the 23 prior roof fall citations, I have no basis for drastically increasing the initial assessment of $295 levied by MSHA's assessment office for this violation simply because there were 23 prior citations for violations of this section. However, I have considered the history of violations stipulated to by the parties in this case and this is reflected in the penalty assessed by me for the violation.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of $475 is reasonable and appropriate for Citation No. 852151, January 5, 1981, 30 CFR 75.200, and respondent IS ORDERED to pay the penalty assessed within thirty (30) days of the date of this decision.

With regard to Citation No. 852152, respondent IS ORDERED to pay the agreed upon settlement amount of $195 within the same thirty day period noted above.

With regard to Citation No. 852149, respondent IS ORDERED to pay a civil penalty in the amount of $400, within the same thirty day period noted above.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 28 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-3-M A/C No. 04-03648-05001
v.	)	DOCKET NO. WEST 79-385-M A/C No. 04-03648-05002 W
VALLEY ROCK AND SAND CORPORATION,	)	MINE: Quail Canyon Pit & Mill
Respondent.	)	

Appearances:

Linda R. Bytof, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California
For the Petitioner

Peter Amschel, Esq.
Hemet, California
For the Respondent.

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, Valley Rock and Sand Corporation, violated various regulations adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

Pursuant to notice of hearing on the merits was held in San Bernardino, California. The parties filed post trial briefs.

ISSUES

The issues are whether Congress may regulate an open pit sand and gravel operation; whether respondent is a "coal or other mine" and extracts "minerals"; whether the 10th Amendment of the Constitution reserves the power of regulation to the State of California; whether the 4th Amendment of the Constitution requires a search warrant; whether respondent is relieved from liability because it is not the present owner; whether OSHA preempts MSHA; and whether the Act agitates and distracts workers increasing their likelihood of industrial injury.

In WEST 80-3-M the Secretary charged that Valley violated the following regulations which are published in Title 30, Code of Federal Regulations.

Citation	Standard	Penalty
371329	56.9-22	$ 56.00
371330	56.14-1	44.00
371331	56.11-1	34.00
371332	56.12-18	44.00
371333	56.14-1	44.00
371334	56.9-87	44.00
371335	56.9-2	44.00
376068	56.14-6	52.00

In WEST 79-385-M the Secretary charged that Valley failed to comply with various withdrawal orders thereby violating Section 104(b) [30 U.S.C. 814(b)] of the Act.

Citation	Penalty
371336	$100.00
371337	100.00
371338	100.00
371339	100.00
376069	100.00
376070	100.00
376071	100.00
376072	100.00
376073	100.00
376074	100.00
376075	100.00

After evidence was adduced in these consolidated cases and prior to the close of the Secretary's cases the parties entered into the following stipulation:

> One: If MSHA inspectors were to testify further they would develop facts that would support a violation of the standards in contest. All withdrawal and termination orders in these cases were properly issued.
>
> Two: Respondent's workers were exposed to the hazards or had access to the hazards involved.
>
> Three: The conditions cited involve the possibility of a worker sustaining a minor injury to being fatally injured.
>
> Four: Concerning penalties, Petitioner's evidence would further show that the penalties were proposed in view of the statutory criteria of the Federal Mine Safety & Health Act of 1977 and that the proposed penalties are reasonable and proper unless the affirmative defenses of Respondent prevail.

The afffirmative defenses of Respondent to be considered and decided in the decision are as follows:

First Affirmative Defense: The Federal Government has no power under the Constitution of the United States to regulate an open-pit sand and gravel operation.

Second Affirmative Defense: Respondent's operation is not a "coal or other mine" within the meaning of the Act.

Third Affirmative Defense: Respondent does not extract "minerals" within the meaning of the Act.

Fourth Affirmative Defense: Regulation of Respondent's operations is expressly reserved to the State of California by Amendment X of the Constitution of the United States.

Fifth Affirmative Defense: Any evidence of non-compliance with the Act by Respondent should be suppressed for a failure of Petitioner to obtain a search warrant as required by Amendment IV of the Constitution of the United States.

Sixth Affirmative Defense: Respondent is not the present owner of the operation.

Seventh Affirmative Defense: This Act is preempted by provisions of State and Federal Occupational Safety & Health Acts, each of which Respondent has fully complied with.

Eighth Affirmative Defense: Regulation under this Act agitates and distracts employees of Respondent increasing their likelihood industrial injury.

Five: MSHA inspectors inspected the Quail Canyon Pit and Mill on October 11, 1977 and they granted an extension of time to obey previously issued notices until October 27, 1977.

FINDINGS OF FACT

In view of the stipulation it is not necessary to review the evidence of the MSHA inspectors concerning the violations. I find the following uncontroverted facts to be relevant:

1. Respondent, a sand and gravel operation, removes material at its Quail Canyon pit and mill. The material is crushed, sized, washed, and separated for later sale (Tr. 26).

2. Respondent removes the sand and gravel with earth moving equipment and uses a conveyor belt, grizzles, screens, crushers, bunkers, scales, and motors (Tr. 142, 143).

3. Respondent produces three or four different grades of gravel which are sold to licensed contractors and ready mix manufacturers (Tr. 144).

4. Respondent also sells its sand to the public, to contractors, and material manufacturers (Tr. 135-136).

5. Occasionally respondent will deliver its product if the purchaser is within 50 miles of the plant (Tr. 137).

6. Respondent has never sold its product outside the State of California (Tr. 135, 136).

7. Dean Gross, the manager of the respondent company, permitted the MSHA inspectors to make their inspection although he was not shown a search warrant (Tr. 39, 140, 168).

8. Respondent has two to four workers in the plant (Tr. 26).

DISCUSSION

Respondent's initial contention is that Congress has no authority to regulate open pit sand and gravel operations.

It is well settled that Congress has broad authority to regulate commercial enterprises engaged in or effecting commerce. Donovan v. Dewey. - U.S. -, 69 L. Ed. 2d, 262, 101 S. Ct. - .

When Congress adopted the Federal Mine Safety and Health Act of 1977 it found that "the disruption of production and loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce." Section 2.

Section 3(h)(1) of the Act defines a "coal or other mine" as follows:

> (h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Section 4 of the Act mandates that the mines which are subject to the Act are:

> Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect Commerce, and each operator of such mine shall be subject to the provisions of this Act.

The legislative findings and purpose as declared in Section 2, the broad definition of "coal or other mine" in Section 3, and the declaration of those mines that subject to the Act in Section 4 indicate a Congressional intent to vest the broadest jurisdictional scope constitutionally permissible under the Commerce clause.

An example of the size of the enterprises which have been determined to have an affect on commerce maybe found in the oft cited case of Wickard v. Filburn, 317 U.S., 111, 63 S. Ct. 82. In that case a farmer exceeded his wheat allotment of 11.1 acres by an additional 11.9 acres. The Supreme Court held that the farmer came within the regulatory scheme of the Agricultrual Adjustment Act of 1938 even though the farmer's contribution to the wheat market was obviously microscopic in relation to the total market. Cf Godwin v. OSHRC 540 F 2d 1013 (C. A 9 1976). The size of a business enterprise is not controlling unless Congress makes it so N.L.R.B. v. Fainblatt et al 306 U.S. 601, 59 S. Ct. 668, 672.

Congress has found that accidents in all mines disrupt production and cause loss of income to operators which in turn impedes and burdens Commerce, 30 U.S.C. § 801(f). Accordingly, even if a mine's products remain solely within a state, any disruption of its operations due to safety and health hazards affects interstate commerce. Marshall v. Kilgore 478 F. Supp 4 (E.D. Tenn, 1979); Marshall v. Bosack 463 F. Supp 800 (E.D. Pa. 1978).

Respondent cites Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct 855, 80 L. Ed 1160 (1936); N.L.R.B. v. Johes & Laughlin Steel Corporation 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed 893 (1937) among other cases. None of the cases relied on by respondent involve legislation where the Congress sought to improve the working conditions in areas of safety and health. As the Supreme Court observed in Donovan v. Dewey, supra,; "[a]s an initial matter it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce."

Respondent's next two contentions are whether a sand and gravel operation are in law subject to the 1977 Act and whether respondent extracts minerals.

It is evident that sand and gravel pits were intended to be within the coverage of the Act. The House Report on the Act cites fatality and injury frequency rates in surface mines; further, the Senate Report in its regulatory impart analysis specifically noted the number and types of mines that would be affected. The report reads as follows:

Metals and nonmetal mining operations	Number of year round active mines	Intermittent or seasonal mines
Underground	629	365
Open pit	1,436	350
Crushed stone	3,510	806
Sand and gravel	5,368	2,450
Mills	858	75
Total	11,801	4,046
Grand Total	21,299	------

House Report No. 95-312, 95th Congress, 1st Session and Senate Report No. 95-181, 95th Congress, 1st Session reprinted respectively at pages 363 and 645 in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session (July 1978). Further, the Senate Committee in its report clearly articulated that " ... [w]hat is considered to be a mine and to be regulated under this Act is given the broadest possible interpretation, and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act Legis. History, at 602.

In addition to the legislative history recent cases have held that sand and gravel operations are subject to the Act. Marshall v. Stoudt's Ferry Preparation Co.,602 F. 2d 589 (3rd Cir. 1979) Cert. denied 444 U.S. 1015 (1980); Marshall v. Cedar Lake Sand and Gravel Co. 480 F. Supp. 171 (E. Wisc, 1979).

In support of its arguments respondent's post trial brief cites the legislative history of the Federal Metal and Non-metalic Mine Safety Act of 1966 (U.S. Code Cong. and Adm. News P. 2874 (1966)). I am not persuaded. The Legislative History of the 1966 Act, which was repealed by the present legislation, is simply not indicative of what Congress intended 11 years later.

Valley's post trial brief asserts that Stoudt's Ferry is distiguishable from the case at bar. I disagree. In Stoudt's Ferry the operator extracted material in a river dredging operation. The court held that the processing of the dredged refuse and selling the resultant product (which was akin to coal) rendered it subject to the Act. Further, in considering the sand and gravel portion of the operation the Court ruled:

> Moreover, the record also establishes that the company processes and sells the sand and gravel it separates from the material dredged from the river. We are persuaded, as was the district judge, that in these circumstances the sand and gravel operation of the company also subjects it to the jurisdiction of the Act as a mineral preparation facility.

Respondent argues that the regulation of its business is expressly reserved to the State of California by the 10th Amendment of the United States Constitution.

The Commerce clause, expressed above, disposes of this argument. Further, in U.S. v. California 297 U.S. 175 (1936), the Supreme Court of the United States ruled that the State of California in operating a purely intra-state railroad could not avoid the effects of the Federal Safety Appliance Act. In National League of Cities v. Usery, 426 U.S. 833 (1976), a leading 10th Amendment case, the Court specifically refused to overrule U.S. v. California.

Respondent's additional affirmative defense asserts that the MSHA inspectors lacked a search warrant. Donovan v. Dewey, supra. decided June 17, 1981 conclusively establishes MSHA's right to conduct warrantless inspections.

Respondent further interposes the defense is that it is not the present owner of the operation.

This defense cannot prevail. Section 3 of the Act contains the following definition:

> "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

Further, Section 2(e) recites that "the operators of such mines with the assistance of the miners have a primary responsibility to prevent the existence of such conditions and practices in such mines."

If continued owners were a condition of imposing liability under the Act the Congressional mandate would be avoided and completely frustrated by an operator merely disposing of his interest. There is no indication in the Act, nor in the legislative history that Congress intended to relieve an operator of responsibility by terminating his ownership.

Respondent further contends that the Mine Act is preempted by provisions of State and Federal Occupational Safety and Health Acts, each of which respondent asserts it has complied with.

Contrary to respondent's view the OSHA Act, 29 U.S.C. 651 et seq., does not preempt the Mine Safety Act. It is a fundamental rule of statutory construction that specific statutory provisions control over general statutory provisions. Further, House Report 95-312 observed that "[M]ining represents a small segment of the working population, yet the operation is of a nature that is so unique, so complex, and so hazardous as not to fit neatly under the Occupational Safety and Health Act." Legislative History at 357.

Respondent's post trial brief cites an interagency agreement dated April 10, 1979 between MSHA and OSHA. The brief contends that the agreement was published in the Federal Register in Volume 44, No. 75 on Tuesday, April 17, 1979 Notices, 22827-22830

Respondent's reliance on the interagency agreement appears for the first time in his post trial brief. I refuse to consider it. There was no request that official notice be taken of the document. Further, the agreement and its affect on these inspections were not an issue encompassed at the instant hearing.

Respondent's final argument is to the effect that regulation under this Act agitates and distracts employees increasing their likelihood of injury.

No evidence supports this bizarre argument. The hazards to employees here were particularly severe with each condition involving a possible fatal injury (Stipulation #3). The defective conditions involved: a lack of berms; unguarded moving machine parts (2 instances); unsafe access, power switches not labeled; power equipment without an audible warning device; equipment defects; and unguarded machinery. The elimination of these hazards could only improve worker safety.

CIVIL PENALTIES

Section 110(i), (30 U.S.C. 820(i)), contains the criteria for assessing penalties. Respondent here ignored notices it received starting in 1977 (Tr. 30, Exhibit P-1). There was no compliance and the citations were ultimately terminated in February 1979 because respondent sold its business. However, respondent is a small operator. The parties have stipulated concerning the appropriateness of the penalty and in view of the statutory criteria I affirm the proposed penalties. For the foregoing

For the foregoing reasons I enter the following:

ORDER

1. All citations and proposed penalties are affirmed.

2. Respondent is ordered to pay the sum of $1,462.00 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

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