JANUARY 1986

Commission Decisions

Administrative Law Judge Decisions

JANUARY 1986

The following case was granted for review during the month of January:

Disciplinary Proceeding, Docket No. D 86-1. (Judge Koutras, disciplinary referral of December 4, 1985.)

The following cases were not granted for review during the month of January:

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 85-59. (Judge Koutras, November 21, 1985.)

Secretary of Labor on behalf of I.B. Acton and others v. Jim Walter Resources, Docket No. SE 84-31-D, etc.. (Judge Melick, November 22, 1985.)

Secretary of Labor on behalf of F. Frederick Pantuso, Jr., v. Cedar Coal Company, Docket No. WEVA 84-193-D. (Judge Steffey, December 12, 1985.)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 84-79. (Judge Broderick, December 20, 1985.)

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 85-90. (Judge Melick, December 19, 1985.)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 1986

DISCIPLINARY PROCEEDING : Docket No. D 86-1

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

On December 4, 1985, Commission Administrative Law Judge George A. Koutras issued a decision in White Oak Coal Co., FMSHRC Docket No. VA 85-21, in which he held the respondent in default and, pursuant to Commission Procedural Rule 80, 29 C.F.R. § 2700.80, referred to the Commission for possible disciplinary proceedings the failure of the respondent's counsel to appear at the scheduled hearing. The respondent's counsel has filed a timely petition for discretionary review seeking review concerning only the judge's disciplinary referral.

The petition for review is granted. The referral is severed from the proceedings on the merits, is assigned the above caption and docket number, and is referred to the Chief Administrative Law Judge for assignment to an administrative law judge for appropriate proceedings under Rule 80(c), 29 C.F.R. § 2700.80(c). See, e.g., Disciplinary Proceeding, 7 FMSHRC 1957 (November 1985)(ALJ). If the attorney who is the subject of this proceeding is adversely affected or aggrieved by the subsequent

decision of the judge appointed by the Chief Administrative Law Judge, he may file a notice of appeal with the Commission. 29 C.F.R. § 2700.80(d). The Commission expresses no view as to the merits of this referral.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 83-65
PITTSBURG & MIDWAY COAL MINING COMPANY	:	

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"). It involves a single issue: Whether Pittsburgh & Midway Coal Mining Company ("P&M") violated 30 C.F.R. § 77.202, a mandatory safety standard which provides: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts." Following a hearing on the merits, a Commission administrative law judge concluded that P&M violated the standard and assessed a civil penalty of $400. 6 FMSHRC 1347 (May 1984)(ALJ). We affirm the judge's decision.

The violation occurred at P&M's McKinley Mine. The mine includes several surface facilities used in the processing of coal. Among these facilities is a coal transfer building. In this building coal is transferred onto a conveyor belt, and, as a result of the transfer, coal dust enters the building's atmosphere. At the top of the building is the tipple control room. The control room serves as an observation post from which the coal processing operations are monitored. In the room are two electrical control boxes, the main breaker box and the main crusher box. The main breaker box, as the name implies, contains several circuit breakers. Inside the main crusher box are a motor starter, a small transformer, an overload relay or circuit breaker, and numerous wires. The main breaker box is approximately 2 feet high and 2 feet wide. The main crusher box is approximately 6 feet high and 2 feet wide.

The citation alleging the violation of section 77.202 was issued on June 9, 1983. The MSHA inspector who issued the citation stated that he observed coal dust in the bottom of each electrical box, that the coal dust was black in color, and that it had accumulated in each box to a depth of at least 1/8 of an inch. The inspector considered this amount dangerous in that an electrical malfunction in the control boxes could cause an arc or spark which could, in turn, put the dust into suspension and propagate an explosion.

P&M's electrical foreman and P&M's director of safety training stated that the accumulations of coal dust were not as extensive as indicated by the inspector. They asserted that under normal operating conditions the accumulations would not be dangerous because electrical malfunctions in electrical control boxes are rare and electrical back-up systems in both boxes are designed to prevent arcs or sparks in the event of malfunctions.

The judge found that the accumulations existed in both boxes and in the amount described by the inspector. 6 FMSHRC at 1349. The judge also found that energized electrical facilities were present and that faults or failures in such facilities are common occurrences. Id. The judge concluded that the existence of accumulations in the presence of potential ignition sources established that the accumulations were "dangerous" within the meaning of the standard. Therefore, he concluded that a violation occurred. Id.

Substantial evidence supports the judge's findings concerning the presence of the accumulation. The inspector visually observed and measured the coal dust. P&M's witnesses did not dispute the presence of the coal dust. Rather, they argued that it was not as extensive as the inspector testified. The judge, who heard the witnesses and who had an opportunity to evaluate their testimony first hand, credited the inspector. We find nothing in the record to warrant the reversal of the judge's findings in this regard. Mathies Coal Co., 6 FMSHRC 1, 5 (January 1984).

The inspector also testified that the circuit breakers on the boxes could short circuit and put the coal dust into suspension and thereby propagate an explosion. He further testified that any broken wire in the boxes could ignite the coal dust. MSHA's electrical specialist confirmed that faulty circuit breakers and defects in the wiring could create an ignition source. P&M's electrical foreman did not dispute that the components of the electrical boxes could become ignition sources. When asked if there could be an electrical failure in the main crusher box which could result in an ignition source, he replied, "Yes ... I guess [there] could." Moreover, he stated that he had twice seen circuit breakers in a main breaker box explode. The foreman emphasized, however, that such occurrences are not common. He stated that there was a back-up system to prevent electrical failures. He also stated that it would be "very rare" for the circuit breakers to explode.

P&M argues on review that the judge erred in finding a violation because the judge did not require the Secretary to establish the existence of a present, actual ignition source in the vicinity of the accumulation at the time of the inspection. Rather, the judge concluded that under section 77.202, if a "potential" ignition source is present in the vicinity of an accumulation, the accumulation is dangerous within the meaning of the standard. 6 FMSHRC at 1349. We agree with the judge's conclusion. It is well established that the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. Federal Mine Safety and Health Review Commission, 606 F.2d 417, 419-20 (4th Cir. 1979); Old Ben Coal Co., 1 FMSHRC 1954, 1957-58 (December 1979). Section 77.202, like most coal mine safety standards, is aimed at the elimination of potential dangers before they become present dangers. Thus, we conclude that the judge did not err in seeking to determine whether, under the circumstances, an ignition could have occurred and that his finding of a violation is supported by substantial evidence.

Accordingly, the decision of the administrative law judge is affirmed. 1/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 85-15
HALFWAY, INCORPORATED	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

The issue in this civil penalty proceeding is whether a violation of a mine's roof control plan properly was found to be "significant and substantial" within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). A citation, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleged that the mine operator, Halfway, Incorporated ("Halfway"), violated 30 C.F.R. § 75.200 by failing to comply with the minimum requirements of its approved roof control plan. Halfway contested the inspector's actions and the jurisdiction of the Commission, an independent adjudicatory agency, attached. Following a hearing on the merits, Commission Administrative Law Judge James A. Broderick affirmed the citation and assessed a civil penalty of $1,000. 7 FMSHRC 884 (June 1985)(ALJ). We granted Halfway's petition for discretionary review. For the following reasons, we affirm the judge's decision.

Halfway operated the No. 1 Mine, an underground coal mine located in Raleigh County, West Virginia. The mine was a "hilltop" mine, in which entries are driven through the coal seam from the interior of the mountain towards the outcrop. 1/ As part of a regular mine inspection

1/ The term "outcrop" is defined as "[t]he part of a rock formation that appears at the surface of the ground" or "[c]oal which appears at or near the surface; the intersection of a coal seam with the surface." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 778 (1968).

conducted on June 20, 1984, MSHA Inspector James Ferguson examined the mine map. It showed that mining operations had advanced within 150 feet of the outcrop on the 001 Second South Section. The inspector asked mine management whether supplemental support had been used in advancing the entry, as required by the mine's approved roof control plan when mining within 150 feet of the outcrop. 2/ He was informed by Donald Hughes, Halfway's general mine foreman, that no supplemental support had been used.

After proceeding underground to inspect the area in question, the inspector observed that the entries had been driven at widths of 20 feet. Room No. 9 had been advanced for a distance of 150 feet beyond the point 150 feet from the outcrop. The last 20 feet of top in that room had deteriorated to such an extent that it had fallen. Similarly, Room No. 8 had been advanced 100 feet beyond the point 150 feet from the outcrop. The inspector also observed deterioration of the roof in that room. Roof bolting provided the sole means of roof support in these areas. At the time of his inspection, the inspector observed no miners in the particular rooms.

Because of these conditions, the inspector issued Halfway a citation alleging a violation of 30 C.F.R. § 75.200. 3/ Pursuant to section 104(d)(1)

2/ Safety Precaution No. 15 of Halfway's Minimum Roof-Control Plan provides:

> Roof bolts shall not be used as the sole means of roof support when underground workings approach and/or mining is being done within 150 feet of the outcrop or highwall. Supplemental support shall consist of at least one row of posts on 4-foot spacing, maintained up to the loading machine operator, limiting roadway widths to 16 feet. This does not apply to new openings being developed from the surface.

Ex. G-3 at 11.

3/ 30 C.F.R. § 75.200 provides:

> [STATUTORY PROVISIONS]
>
> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof

(footnote 3 continued)

of the Act, the inspector found that the violation was of such nature as could contribute significantly and substantially to the cause and effect of a mine safety hazard. The inspector terminated the citation after Halfway abated the condition by dangering-off Room Nos. 8 and 9 and agreed to use supplemental support in the remaining rooms as specified in the roof control plan.

The judge found that Halfway violated 30 C.F.R. § 75.200 by mining within 150 feet of the outcrop without the supplemental support required by its roof control plan. 7 FMSHRC at 885. He found the violation to be serious because roof conditions can deteriorate as mining operations approach the outcrop, and referred to the deterioration of the roof in Room Nos. 8 and 9 as evidence supporting his conclusion. Id. The judge stated, "A serious injury or fatality would have been reasonably likely had mining continued." 7 FMSHRC at 885-86. He determined that the violation was therefore of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. 7 FMSHRC at 886.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard[.]" 30 U.S.C. § 814(d)(1). The Commission first interpreted this statutory language in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981):

> [A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, if based upon the particular facts surrounding the

---

Footnote 3 end.

> conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

> violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted). Accord, Consolidation Coal Co., 6 FMSHRC 34, 37 (January 1984). The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

On review, Halfway concedes a violation of its roof control plan, but contests the finding that the violation was significant and substantial. It argues that the violation did not contribute to a discrete safety hazard and that no reasonable likelihood existed for an injury. We disagree.

By mining the subject entries within 150 feet of the outcrop without supplemental support and in widths in excess of 16 feet, Halfway violated its roof control plan and, hence, 30 C.F.R. § 75.200. There is ample record evidence to support the judge's finding that this conceded violation contributed to the discrete safety hazard of a roof fall. MSHA Inspector Ferguson testified that the mine had a massive roof structure, which diminished and deteriorated as mining approached the outcrop. He explained that near the outcrop roof conditions could change without warning, and that the deterioration created a danger of roof falls, which could occur suddenly. Clearly, the roof control provision requiring supplemental support within 150 feet of the outcrop was included in the roof control plan in contemplation of those dangers. The inspector confirmed that the purpose of the supplemental support was to replace some of the roof support lost in driving 20-foot wide entries, by effectively limiting the width of the entries to 16 feet, and to serve as a visual indicator of potential roof movement. Tr. 38-39. This evidence provides substantial support for the judge's finding that the failure to provide the required supplemental support contributed to a discrete hazard of roof falls in the deteriorating mining conditions encountered near the outcrop.

Halfway further challenges the judge's finding that the hazard contributed to by the violation was reasonably likely to result in injury. It argues that the judge improperly assumed the existence of a "continuing violation" because he conditioned his conclusion regarding the likelihood for injury on continued mining activity, and, at the time that the citation was issued, mining in Room Nos. 8 and 9 had already been discontinued.

This argument misconstrues the importance of the timing of the issuance of a citation in the significant and substantial violation context. The fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

It is undisputed that Halfway's miners advanced Room Nos. 8 and 9 for distances of 100 feet and 150 feet, respectively, beyond the point 150 feet from the outcrop without the supplemental support mandated by the mine's roof control plan. This was a major, not minor, departure from the roof control plan and, during that phase of active mining, this violation exposed miners to a roof fall hazard. The undisputed testimony of MSHA Inspector Ferguson clearly supports this finding. The inspector testified that the roof near the face area in the cited rooms had deteriorated to the point that a roof fall was likely to occur. Tr. 41, 53, 70, 77. He also testified that roof bolts would not anchor and that the roof had fallen, exposing mud, dirt, and the roots of grass and trees. Tr. 84-85. The testimony of Halfway's own witness supports the inspector's testimony. See, e.g., Tr. 106. This constitutes substantial evidence supporting the conclusion that a reasonable likelihood for injury existed as the cited entries approached the outcrop.

We find further support for the conclusion that it was reasonably likely that the roof fall hazard contributed to by the violation would result in injury had normal mining operations continued because Room Nos. 8 and 9 remained accessible until Halfway abated the citation by dangering-off the entries. Tr. 44. 4/ Active mining was taking place

4/ The evidence is conflicting as to whether Room No. 9 was dangered-off at the time of the inspection. Compare Tr. 44 with Tr. 94. However, in finding that the violation "was abated by dangering off rooms 8 and 9," 7 FMSHRC at 885, the judge appears to have implicitly credited the MSHA inspector's testimony and found that Room No. 9 had not been previously dangered-off.

in Room Nos. 3-7 and travelways to the cited areas could have been used by miners. Tr. 29, 43-44, 74. In the absence of any affirmative measures by Halfway to prevent miner exposure to the roof fall hazard found to exist in Room Nos. 8 and 9, a roof fall with resulting injury to a miner remained a reasonable possibility.

Finally, Halfway does not dispute on review that any actual injury from a roof fall would be reasonably serious in nature. Our decisions have stressed the fact that roof falls remain the leading cause of death in underground mines. See, e.g., Consolidation Coal Co., supra, 6 FMSHRC at 37-38 & n. 4.

Accordingly, we conclude that the violation in this case properly was found to be "significant and substantial" in that there was a reasonable likelihood that Halfway's noncompliance with the supplemental support requirements of its roof control plan could significantly and substantially contribute to the cause and effect of a roof fall hazard. The decision of the administrative law judge is affirmed. 5/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Chairman Ford assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 30, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RONNIE D. BEAVERS, et al.	:	Docket No. WEVA 85-73-D
v.	:	
KITT ENERGY CORPORATION,	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This inquiry has been conducted to determine whether Commission Administrative Law Judge Roy J. Maurer, the presiding judge in the above-captioned case, and Frederick W. Moncrief, counsel for the Secretary of Labor, engaged in prohibited ex parte communications in violation of Commission Procedural Rule 82, 29 C.F.R. § 2700.82. 1/

1/ Rule 82, entitled "Ex parte communications," provides:

> (a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.
>
> (b) Procedure in case of violation. (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.
>
> (2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.
>
> (c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission....

29 C.F.R. § 2700.82.

This matter was brought before the Commission on October 30, 1985, when Commission Administrative Law Judge Joseph B. Kennedy filed with the Commission a memorandum asserting that ex parte telephone conversations between Judge Maurer and Mr. Moncrief occurred on May 2, 1985, and October 1 and 2, 1985, during the course of pre-trial proceedings in this case. (Judge Kennedy attached to his memorandum copies of letters in the record of this case from Moncrief to Judge Maurer memorializing the telephone conversations in question.) Judge Kennedy requested the Commission to conduct an inquiry to determine whether the telephone conversations were in violation of Rule 82. The Commission solicited and received from Judge Maurer and Moncrief statements making a full and complete disclosure of the circumstances and content of the communications. In addition, the Commission severed this Rule 82 inquiry from the merits of the case and stayed further proceedings before Judge Maurer.

The case on the merits involves a discrimination complaint filed on January 9, 1985, by the Secretary of Labor on behalf of Ronnie D. Beavers and twenty-seven other miners pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The complaint alleges that Kitt Energy Corporation ("Kitt Energy") laid off the complainants because they lacked the underground safety and health training specified in section 115 of the Mine Act, 30 U.S.C. § 825. The complaint also states that although Kitt Energy subsequently provided the training and recalled the complainants to work, it refused to compensate them for their training. The Secretary asserts that the layoff of the miners and the refusal to compensate them after the recall violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). Kitt Energy denied the allegations of illegal discrimination, and the United Mine Workers of America ("UMWA") intervened.

Frederick Moncrief represented the Secretary, Bronius Taoras represented Kitt Energy, and Earl Pfeffer represented the UMWA. The case was assigned first to Commission Administrative Law Judge James A. Broderick. On April 5, 1985, Judge Broderick issued a pre-hearing order directing counsel to file stipulations concerning those factual matters not in dispute and to specify witnesses and exhibits to be offered concerning disputed factual issues. On April 25, 1985, after Judge Broderick's pre-hearing order was issued, but before the specified dates for compliance with the order, the matter was reassigned to Judge Maurer.

Prior to the reassignment of the case, the Commission heard oral argument in two cases posing the issue of whether an operator violated section 105(c)(1) of the Mine Act when it bypassed for rehire laid-off individuals because they had not obtained relevant training referred to in section 115 of the Act. UMWA on behalf of Rowe, et al. v. Peabody Coal Co., etc., 7 FMSHRC 1357 (September 1985), pets. for review filed, Nos. 85-1714 & 85-1717 (D.C. Cir. October 29 & 30, 1985); Secretary on behalf of I.B. Acton, et al., etc. v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (September 1985), pets. for review filed, Nos. 86-1002 & 86-1027 (D.C. Cir. January 3 & 10, 1986). In these cases, the Commission concluded

that an operator could bypass laid-off individuals who lacked training but that if it recalled individuals who had obtained the training, it had to reimburse them for their training costs. In large part, the Commission rested its decisions on Secretary on behalf of Bennett, et al. v. Emery Mining Corp., 5 FMSHRC 1391 (August 1983), pet. for review filed, No. 83-2017 (10th Cir. August 17, 1983), in which the Commission held that although a mine operator may require that job applicants obtain requisite training prior to hire, it must reimburse newly hired miners who had obtained such training.

For the reasons that follow, we conclude that Judge Maurer and Moncrief did not engage in ex parte communications in violation of Rule 82. The stay is dissolved and the matter is returned to Judge Maurer for further proceedings on the merits.

Based upon the consistent and uncontested statements that Judge Maurer and Moncrief submitted to the Commission pursuant to this inquiry, and upon other aspects of the record in this matter, we find that the following events pertinent to this inquiry occurred following the reassignment of this case. On May 2, 1985, Moncrief telephoned Judge Maurer. Moncrief told the judge that he was calling on behalf of both himself and Kitt Energy's counsel, Mr. Taoras. Moncrief requested relief for the parties from the various filing requirements of Judge Broderick's previously issued pre-hearing order. Judge Maurer reminded Moncrief that the UMWA had intervened. Moncrief stated that he had contacted the UMWA's counsel, who had agreed with the Secretary and Kitt Energy to seek relief from the pre-hearing order. As the basis for the request, Moncrief told Judge Maurer that he and Taoras had agreed that the case largely involved legal questions. He advised Judge Maurer that the Peabody and Jim Walter cases, supra, had been argued before the Commission and that Emery, supra, was pending in the Tenth Circuit. Moncrief stated that these cases probably would be dispositive of the issues at hand. In response, Judge Maurer told Moncrief to submit a letter on behalf of the parties requesting the relief that they wanted. Judge Maurer also stated that if he were to conclude that Peabody and Jim Walter had a potentially decisive bearing on the issues of the case, he would stay the matter but not past September 1985.

As the requested follow-up to the May 2 conversation, on May 8, 1985, Moncrief wrote to Judge Maurer. In the letter, Moncrief requested relief from the pre-hearing order "on behalf of ... Mr. Taoras, and myself." The letter asserted that the Peabody, Jim Walter, and Emery cases were likely to resolve the issues in Kitt Energy, or at least provide considerable guidance in their resolution. Accordingly, Moncrief requested a continuance pending the Commission's decisions in Peabody and Jim Walter, but stated that he had advised the other counsel of Judge Maurer's desire not to continue the matter beyond September. Moncrief ended his letter, "I trust that this effectively summarizes our conversation." Copies of the letter were sent to Taoras and Mr. Pfeffer, and the letter was placed in the official file of the case. Subsequently, by order dated May 10, 1985, Judge Maurer granted the parties relief from the requirements of Judge Broderick's pre-hearing order and notified the parties that the matter would be set for hearing in September 1985.

On September 5, 1985, Judge Maurer scheduled a hearing for October 9, 1985, in Morgantown, West Virginia. On September 30, 1985, the Commission issued its decisions in Peabody and Jim Walter. On October 1, 1985, Judge Maurer received a copy of a letter written by Taoras to counsel for the Secretary and the UMWA, which stated that the parties were attempting to stipulate to the relevant facts in Kitt Energy. On October 1, about the same time that Judge Maurer received the copy of the Taoras letter, Moncrief again telephoned the judge. Moncrief stated that he was calling on behalf of all of the parties and that he was seeking a continuance of the scheduled October 9 hearing. Moncrief stated that the previous day's issuance of the Commission's decisions in Peabody and Jim Walter probably would obviate the need for an evidentiary hearing. Moncrief also stated that the parties were working on stipulations to submit to the judge. Judge Maurer told Moncrief that he would continue the hearing if Moncrief and Taoras would agree to certain other conditions with respect to future hearings.

On October 2, 1985, Moncrief called Judge Maurer and informed him that Taoras had agreed to the other conditions. Judge Maurer asked Moncrief to advise all of the parties that the judge would issue an order continuing the hearing. Moncrief complied with this request and on October 3, 1985, wrote the judge a letter in which he "confirm[ed] [the] telephone calls of October 1 and 2." Copies of the letter were sent to counsel for Kitt Energy and the UMWA, and the letter was placed in the record. On October 4, 1985, the judge made an order continuing indefinitely the previously scheduled Morgantown hearing.

Commission Procedural Rule 82 (n. 1, supra) and section 557(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(d) (1982), prohibit ex parte communications between a Commission judge and a party regarding the merits of a pending case. UMWA on behalf of Rowe, et al. v. Peabody Coal Co., etc., 7 FMSHRC 1136, 1142 (August 1985); Secretary on behalf of Clarke v. T.P. Mining, Inc., 7 FMSHRC 1010, 1014 (July 1985); United States Steel Corp., 6 FMSHRC 1404, 1407-09 (June 1984); Knox County Stone Co., Inc., 3 FMSHRC 2478, 2482-86 (November 1981). The term, "ex parte communication," is defined in the APA as:

> an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding....

5 U.S.C. § 551(14) (1982). The three telephone conversations between Judge Maurer and Moncrief were not ex parte communications within the meaning of our rule and the APA. The record reflects that reasonable prior notice of the conversations was given to all of the parties. Moncrief asserts that when he spoke with Judge Maurer, "it was after discussion with and by agreement of [Kitt Energy's] and [the UMWA's] counsel." Judge Maurer's statement and the record confirm Moncrief's assertion. We note also that Moncrief's letters memorializing these conversations were placed promptly in the record and served on the parties.

Judge Maurer states that in the first conversation on May 2, 1985, Moncrief informed him that he was calling on behalf of himself and Kitt Energy and that he had been in touch with counsel for the UMWA. Judge Maurer's contemporaneous handwritten notes on the conversation, which are in the record, state, "Moncrief calling on behalf of both." (Emphasis in original.) With respect to the telephone conversation of October 1, 1985, Judge Maurer states that Moncrief also informed him that he was calling on behalf of all of the parties. It is clear from the statements of Moncrief and Judge Maurer that Moncrief contacted Taoras and the UMWA's counsel regarding the substance of the May 2 and October 1 conversations prior to calling Judge Maurer. (The October 2 conversation was merely a follow-up to the October 1 conversation.) Moreover, copies of Moncrief's letters of May 8 and October 3, 1985, in which Moncrief indicated to the judge that counsel for the parties had been contacted previously concerning the subjects of the conversations, were sent to both counsel. Importantly, neither counsel for Kitt Energy nor counsel for the UMWA has disputed the contents of Moncrief's letters, nor have they objected to the contacts reflected in the letters. If Moncrief had not been speaking for all of the parties and with their prior notice when he contacted the judge, it is logical to assume that some objection from the other parties to the litigation would have been lodged.

Thus, we find that prior to the telephone conversations Moncrief advised the parties that he would converse with the judge, and we find further that the parties were aware of the subject matter that Moncrief would raise with the judge in those conversations. It is not impermissible for a party to contact a judge on behalf of all the parties concerning essentially procedural matters, where the conversation remains within the scope of the procedural subjects previously authorized by the parties to be raised with the judge. Because we find that Moncrief was acting with authorization on behalf of all parties and that "reasonable prior notice" had been given to other parties regarding the conversations, we conclude that the conversations at issue were not "ex parte communications" within the meaning of Rule 82 and the APA.

Even were we to conclude that the communications were ex parte, we would not find them "prohibited ex parte communications." Rule 82 prohibits communications "with respect to the merits of any case." The conversations of Judge Maurer and Moncrief were procedural in nature and did not concern the merits of the Kitt Energy litigation. It is true, as the Commission has stated, that the concept of the "merits of a case" is to be construed broadly and, at the very least, includes discussion of issues in a case and how those issues should or will be resolved. Peabody Coal Co., supra, 7 FMSHRC at 1014; T.P. Mining, supra, 7 FMSHRC at 1143. For example, a judge may not suggest to counsel in an off-the-record, ex parte conversation that counsel obtain a potential piece of evidence from opposing counsel. T.P. Mining, 7 FMSHRC at 1015-16. Nor may a judge solicit substantive, off-the-record information from one counsel concerning the position a party has taken in other pending litigation when that position might influence the outcome of the case. Peabody Coal Co., 7 FMSHRC at 1143. However, when counsel merely

advises a judge of the existence of pending decisions that may obviate the need for an evidentiary hearing, as was done here in the conversations of May 2 and October 1, 1985, the conversation is procedural and does not pertain to the merits of the case.

It is one thing to discuss the substance of the issues in a case; it is quite another to advise a judge -- on behalf of all of the parties -- that decisions are forthcoming or already exist that may simplify the procedural tasks of the judge and the litigants in the pending case. To do the former is to influence the substance of the decision in a pending case outside of the formal, public proceeding. See, e.g., Patco v. Federal Labor Relations Authority, 685 F.2d 547, 570 (D.C. Cir. 1982). To do the latter is to facilitate the procedural process by which the decision is reached. The prohibition against ex parte communications was not intended to erect meaningless procedural barriers to effective agency action. Patco, supra, 685 F.2d at 563-64.

Further, that portion of the conversation of October 1, 1985, in which Moncrief advised Judge Maurer that the parties were drafting factual stipulations to submit to the judge was in the nature of a status report to the judge. This type of conversation is permissible. T.P. Mining, 7 FMSHRC at 1015. Similarly, the conversation of October 2, 1985, in which Moncrief advised the judge that Taoras had agreed to the other conditions that the judge wished to impose with respect to future hearings and in which the judge asked Moncrief to advise the parties that he was continuing the hearing also concerned the status of the case and did not violate Rule 82.

Thus, there is nothing in this record that in any way reflects discredit on the conduct of Judge Maurer or Moncrief. Indeed, they conducted themselves in an able and efficient manner. Their conduct in handling the litigation was procedurally proper and in accordance with accepted standards. We therefore conclude that the referral by Judge Kennedy is without merit. 2/

2/ Because of the unusual manner in which this inquiry arose, the Commission directed Judge Kennedy to make a full and complete disclosure of the circumstances by which he became aware of the asserted ex parte communications. In doing so, Judge Kennedy also moved the Commission to strike certain portions of Judge Maurer's statement. Because of our resolution of this matter, we have determined that the question of how the Moncrief letters were obtained need not be addressed further in the present proceeding. Accordingly, the motion to strike is denied.

For the foregoing reasons, this inquiry is closed and the case on the merits may proceed. 3/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ Chairman Ford assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 2 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-165
	:	A.C. No. 15-12081-03530
v.	:	
	:	Docket No. KENT 85-197
B J D COAL COMPANY, INC., Respondent	:	A.C. No. 15-12081-03531
	:	
	:	No. E-1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a joint motion to approve settlement agreements and to dismiss the cases. Respondent has agreed to pay the proposed penalties of $2,140 in full. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay penalties of $2,140 within 30 days of this order. No amount of these penalties shall be taken from nor detracted from the estate of the deceased Jimmy Dale Hamilton.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 6, 1986

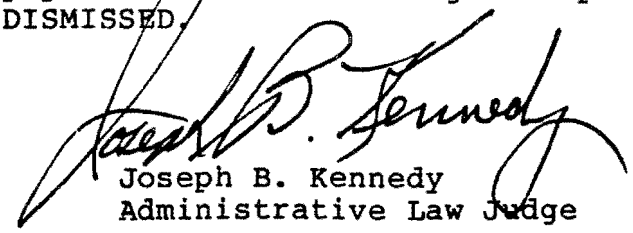
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-193 A. C. No. 15-14443-03517
v.	:	No. 4 Mine
MELANIE COAL COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

Based on an independent evaluation and de novo review of the circumstances, I find CMI Richy D. Hamilton and the Assessment Office did a specially commendable job of enforcement in this case and that unlike many of the marginal proposals I receive this one is in full accord with the purposes and policy of the Act.

Accordingly, It is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $3,692, in six equal installments commencing January 15, 1986 and each month thereafter until the full amount is paid on or before June 15, 1986. Finally, it is ORDERED that subject to payment of the amount agreed upon the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 1986

TENNIS MAYNARD, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 84-231-D
BLOCK COAL COMPANY, Respondent	:	MSHA Case No. Pike CD 84-12

DECISION

Appearances: Hugh M. Richards, Esq., Prestonsburg, Kentucky, for Complainant;
Thomas J. Blaha, Esq., Paintsville, Kentucky, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) [hereinafter referred to as the Act] on August 23, 1984 alleging that he was "not able to take time off with a paid vacation" in violation of company policy. He further alleged that he was harassed on and off the job (presumably by the Respondent) as a result of filing an earlier discrimination complaint against Block Coal Company. This "harassment" allegedly has caused him severe mental anguish and requires medical treatment. By his complaint, he sought removal of all reprimands and personnel actions from his personnel file and vacation with pay. At the hearing, this request for relief was expanded to include reinstatement to his former job at some future time when he becomes medically able to return to work, three hours of pay at time and a half (for which he had been docked) and that he be allowed to keep the medical insurance he had prior to leaving the job.

This is the second Complaint of Discrimination filed with the Commission by Mr. Maynard against essentially the same Respondent. The earlier case is styled Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Tennis Maynard, Jr. v. Diamond P. Coal Company, Inc., (Docket No. KENT 82-199-D). Exhibit No. C-1 herein is the settlement agreement filed in that case and is signed by Mr. Paul Pelphrey for both Diamond P. and Block Coal

Companies. That case was disposed of by Decision Approving Settlement at 5 FMSHRC 1988 on November 25, 1983. Insofar as it is relevant, it will be discussed further in the body of this decision.

Pursuant to notice, this case was heard in Prestonsburg, Kentucky on August 28 and 29, 1985. Tennis Maynard, Jr., Elbie Pickelsimer and Joe Cook testified on behalf of the Complainant; Paul Pelphrey and Dennis Marshall testified on behalf of Respondent.

I have carefully considered the entire record and the contentions of the parties, and make the following decision.

DISCUSSION AND FINDINGS

Tennis Maynard, Jr. [hereinafter Complainant] had been employed as a rock truck driver by Mr. Pelphrey in the surface coal mining business under various company names; Diamond P. and Block Coal among them, and at various locations in Eastern Kentucky. His former job with Diamond P. terminated with his firing on May 17, 1982 because he refused to work in an allegedly unsafe condition. As a consequence of this firing, he filed a Complaint of Discrimination, which was later settled prior to hearing and resulted in his reinstatement. His last job was in Morgan County, Kentucky on Route 650, where Dennis Marshall was again his supervisor on the second shift.[1] This was the job he was reinstated in as of October, 1983 as a result of the settlement of his previous discrimination complaint, supra. He remained in this job until he quit on June 14, 1984.

After Complainant's return to work in October of 1983, he felt that there were several incidents which occurred at work which interfered with his job and amounted to "discrimination".

Among them was one case where he had backed his rock truck up a ramp into a four foot wide hole which almost caused the truck to turn over. He was not warned of the hole in time by the man "running field". Another time there was a tree improperly loaded on another truck, which broke the windshield of Complainant's truck while passing at night. I specifically find that these two incidents were serious and posed a grave danger to Complainant. However, Complainant

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[1]The second shift was a ten hour shift from six (6) in the evening until four (4) in the morning, with frequent overtime until seven (7) in the morning.

has failed to show that the management of Block Coal Company was culpable in bringing these occurrences about. There is simply no evidence in the record to that effect from any source, including the Complainant himself. The men involved in these accidents were rank and file workers in the same relative position as Complainant with management.

Complainant also was docked three (3) hours of overtime pay one night because he had parked his truck and was not working due to problems with the truck's headlights. His supervisor explained that the Complainant had failed to contact him concerning any difficulty with the truck and only after one of the other men had told him that Maynard was sitting out there did he go out to investigate. He found him "reared back in the seat," appearing to be asleep. He was docked three (3) hours pay because he didn't contact his foreman to either have his truck repaired or to use the spare truck which was available on the site that night. Mr. Marshall's explanation of the Company's action in this matter is credible and I so find.

With regard to malfunctioning equipment generally, a somewhat related claim is made by Complainant that his supervisor provided him with inferior equipment in comparison with the other rock truck drivers. It is not disputed that the trucks were assigned on a seniority basis, with the more desirable trucks going to the most senior men. Complainant, however, feels that he should have been assigned a better truck earlier in his employment at the Morgan County site. For purposes of this discrimination case and without deciding which particular truck Complainant should have been driving on any particular day, the important issue is safety on the job. It is unrefuted in the record that the company rule was that any truck driver having any problem with his truck is to report it to the foreman immediately and that he is not required to operate an unsafe vehicle. In several places in the record, Complainant states he did operate an unsafe vehicle but he does not state that he was required to do so or that he could not have reported the vehicle's condition to management. In fact Mr. Marshall testified that Complainant didn't report problems with the vehicles as often as others did.

Complainant further complains that on at least one occasion, he was made to work harder than the other rock truck drivers. No allegations of a derogation in job safety are made. The Respondent of course contests this and replies that the foreman involved in this instance only wanted Complainant to put in a day's work for a day's pay. I find this issue unnecessary to resolve as even if it is true, it

is not "protected activity" within the meaning of the Act. Mere complaints about job duties and general disagreements with supervisors are not "protected activities".

Finally, with regard to the issue of Complainant's entitlement to one week's vacation pay prior to his departure from the Company, there is a definite split of opinion between the parties. Complainant is aware that you have to be on the job one year in order to get one week's paid vacation, but he states he was going into his third year of employment by senority and had never had a paid vacation.

The settlement agreement which the parties signed to reinstate Complainant in 1983 (Exhibit No. C-1) states inter alia that: "Respondent shall pay Maynard back wages in the lump sum amount of Ten Thousand ($10,000.00) Dollars, less deductions, required by law." Block Coal Company's position on this issue, through Mr. Pelphrey, is that Complainant was paid two weeks vacation as part of the $10,000 settlement. Therefore he would have to finish a full year's work after reinstatement in order to be entitled to another week of paid vacation. I note, however, that the settlement agreement itself does not mention vacation pay. Nor does the Decision Approving Settlement. The only evidence in the record concerning this issue comes from Mr. Pelphrey, who with his counsel, personally negotiated the settlement with a Mr. Grooms, the Department of Labor attorney who was representing Complainant at the time. Since only Pelphrey, his lawyer, and Grooms were privy to these settlement negotiations, if the situation was other than as Mr. Pelphrey has testified, it was incumbent upon Complainant to produce that testimony from Grooms. Therefore, by a simple preponderance of the relevant, probative and credible evidence I find that the $10,000 settlement paid the Complainant up through the time of his reinstatement, including two weeks of paid vacation that he had accumulated in the interim less $2,000 and some odd dollars that he earned in other jobs during the time period he was off work.

By early 1984, Complainant was having medical problems with his stomach and nerves and was subsequently given Tagamet and Mylanta for his stomach, Sinequan to help him sleep at night, which was later changed to Amitriplyline, and Chlorpromazine. Complainant traces these medical problems to "harassment and discrimination" that he was going through on the job. Towards the end of his employment with Block Coal Company, he became worried about his safety and the safety of the men that worked with him because he couldn't keep his mind on his job. On June 14, 1984, Complainant filed the instant discrimination complaint with MSHA and quit his job with Block Coal Company on the advice of his personal physician, Dr. Param.

Dr. Robert P. Granacher, Jr. a Board certified psychiatrist, examined Mr. Maynard for 5-1/2 hours on June 5, 1985 in connection with a worker's compensation case in which Complainant is the Plaintiff and concluded that he is suffering a spontaneous major depression with paranoid features unrelated to working conditions or occupational cause. The doctor realized that Complainant feels very strongly that his medical problems were brought about by his work, more specifically, his problems at work, but he (the doctor) feels he is having misperceptions about the etiology of his illness, is probably paranoid and may even be delusional.

As of the date of the hearing in August of 1985, Complainant was himself still of the opinion that he could not return to work at that time, because of his emotional illness, and in fact, doesn't know if he ever will be well enough to work again.

ISSUES

1. Whether Complainant has established that he was engaged in activity protected by the Act.

2. If so, whether Complainant suffered adverse action as a result of the protected activity.

3. If so, to what relief is he entitled.

CONCLUSIONS OF LAW

Complainant and Respondent are protected by and subject to the provisions of the Act, Complainant as a miner, and Respondent as the operator of a mine.

In order to establish a prima facie case of discrimination under the Act, the miner has the burden of showing (1) that he engaged in protected activity and (2) that he was subject to adverse action which was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The mine operator may rebut the prima facie case by showing that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity.

On the facts presented in this proceeding, I cannot conclude that there is any credible evidence to suggest or support any theory that Mr. Maynard's departure from Block Coal Company or his difficulties while employed there from October 1983 until June 14, 1984 were in any way connected with any protected activity on his part. There is no evidence of any protected work refusals or retaliations for such activity nor is there any evidence that Mr. Maynard made any safety complaints to MSHA or to any state or local mining authorities during this time period.

I do conclude, however, that when Complainant filed the two Complaints of Discrimination which he has filed against Diamond P. and Block Coal Companies, he was engaged in activity protected under the Act. Further, I conclude that on those occasions during the eight (8) month period of his reinstatement with Block Coal, when Complainant reported accidents, incidents involving safety and safety-related problems with the equipment he was using to management personnel, he was engaged in activity protected under the Act. Having found Complainant engaged in activity protected by the Act, the critical issue in this case is whether Mr. Maynard's termination of his employment was in any way prompted by his engaging in protected activity under section 105(c) of the Act, or whether it resulted from his inability to handle his job because of emotional or mental illness. While there is some argument by counsel as to the proper characterization of Complainant's June 14, 1984 departure, I find that Complainant quit his job because of his emotional illness which is diagnosed as a major depression with paronoid features, not because of any discriminatory action on the part of the mine ownership or management.

The only adverse action therefore that I find in this case is the docking of Complainant's pay for three (3) hours. The crucial question here then is whether the evidence establishes that the adverse action was motivated in any part by the protected activity. I conclude for the reasons stated earlier in this decision under Discussion and Findings that it was not.

Whether the Respondent treated the Complainant unfairly by assigning him to drive older equipment vice newer and better equipment or making him work harder than other truck drivers; or whether it sufficiently considered his emotional problems are not issues properly before me in this case. My jurisdiction is limited to considering whether the Respondent discriminated against the Complainant for activity protected under the Federal Mine Safety and Health Act of 1977. I conclude that the evidence before me establishes that it did not.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the Complainant here has failed to establish a prima facie case of discrimination on the part of the Respondent. Accordingly, the Complaint IS DISMISSED, and the Complainant's claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge

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January 7, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-97
	:	A.C. No. 15-13881-03554
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY, Respondent	:	William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks civil penalty assessments against the respondent for two alleged violations of certain mandatory safety standards set forth in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in Evansville, Indiana, on December 3, 1985.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalty to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(a) "S&S" Citation No. 2505478 issued on January 7, 1985, cites a violation of 30 C.F.R. § 75.301, and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit I.D. 003 in that the quantity of air going through the last open crosscut was less than 9000 CFM as required by the approved ventilation, methane and dust-control plan. When measured with an approved anemometer there was only 5710 CFM going through the last open crosscut.

Section 104(a) "S&S" Citation No. 2506565, issued on January 28, 1985, cites a violation of 30 C.F.R. § 75.400, and the condition or practice is stated as follows: "An accumulation of loose coal was present under the bottom belt and rollers along the No. 1 belt conveyor entry starting at the tail feeder and extending outby for a distance of approximately 20 feet."

This case is one of five cases heard in Evansville, Indiana, on December 3, 1985. When this case was called for trial, the parties advised me that the respondent admitted to the violations, and sought leave to dispose of the matter by tendering full payment of the proposed civil penalties filed by the petitioner for the two violations in question.

Respondent's representative confirmed that the respondent no longer contests the violations, and he agreed that the respondent would tender the full amount of the proposed civil penalties. He also agreed to the negligence and gravity findings made by the inspector in support of the citations issued in this case.

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent's operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business.

The parties stipulated that the violations were promptly abated in good faith by the respondent. I take note of the

fact that Citation No. 2505478 was abated within 20 minutes of its issuance, and that Citation No. 2506565 was abated within an hour of its issuance. In both instances abatement was achieved prior to the time fixed by the inspector.

The respondent's request to withdraw its contest and to pay the proposed civil penalties was granted from the bench, and I considered the proposed disposition of this case as a settlement proposal pursuant to Commission Rule 30, 29 C.F.R. § 2700.30. Further, after consideration of the pleadings, stipulations, and arguments made on the record by the parties in support of the proposed mutually agreed upon disposition of the case, I rendered a bench decision approving the proposed disposition, and this decision is reaffirmed and reduced to writing herein pursuant to Commission Rule 65, 29 C.F.R. § 2700.65.

Conclusion

In view of the foregoing, the citations issued in this case ARE AFFIRMED. Further, after careful consideration of the information submitted by the parties with respect to the six statutory civil penalty criteria found in section 110(i) of the Act, I conclude and find that the proposed settlement disposition advanced by the parties is reasonable and in the public interest, and IT IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $206 in full satisfaction of Citation No. 2505478, January 7, 1985, 30 C.F.R. § 301, and a civil penalty in the amount of $112 for Citation No. 2506565, January 28, 1985, 30 C.F.R. § 75.400. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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Mr. Bruce Hill, Director of Safety and Training, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42458 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 7, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-182
	:	A.C. No. 15-13881-03569
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY, Respondent	:	William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks a civil penalty assessment in the amount of $241 against the respondent for an alleged violation of mandatory health standard 30 C.F.R. § 70.501. The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in Evansville, Indiana, on December 3, 1985.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory health standard, and (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(a) "S&S" Citation No. 2505980, issued on June 12, 1985, cites a violation of 30 C.F.R. § 70.501, and the condition or practice is stated as follows:

> Based upon the results of a supplemental noise survey conducted by MSHA on 5-30-85, the noise exposure exceeds the allowable dose percentage of 132%. The noise exposure in the working environment of the continuous miner operator (occupation code 036) on Number 4 unit MMU No. 0040 is 133.5%.
>
> The operator shall take corrective actions to reduce the noise level to within the allowable limit of 132%. A hearing conservation plan as required by section 70.501 shall be submitted to MSHA within 60 days of this citation dated 6-4-85. Joy Miner 14 CM-5 Co. SN. M 004. No. 4 Unit located in the 1st west entries off the 5th north.

This case is one of five cases heard in Evansville, Indiana, on December 3, 1985. When this case was called for trial, the parties advised me that they reached a proposed settlement of the controversy, the terms of which included an agreement by the respondent to pay a civil penalty assessment in the amount of $50 for the violation in question.

The respondent's representative agreed that the violation occurred as stated in the citation, and he also agreed to the negligence finding made by the inspector in support of his citation.

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalty will not adversely affect the respondent's ability to continue in business. They also stipulated that the violation was abated in good faith by the respondent.

In support of the proposed civil penalty reduction in this case, the petitioner's counsel asserted that he has taken into consideration a possible error factor in connection with the dosimeter used by the inspector to measure the noise level exposure for the continuous miner operator's working environment. Under the circumstances, counsel asserted that the gravity of the violation is not as great as originally determined by the inspector.

I take note of the fact that in its answer to the initial civil penalty proposal filed by the petitioner, the respondent took issue with the inspector's "significant and substantial" (S&S) finding in view of the marginal dosimeter reading of 133.5 percent. The allowable noise exposure limit for the tested occupation in question is 132 percent. I also take note of the fact that compliance was achieved and the noise level exposure was reduced to within the allowable limit of 132 percent after the respondent replaced a worn part and replaced a chain on the continuous-mining machine operated by the affected miner in question. Under the circumstances, I cannot conclude that the inspector's original gravity finding indicating a permanently disabling possible hearing loss is supportable.

Conclusion

After careful consideration of the pleadings, stipulations, and arguments advanced by the parties on the record in support of the proposed settlement disposition of this case, I affirmed the citation and approved the proposed settlement in a bench decision made pursuant to 29 C.F.R. § 2700.30. That decision is reaffirmed and reduced to writing pursuant to 29 C.F.R. § 2700.65. I conclude and find that the settlement disposition is reasonable and in the public interest.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $50 for the violation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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Mr. Bruce Hill, Director of Safety and Training, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42458 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 7 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 85-33 A.C. No. 44-05831-03524
v.	:	Mine No. 47
SUTHERLAND COAL COMPANY, Respondent	:	

ORDER APPROVING SETTLEMENT

Before: Judge Broderick

On December 24, 1985, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The two violations involved were originally assessed at $3450, and the parties propose to settle for the amount assessed with a provision for extended payment of the assessment.

The violations were very serious, having resulted in or contributed to the fatal injury of a mine foreman, who was the son of the mine owner. The motion states that the fatal accident resulted from the operator's reckless disregard for safety. Respondent was a small operator, with a limited history of prior violations. The mine was closed following the accident and has not reopened. Respondent states that it can only pay the penalty in installments, and the Secretary has agreed to this.

I conclude that the settlement agreement should be approved.

Therefore, IT IS ORDERED that the settlement is APPROVED. It is further ordered that Respondent shall pay the sum of $3450 for the violations alleged. Payment shall be made as follows:

> Respondent shall pay the sum of $143.75 on or before February 1, 1986, and a like sum on the first day of each month thereafter until the total amount is paid.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

JAN 7 1986

DONALD C. BEATTY, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 84-205-D
v.	:	
	:	Lucerne No. 8 Mine
HELVETIA COAL COMPANY, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C., for Complainant; William M. Darr, Esq., Indiana, Pennsylvania, for Respondent.

Before: Judge Broderick

I issued a decision on the merits in this case on October 22, 1985 (corrected October 24, 1985). In that decision, I found that Complainant established that he had been discriminated against by Respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (Act). As part of the relief, I ordered Respondent to pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding. I directed counsel to confer and attempt to agree on the amount due Complainant as costs and expenses.

Complainant has submitted a statement of attorney's fees in the total amount of $6230. Of this amount, $4250 is claimed for Earl R. Pfeffer, Esq., $60 is claimed for Mary Lu Jordan, Esq., and $1920 is claimed for the United Mine Workers of America (UMWA), by whom Pfeffer and Jordan are employed. $441.12 is claimed by the UMWA for the attorney's travel expenses. Respondent does not object to these amounts.

Complainant has also filed a claim in the total amount of $495.72 for "briefing" of Donald Beatty, Tom Grove and Robert Schork on May 14, 1985, and their appearance at the hearing May 15, 1985. Beatty is the Complainant. Grove and Schork testified on his behalf. The Local Union apparently paid them $167.12, $165.99, and $162.61 respectively. There is no explanation of the amounts claimed. I will allow reimbursement of the statutory witness fees for the three individuals ($30 per day).

Therefore, IT IS ORDERED that Respondent shall pay the following costs and expenses in satisfaction of paragraph 3 of the Relief in my decision issued October 24, 1985:

1.	To Earl R. Pfeffer, Esq.,	$4250.00
2.	To Mary Lu Jordan, Esq.	60.00
3.	To UMWA	2361.12
4.	To Local 3548, UMWA	90.00

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. HOPE 79-323-P A.C. No. 46-05121-03008F
v.	:	Wayne Mine
MONTEREY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of a settlement to dismiss this proceeding, upon the following grounds:

1. On May 8, 1978, Section 107(a) imminent danger Withdrawal Order No. 25842 was issued to Monterey at its Wayne Mine for three alleged violations of the mandatory safety standards which are the subject of the present civil penalty proceeding.

2. The violations were issued as a result of a fatal shaft sinking accident which occurred at the mine on May 5, 1978.

3. At the time the accident occurred, the intake air shaft at the Wayne Mine was being constructed by Frontier-Kemper Constructors ("Frontier-Kemper"), an independent contractor employed by Monterey for the purpose of conducting the shaft sinking operations.

4. While the shaft sinking operations at the Wayne Mine were under the direct supervision and control of Frontier-Kemper, MSHA enforcement policy on May 8, 1978, was to cite the mine owner-operator for all violations which occurred on mine property. Therefore, Withdrawal Order No. 25842 was issued to Monterey instead of Frontier-Kemper which was actually conducting the operations which resulted in the three violations at issue.

5. MSHA's enforcement policy with regard to issuing citations or orders to independent contractors was later revised and on July 26, 1985, Order No. 28542 was modified to include Frontier-Kemper as the operator responsible for the three alleged violations.

6. On December 13, 1985, the Secretary filed a civil penalty proceeding with this Commission against Frontier-Kemper, Docket No. WEVA 86-76, for the same three violations at issue in this proceeding. It is now the intention of the Secretary to proceed solely against Frontier-Kemper as the operator responsible for the violations at issue.

7. Therefore, the following settlement has been agreed to by the parties:

a. The Secretary will modify Order No. 28542 to delete Monterey as the cited operator; and

b. The Secretary will and hereby does move to dismiss this civil penalty proceeding against Monterey without penalty assessment.

I conclude that the settlement should be approved.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion for approval of settlement is GRANTED.

2. The hearing set for January 9, 1986, is CANCELLED.

3. This proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

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JAN 8 1986

ROCCO CURCIO, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 84-208-D
v.	:	
	:	Emilie No. 1 Mine
KEYSTONE COAL MINING CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C., for Complainant; William M. Darr, Esq., Indiana, Pennsylvania, for Respondent.

Before: Judge Broderick

I issued a decision on the merits in this proceeding on September 27, 1985. In that decision I found that Complainant established that he had been discriminated against by Respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (Act). As part of the relief, I ordered Respondent to pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding. I directed counsel to confer and attempt to agree on the amount due Complainant as costs and expenses. Complainant has submitted a statement of attorneys fees in the total amount of $5407.49. Of this amount $3671.87 is claimed for Earl R. Pfeffer, Esq., $120. is claimed for Mary Lu Jordan, Esq., and $1615.62 is claimed for the United Mine Workers of America (UMWA), by whom Pfeffer and Jordan are employed. In addition, the UMWA claims $370.65 for the cost of the attorney's hotel, per diem and transportation expenses and for the transcript of the hearing. Respondent does not object to these amounts.

Complainant also has filed a claim in the amount of $294.72 for expenses incurred by Local 1412, UMWA in connection with this proceeding. Respondent objects to this claim.

Section 105(c)(3) of the Act provides that all costs and expenses determined to have been reasonably incurred in connection with the institution and prosecution of the proceeding shall be assessed against the person found to have violated section 105(c).

Local 1412 apparently paid Complainant $25.00 for a two hour meeting he had with his counsel on December 12, 1984, the day prior to the hearing herein. The amount is apparently based on Complainants hourly rate of pay (12.50). There is no showing or claim that he actually lost time or wages as a result of the meeting. Therefore, it is not shown to be an expense reasonably incurred in this proceeding, and I reject the claim. However, I will allow the claim for mileage and parking on that day in the total amount of $17.00. The Local Union also apparently paid claimant $106.78 for his attendance at the hearing on December 13, 1984 (8 hours at $13.348 per hour. The discrepancy in the hourly rate is not explained). Again, there is no showing or claim that he actually lost wages in the amount claimed and I reject the claim. The Local Union claims $115.32 for witness Jerry Duncan who testified at the hearing (8 hours at $14.415 per hour). The reasonable expense for a witness at a hearing is the witness fee fixed by 28 U.S.C. § 1821, and I will allow reimbursement for the statutory witness fee ($30 per day) and the mileage and parking expenses ($17.00). Claimant seeks reimbursement to the Local Union for a one half hour meeting of Jerry Duncan and Jim Bonelli with MSHA on July 23, 1984 in the total amount of $13.62. The complaint was filed with the Commission on August 30, 1984. The expense is not explained and cannot be said to have been incurred in connection with the present proceeding. It is denied.

Therefore, IT IS ORDERED that Respondent shall pay the following costs and expenses in satisfaction of paragraph 3 of the Relief in my decision issued September 27, 1985:

1.	To Earl R. Pfeffer, Esq.	$3,671.87
2.	To Mary Lu Jordan, Esq.	120.00
3.	To UMWA	2,086.27
4.	To Local 1412, UMWA	64.00

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-124 A.C. No. 15-00590-03527
v.	:	No. 1 Mine
DIXIE FUEL COMPANY, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; William A. Rice, Esq., Harlan, Kentucky, for Respondent.

Before: Judge Broderick

The above case was called for hearing pursuant to notice on December 17, 1985 in Pineville, Kentucky. At the opening of the hearing, counsel made a motion on the record for the approval of a settlement agreement reached by the parties.

The case involves two citations, one for an alleged violation of the ventilation standard, originally assessed at $400.00, the other for an alleged violation of the roof control plan originally assessed at $10,000.00. The agreement proposes to settle for payment of $400.00 and $7500.00 for the violations.

The operator operates two mines which in 1983 produced 223,504 tons of coal and in 1984 242,784 tons. There were 9 prior violations of 30 C.F.R. § 75.316, and 27 prior violations of 30 C.F.R. § 75.200.

The ventilation violation alleged that the air had dropped below the required 9000 cubic feet per minute at the last open crosscut. Less than one tenth of one percent methane was present. Because the operator could not determine the reason for the air loss after diligent effort, the area was abandoned.

The roof control violation was extremely serious. It resulted in one fatal injury, and 3 other nonfatal injuries.

The citation charged that while advancing toward the outcrop, subnormal roof conditions were encountered and a sufficient number of additional roof supports were not installed to adequately support the roof. Respondent's history of prior roof control violations is not good and includes another fatal roof fall in May, 1983. The mine in question has been closed, having been operated for only two weeks in 1985.

As part of the settlement agreement, Respondent has agreed to make available to all miners in its two mines a copy of the approved roof control plan. It has further agreed that all the miners up to and including section foremen will attend a training class in roof control to be conducted by MSHA at its Harlan, Kentucky office. The class will be held on company time, that is, the miners will be paid at their regular rates of pay for attending the class.

I have carefully considered the settlement agreement in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Therefore, IT IS ORDERED that the settlement agreement proposed on the record December 17, 1985 is APPROVED;

IT IS FURTHER ORDERED that Respondent shall make available to each of its miner-employees a copy of the current approved roof control plan.

IT IS FURTHER ORDERED that all of Respondent's miner-employees, up to and including section foremen, shall attend a roof control class at the MSHA office in Harlan, Kentucky and they shall be paid by Respondent at their regular rates of pay. This class shall be held on or before February 7, 1986.

IT IS FURTHER ORDERED that Respondent shall pay the sum of $7900.00 within 30 days after the roof control class referred to above is held, and subject to the payment and the other conditions set out above being fulfilled, this proceeding is DISMISSED.

James A. Broderick

James A. Broderick
Administrative Law Judge

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JAN 14 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-163
	:	A.C. No. 15-03161-03558
v.	:	
	:	Star North Underground
PEABODY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking civil penalty assessments in the amount of $6,000 for two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The respondent contested the alleged violations and the case was docketed for a hearing on the merits. The hearing was subsequently continued after the parties advised me of a proposed settlement of the violations.

By joint motion filed with me on January 6, 1986, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement of the case, the terms of which require the respondent to pay civil penalties in the amount of $4,000 for the disputed violations.

Discussion

In support of the proposed settlement, the parties state that they have discussed the alleged violations and the statutory criteria stated in section 110 of the Act. They have also submitted information concerning the civil penalty criteria and a full disclosure of the circumstances connected with the issuance of the violations.

The violations in this case were issued after an investigation of a fatal accident at the respondent's mine on January 15, 1985. According to MSHA's official accident investigation report, which is a part of the record, chief maintenance foreman James W. Warner was fatality injured when he became entangled between a belt conveyor and belt roller. According to the report, the accident victim had apparently removed a portion of the belt conveyor guard without deenergizing the belt. Citation No. 2506470, January 15, 1985, cites a violation of 30 C.F.R. § 75.400(c) for a failure to adequately guard the belt conveyor drive, and Citation No. 2506471, January 15, 1985, cites a violation of 30 C.F.R. § 77.404(c), for the failure of the accident victim to deenergize the power from the beltline before performing maintenance or repairs on the belt.

In support of the proposed settlement, petitioner states that the accident victim was grossly negligent in attempting to repair or perform maintenance on the belt when he removed a portion of the belt guarding and failed to deenergize the belt. Based on a review of the available evidence, including the information contained in the accident report, and citing Old Dominion Power Company, 6 FMSHRC 1886, 1895-96 (1984), and Nacco Mining Company, 3 FMSHRC 848 (1981), petitioner believes that this gross negligence should not be attributed to the respondent.

Petitioner asserts that the accident victim did not endanger others by his negligent acts, and there is no evidence that the respondent could have reasonably foreseen that he would act in such a manner on the date the violations occurred. Petitioner points out that the accident victim was chief maintenance foreman at the mine with over 7 years experience at his occupation, had 14 years total mining experience, and had received his annual retraining on October 26, 1984.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $2,000 in satisfaction of Citation No. 2506470, and $2,000 for Citation No. 2506471. Payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment this matter is dismissed.

George A. Koutras
Administrative Law Judge

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JAN 14 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-81-M A.C. No. 47-0095-05502
v.	:	Mackville Quarry
LANDWEHR MATERIALS, INC., Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Thomas J.Landwehr, General Manager, Landwehr Materials, Inc., Appleton, Wisconsin, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 56.5-50(b). Pursuant to notice, the case was heard in Green Bay, Wisconsin on December 10, 1985. Arnie Mattson, a Federal mine inspector, testified on behalf of Petitioner. No witnesses were called by Respondent. The parties waived their right to file written post-hearing briefs, but both made arguments on the record at the close of the hearing. I have considered the entire record, and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of a limestone quarry in Outagamie County, Wisconsin, known as the Mackville Quarry and Mill.

2. The subject mine is open about 9 months of the year, and works about 38,000 to 40,000 production hours annually. About 20 employees work at the mine.

3. Inspections of the subject Quarry's noise levels were conducted by MSHA in May, 1979 and March, 1984. In May, 1979 citations were issued because two miners were exposed to excessive noise and were not wearing approved hearing protection. The citations were terminated when Respondent required the miners to wear hearing protection. In March, 1984, a noise sampling survey was conducted. It showed that certain employees were exposed to noise in excess of the prescribed limits. Citations were not issued, because the employees were wearing approved hearing protection.

4. Between October 17, 1982 and October 16, 1984, Respondent had a history of one paid violation of a mandatory health or safety standard.

5. Respondent has always cooperated with the MSHA inspectors in their inspections of its facilities.

6. On October 16 and 17, 1984, Federal Mine Inspector Arnie Mattson conducted a health and safety inspection of Respondent's mine. The inspection included a sound level examination of the environment of a shovel operator. The inspector determined that the shovel operator was exposed to 96 dBA for an 8 hour day. The operator was wearing personal hearing protection. A citation was issued because the Inspector determined that feasible engineering controls were not being utilized.

7. Following a discussion between Respondent and the Inspector, the MSHA Technical Support Unit in Denver, Colorado performed a noise control examination in April and May, 1985. The citation termination date was extended because of this examination.

8. A vinyl barrier curtain was installed between the shovel operator and the engine compartment of the shovel. Tests performed by MSHA's Industrial Hygienist showed that the noise level was reduced in the shovel operator's environment by almost 4 dBA (from an average of 101 dBA to an average of 98 dBA). This was a reduction in terms of the percentage of the permissible noise levels of approximately 33 percent (101 dBA is 459 percent of the allowable level; 98 dBA is 303 percent). The reduction, though significant, did not reduce the noise to permissible levels (90 dBA), so personal protection equipment was still deemed necessary.

9. The report from the Denver technical center indicated that the ear muffs worn by the shovel operator did not afford adequate protection because of a loose fit. This report was issued after the citation was terminated.

10. The citation was terminated on May 1, 1985 after the installation of a leaded vinyl curtain between the shovel operator and the engine. The shovel operator was still required to wear hearing protection.

REGULATORY PROVISIONS

30 C.F.R. § 56.5-50 provides in part as follows:

> 56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, 'General Purpose Sound Level Meters,' approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.
>
> PERMISSIBLE NOISE EXPOSURES
>
> | Duration per day, hours of exposure | Sound level dBA, slow response |
> |---|---|
> | 8 | 90 |
> | 6 | 92 |
> | 4 | 95 |
> | 3 | 97 |
> | 2 | 100 |
> | 1-1/2 | 102 |
> | 1 | 105 |
> | 1/2 | 110 |
> | 1/4 or less | 115 |
>
> * * *
>
> (b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce

exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

ISSUES

1. Whether the evidence showed that Respondent failed to utilize feasible engineering controls where an employee's exposure to noise exceeded permissible limits?

2. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation of the subject mine. I have jurisdiction over the parties and the subject matter of this proceeding.

2. Section 110(a) of the Act provides that if a violation occurs of a mandatory health or safety standard, a civil penalty shall be assessed for the violation.

3. On October 17, 1984, a shovel operator at the subject mine was exposed to noise 2.28 times the permisible level; the exposure was equivalent to 96 dBA for 8 hours per day.

4. There were feasible engineering controls available to reduce the exposure, namely the installation of a vinyl curtain between the shovel operator and the shovel motor.

5. Respondent was in violation of 30 C.F.R. § 56.5-50(b) on October 17, 1984 because of its failure to utilize engineering controls to reduce the exposure of its shovel operator to excessive noise.

6. Respondent is a relatively small operator and operates only 9 months of the year.

7. The violation was moderately serious: the exposure was 2.28 times the permissible level; the shovel operator was wearing inadequate personal protection. Therefore, a hearing loss was likely to result from continued exposure to the excessive noise.

8. Because MSHA had examined the noise level in the facility previously, and had never required engineering

controls to reduce the noise levels, Respondent's negligence must be deemed minimal.

9. There is no evidence that the imposition of a penalty will have any effect on Respondent's ability to continue in business.

10. Respondent abated the violation promptly and made a good faith effort to comply with MSHA's requirements.

11. Considering the moderately serious nature of the violation, an appropriate penalty would be $90. Giving Respondent credit for the minimal negligence, its cooperative attitude, and prompt abatement, I conclude that an appropriate penalty for the violation is $70.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 2373982 issued October 17, 1984 is AFFIRMED.

2. Respondent shall within 30 days of the date of this decision pay the sum of $70 as a civil penalty for the violation found herein.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 14, 1986

NACCO MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 85-87-R
v.	:	Citation No. 2330657; 6/5/85 Modified to
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 2330657-02; 6/24/85 Powhatan No. 6 Mine
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-2 A. C. No. 33-01159-03668
v.	:	
	:	Powhatan No. 6 Mine
NACCO MINING COMPANY, Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: Paul W. Reidl, Esq., Crowell & Moring, Washington, D. C. for Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio for Respondent/Petitioner;
Thomas M. Myers, Esq., United Mine Workers of America, Shadyside, Ohio for Intervenor.

Before: Judge Merlin

The above-captioned notice of contest is before me pursuant to order of the Commission dated November 13, 1985. See also the letter of the Commission's Acting General Counsel dated January 7, 1986. The related penalty case is before me pursuant to Order of Assignment dated November 14, 1985.

In a telephone conference call with the undersigned Administrative Law Judge counsel agreed that (1) the contest and penalty cases be consolidated for decision; (2) the cases be decided on the basis of the present record without any further hearing and (3) filing of post-hearing briefs be waived. 1/

Accordingly, the contest and penalty cases are hereby consolidated and decided on the present record.

The subject citation dated June 5, 1985 and issued under section 104(a) for a violation of 30 C.F.R. § 75.200, reads as follows:

> During an investigation of a 103(g)(1) complaint it has been determined that Bill Palmer, while operating the No. 14 continuous mining machine in the 6+94 crosscut No. 3 to 2 entry in the 9 left 2 east section on the first shift 5-30-85 traveled at least 6 feet 5 inches inby permanent roof supports (roof bolts) and temporary roof supports had not been installed. Information to substantiate this violation was obtained by inspecting the 6+94 crosscut and conferring with management and mine employees. The Section Foreman was Stanley Sikora.

The notice of termination dated June 11, 1985 provides:

> Safety meetings were held and the roof control plan and the hazards of going beyond roof supports were explained to all the working miners.

Subsequently on June 24, 1985, a modification was issued changing the 104(a) citation to a 104(d)(1) citation. This modification states as follows:

> No. 2330657 issued on 6-5-85 is being modified to show this action was a

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1/ Operator's counsel filed a Notification of Subsequent Authority which the Solicitor has moved to strike. The operator has opposed the Solicitor's motion. The matter is moot because I read the decisions in question before the operator's notification was received. Since the positions of the parties have been fully presented, further briefing is unnecessary.

> 104(d)(1) type citation instead of a 104(a). Bill Palmer, continuous miner operator under the supervision of Stanley Sikora, Section Foreman, was mining coal 6 feet 3 inches inby permanent roof supports in an area of unsupported roof. This violation occurred May 30, 1985, in the 9 left 2 east section. This is an unwarrantable failure. This citation was terminated 6-11-85.

The operator does not contest the fact of violation (Tr. 6-7). Nor has it argued that the violation was not serious. Its challenge is first, to the circumstances and procedures under which the (d) citation was issued and second, to the existence of unwarrantable failure (Tr. 7-8, 37).

The first issue is the validity of the citation in light of the requirements of section 104(d) that the inspector issue the citation on an "inspection" and make a "finding" of unwarrantable failure.

Three administrative law judges of this Commission now have considered the meaning and effect of section 104(d) in cases like this. In an Order Granting In Part For Summary Decision, Specifying Further Proceedings, And Granting Motion To Consolidate in Westmoreland Coal Co., (WEVA 82-340-R et al.) (May 4, 1983), Judge Steffey explained section 104(d) in light of the legislative history as follows:

> WCC correctly argues that an order issued under section 104(d) should be based on an inspection as opposed to an investigation. As hereinbefore indicated, the Secretary argues that Congress has not defined either term to indicate that Congress recognized that there is a difference between an "inspection" as opposed to an "investigation." If one wants to examine the legislative history which preceded the enactment of the unwarrantable-failure provisions of the 1977 Act, one must examine the legislative history which preceded the enactment of section 104(c) of the 1969 Act. The reason for the aforesaid assertion is that Congress made no changes in the wording of section 104(c) of the 1969 Act when it carried those provisions over to the 1977 Act as section 104(d).
>
> The history of the 1969 Act shows that there was a difference in the language of the unwarrantable-failure provisions of S. 2917 as opposed to H. R. 13950.

Whereas S. 2917, when reported in the Senate, contained an unwarrantable-failure section 302(c) which read almost word for word as does the present section 104(d), H.R. 13950 contained an unwarrantable-failure section 104(c) which provided that if an unwarrantable-failure notice of violation had been issued under section 104(c)(1), a reinspection of the mine should be made within 90 days to determine whether another unwarrantable-failure violation existed. H.R. 13950 also contained a definition section 3(1) which defined an "inspection" to mean "*** the period beginning when an authorized representative of the Secretary first enters a coal mine and ending when he leaves the coal mine during or after the coal-producing shift in which he entered."

Conference Report No. 91-761, 91st Cong., 1st Sess., stated with respect to the definition in section 3(1) of H.R. 13950 (page 63):

*** The definition of "inspection" as contained in the House amendment is no longer necessary, since the conference agreement adopts the language of the Senate bill in section 104(c) of the Act which provides for findings of an unwarrantable failure at any time during the same inspection or during any subsequent inspection without regard to when the particular inspection begins or ends.***

Section 104(c)(1) of H.R. 13950 provided for the findings of unwarrantable failure to be made in a notice of violation which would be issued under section 104(b). Section 104(c)(1)'s requirement of a reinspection within 90 days to determine if an unwarrantable-failure violation still existed explained that the reinspection required within 90 days by section 104(c)(1) was in addition to the special inspection required under section 104(b) to determine whether a violation cited under section 104(b) had been abated. Section 104(c)(1), as finally enacted, eliminated the confusion about intermixing reinspections with

special inspections by simply providing that an unwarrantable-failure order would be issued under section 104(c)(1) any time that an inspector, during a subsequent inspection, found another unwarrantable-failure violation. (Conference Report 91-761, pp. 67-68).

The legislative history discussed above shows that Congress thought of an inspection as being the period of time an inspector would spend to inspect a mine on a single day because the inspection was to begin when the inspector entered the mine and end when he left. It would be contrary to common sense to argue that the inspector might take a large supply of food with him so as to spend more than a single day in a coal mine at one time. On the other hand, Congress is very experienced in making investigations to determine whether certain types of legislation should be enacted. Congress is well aware that an investigation, as opposed to an inspection, is likely to take weeks or months to complete. Therefore, I cannot accept the Secretary's argument that Congress did not intend to distinguish between an "inspection" and an "investigation" when it used those two terms in section 104(a) and section 107(a) of the 1977 Act.

It should be noted, for example, that the counterpart of section 104(a) in the 1977 Act was section 104(b) in the 1969 Act. Section 104(b) in the 1969 Act provided for notices of violation to be issued "upon any inspection," but section 104(a) in the 1977 Act provides for citations to be issued "upon inspection or investigation." Likewise, the counterpart of imminent-danger section 107(a) in the 1977 Act was section 104(a) in the 1969 Act. In the 1969 Act an imminent-danger order was to be written "upon any inspection," but when Congress placed the imminent-danger provision of the 1977 Act in section 107(a), it provided for imminent-danger orders to be issued "upon any inspection or investigation." On the other hand,

when the unwarrantable-failure provision of section 104(c) of the 1969 Act was placed in the 1977 Act as section 104(d), Congress did not change the requirement that unwarrantable-failure orders were to be issued "upon any inspection."

The legislative history explains why Congress changed section 104(a) in the 1977 Act to allow a citation to be issued "upon inspection or investigation." Conference Report No. 95-461, 95th Cong., 1st Sess., 47-48, states that the Senate bill permitted a citation or order to be issued based upon the inspector's belief that a violation had occurred, whereas the House amendment required that the notice or order be based on the inspector's finding that there was a violation. Additionally, as both the Secretary and WCC have noted, Senate Report No. 95-181, 95th Cong., 1st Sess., 30, explains that an inspector may issue a citation when he believes a violation has occurred and the report states that there may be times when *** a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, [section 104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. ***

The legislative history and the plain language of section 107(a) in the 1977 Act explain why that section was changed so as to insert the provision that an imminent-danger order could be issued upon an "investigation" as well as upon an "inspection." Section 107(a) states that "*** [t]he issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110." Both Senate Report No. 95-181, 37, and Conference Report No. 95-461, 55, refer to the preceding quoted sentence to show that a citation

of a violation may be issued as part of an imminent-danger order. Since section 104(a) had been modified to provide for a citation to be issued upon an inspector's "belief" that a violation had occurred, it was necessary to modify section 107(a) to provide that an imminent-danger order could be issued upon an inspection or an investigation so as to make the issuance of a citation as part of an imminent-danger order conform with the inspector's authority to issue such citations under section 104(a).

Despite the language changes between the 1969 and 1977 Acts with respect to the issuance of citations and imminent-danger orders, Congress did not change a single word when it transferred the unwarrantable-failure provisions of section 104(c) of the 1969 Act to the 1977 Act as section 104(d). Conference Report No. 95-461, 48, specifically states "[t]he conference substitute conforms to the House amendment, thus retaining the identical language of existing law."

My review of the legislative history convinces me that Congress did not intend for the unwarrantable-failure provisions of section 104(d) to be based upon lengthy investigations. Congress did not provide that an inspector may issue an unwarrantable-failure citation or order upon a "belief" that a violation occurred. Without exception, every provision of section 104(d) specifically requires that findings be made by the inspector to support the issuance of the first citation and all subsequent orders. The inspector must first, "upon any inspection" find that a violation has occurred. Then he must find that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. He must then find that such violation is caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. He thereafter must place those findings in the citation to

> be given to the operator. If during that same inspection or any subsequent inspection, he 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 to cause all persons in the area affected by such violation to be withdrawn and be prohibited from entering such area until the inspector determines that such violation has been abated.
>
> After a withdrawal order has been issued under subsection 104(d)(1), a further withdrawal order is required to be issued promptly under subsection 104(d)(2) if an inspector finds upon any subsequent inspection that an additional unwarrantable-failure violation exists until such time as an inspection of such mine discloses no unwarrantable-failure violations. Following an inspection of such mine which discloses no unwarrantable-failure violations, the operator is liberated from the unwarrantable-failure chain. Conference Report No. 95-181, 34, states that "[b]oth sections [104(d)(1)] and [104(e)] require an inspection of the mine in its entirety in order to break the sequence of the issuance of orders." [Emphasis supplied.]

Most recently, in Emery Mining Corporation, 7 FMSHRC 1908 (1985) Judge Lasher agreed with and followed Judge Steffey stating in pertinent part:

> The first mention of the words "inspection and "investigation" is at the heading of Section 103 of the Act. That heading reads "Inspections, Investigations, and Recordkeeping."
>
> Section 103(a) of the Act provides: "Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of ... (4) determining whether there is compliance with the mandatory health or safety standards . . ."

Section 103(b) of the Act, speaking only of an "investigation," provides: "For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a ... mine, the Secretary may, after notice, hold public hearings, et cetera." 7/

Section 103(g)(2) of the Act, relating only to "inspection," provides that prior to or during "any inspection of a ... mine, any representative of miners ... may notify the Secretary ... of any violation of this Act, et cetera."8/

Of considerable significance, the most used enforcement tool, section 104(a), mentions both inspections and investigations. It provides that "if, upon inspection or investigation, the Secretary ... believes that an operator of a ... mine ... has violated this Act, or any ... standard, ... he shall, with reasonable promptness, issue a citation to the operator. ... The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

7/ I note here that this is one of the more significant provisions of the Act in determining the validity of the order in question since it authorizes the Secretary to make an "investigation" of an accident or "other occurrence relating to health or safety." It is clear here, as well as in other provisions of the Act, that Congress saw an investigation as something different from an inspection. One can readily see the difference between the investigation of some past happening or occurrence or accident and the inspection of some physical plant or property.

8/ Section 103(g)(1) provides a procedure for the representative of miners to obtain "an immediate inspection" by giving notice to the Secretary of the occurrence of a violation or imminent danger.

Section 104(d)(1), in contrast to section 104(a), relates only to "inspections," providing that "if, upon any inspection of a ... mine, an authorized representative of the Secretary finds that there has been 9/ [footnote omitted] a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as can significantly and substantially contribute to the cause and effect of a ... hazard, and if he finds such violation to be caused by an unwarrantable failure ... he shall include such findings in any citation given to the operator under this Act."

The second sentence of section 104(d)(1) provides for the withdrawal order in the enforcement chain or scheme contemplated by Congress in this so-called "unwarrantable failure" formula. Significantly, it provides that "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 ... and finds such violation to be also caused by an unwarrantable failure ..., he shall forthwith issue an order requiring the operator to cause all persons ... to be withdrawn from ... such area ...."

If the position of the Secretary in this case were adopted, that is, if withdrawal orders could be issued on the basis of an investigation of past occurrences, the effect would be to increase the 90-day period provided for in the second section of section 104(d)(1) and by the amount of time which passed between the occurrence of the violative condition described in the order and the issuance of the order. 10/ [footnote omitted]

Section 104(d)(2) of the Act permits the issuance of a withdrawal order by the Secretary if his authorized representative "finds upon any subsequent inspection" the existence of violations similar to those that resulted in the issuance of the section 104(d)(1) order.

Summing up, it is clear that nowhere in section 104(d) is the issuance of any enforcement documentation sanctioned on the basis of an investigation. Although Congress did not define the terms "inspection" or "investigation" specifically in the Act, there is no question but that Congress in using those terms in specific ways in prior sections of the Act, and by not using the term "investigation" in section 104(d)(1) and (2) 11/ [footnote omitted] did so with some premeditation.

* * * * *

Finally, it is noted that section 107(a) of the Act permits the Secretary's representative to issue a withdrawal order where imminent danger is found to exist either upon an inspection or investigation.

Perusal of these various portions of the Mine Act, commencing at the point where the subject words are first used on through to the end of their use, indicates that such terms were used with care and judiciously and with an understanding of the general connotations contained in their definitions. 12/

* * * * *

12/ Reference is made to Webster's Third New International Dictionary, G. & C. Merriam Company, 1976, which defines "inspect" in the following manner: "1: to view closely and critically (as in order to ascertain quality or state, detect errors, or otherwise appraise): examine with care: scrutinize (let us inspect your motives) (inspected the herd for ticks) 2: to view and examine officially (as troops or arms)." The word "inspection," in the same dictionary, contains various definitions, which include references to "physical" examinations of various things, including persons, premises, or installations. The word "investigate" is defined as follows: "to observe or

> I conclude that the Act does not permit a section 104(d)(2) order to be based on an investigation, as here, but rather the order must be based on and it must have been a product of an inspection of the site. Section 104(d)(2) provides that an order may be issued only if, upon an inspection of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d)(2) order may not be issued.

The foregoing decision was not appealed.

Again, most recently in Southwestern Portland Cement Company, 7 FMSHRC___ (November 25, 1985) Judge Morris also issued an Order employing the same rationale and reaching the same result as Judge Steffey. Judge Morris concluded his discussion on this issue as follows:

> * * * * *
>
> I agree with Judge Steffey and I conclude that the Act does not permit a

---

Footnote 12/ (continued)

> study closely: inquire into systematically: examine, scrutinize (the whole brilliance of this novel lies in the fullness with which it investigates a past) (a commission to investigate costs of industrial production. . .)."
>
> One concludes from reading these definitions that an investigation is more applicable to the study or scrutiny of some past event or intellectual subject, whereas an inspection relates more generally to looking at some physical thing. This common distinction between these phrases is consistent with the congressional usage of the term "investigate," for example, in section 103(b) of the Act and for the use of both terms in section 104(a) of the Act.

> section 104(d) order to be based on an investigation. But rather the order must be based on and it must have been a product of an inspection of the site. Section 104(d) provides that an order may be issued only if, upon an inspection of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d) order may not be issued.
>
> As previously noted, when it intended to permit MSHA enforcement actions to proceed on the basis of an inspection or an investigation, Congress so provided. The section 104(d) requirement of an inspection cannot be dismissed as mere semantic inadvertence on the part of Congress.
>
> Section 104(d) sets forth the sanctions that may be imposed against an operator under the specific conditions discussed in that section. It follows that the inspector authorized on a miner's complaint by section 103(g)(1) cannot reduce the safeguards Congress intended to provide in section 104(d). The Secretary's reliance on section 103(g)(1) is, accordingly, rejected.

There is little that can or needs to be added to Judge Steffey's decision which thoroughly addresses the question of what section 104(d) means and how it should be interpreted in a case such as this. This decision is persuasive and the instant matter falls squarely within it. The recent decisions of Judges Lasher and Morris also follow Judge Steffey's rationale and result. In this case there is no dispute that when the inspector went to the mine he was looking into the circumstances of a past event. The cited violative event of the continuous miner operator going beyond supported roof occurred and ended several days before the inspector visited the mine. The unsupported roof was bolted later on the same day the violation occurred which was long before the inspector arrived. Because the inspector here was engaged in the investigation of a past happening rather than an inspection of an existing situation he could not issue a (d) citation. Since the inspector could not issue a (d) citation, the sub-district manager could not do so either. The power to modify exercised by the sub-district manager pursuant to section 104(h) does not mean that he, a step further removed from the

actual situation, could do what the statute forbids the investigating inspector from doing in the first instance. And section 103(g) cannot change the conditions so clearly required by section 104(d) for issuance of an unwarrantable citation.

I have not overlooked Judge Koutras' decision holding that walk-around pay was due when a miner representative accompanied an inspector on a roof control technical "investigation". Monterey Coal Company, 5 FMSHRC 1223 (1983). As the decision makes clear, the term "investigation" in that case was the result of MSHA computer code labels rather than the statute itself and the Judge expressed difficulty in understanding any real distinction between a spot inspection and activity to determine whether an operator was complying with its roof control plan. That there was no real distinction in that case is apparent because the inspector there was looking into and observing on-going and present events unlike this case which involved only looking back into a specific past happening. Even more importantly, as Judge Koutras explained, the walk-around pay provision is governed by its unique legislative history and by judicial decisions which interpret it in light of that history. Section 104(d) which has its own terms and legislative history must be governed by them. Accordingly, Monterey is distinguishable from this case.

In light of the foregoing, I hold that the (d) citation cannot stand and must be modified to an (a) citation.

Mention must also be made of the manner in which the sub-district manager proceeded. He ordered a supervisory inspector to order the issuing inspector to change the (a) citation to a (d) citation (Tr. 351-352). And he testified that his decision to modify the citation was based upon prior safety meetings he had held with the operator and upon certain MSHA policy memoranda regarding the issuance of 104(d) citations and orders for roof control violations (Gx-5, Gx-6, Gx-7, Tr. 358-368). Finally, he never spoke to the issuing inspector and he did not know or care what was done by the section foreman who was in charge when the violation occurred (Tr. 351-352, 399). The sub-district manager, is of course, a duly authorized representative of the Secretary with power under section 104(h) to modify citations. But he cannot exercise this power based solely upon blanket administrative fiat which indiscriminately decrees that all section foreman must have known or should have known of this type of violation regardless of what actually occurred in the particular case. I do not read the MSHA memoranda as requiring such an approach (Gx-5, GX-6, GX-7). In any event, the sub-district manager followed such a policy here and his action must be disapproved of because the result reached by a duly authorized representative, whatever his administrative level, must be based upon the facts of the case involved. There is a dispute between the sub-district manager and the operator's mine manager over what was discussed at their meetings, but this makes no difference because unwarrantable failure can in no wise be based on these meetings and general policies without reference to the

circumstances of the violation itself (Tr. 358, 376-377, 920, 933, 1077). Nevertheless, because a full and complete de novo hearing was held before an administrative law judge of this Commission, the basis upon which the sub-district manager acted would not in and of itself provide grounds for modifying the (d) citation in this case unless the evidence on the merits showed no unwarrantable failure which it does not. See the discussion of negligence, infra. If an operator wishes to successfully challenge an intermediate administrative action such as the sub-district manager's, it would be better advised to make the attempt where it can prevail on the merits. I set forth my views on the propriety and effect of the sub-district manager's action so that if an appeal is taken and the Commission disagrees with my determination regarding the "inspection" requirement of section 104(d), further remands will be unnecessary.

There remains for consideration the penalty case. As set forth above, the operator admits the violation and has not contested that the violation was serious. I take official notice that roof falls remain a major source of serious accidents in the mines.

Next, negligence must be determined. In this connection an exposition of the facts is appropriate. Near the end of the hoot owl shift on the morning of May 30, 1985, the section foreman, Mr. Sikora, assigned the continuous miner operator, William Palmer, the task of cutting coal in the crosscut going from the No. 3 entry towards the No. 2 entry (Tr. 615-618). This was the second cut into the crosscut. The first cut previously had been taken by someone else (Tr. 437, 440). According to the engineer's map and the witnesses, the first cut was very much off sight and on an angle (Tr. 189, 197, 269, 297-298, 324, 878-879) (Op. Exhibit 4). But Sikora did not notice this and he said he did not check because it was the end of the shift and he was in a hurry to go home (Tr. 659-660, 718). Palmer also did not look to see if the first cut was straight or on an angle (Tr. 451). The crosscut could not have been holed through under supported roof with just one cut and this was especially true because of the angled first cut (Tr. 670, 719, 451). However, Palmer did hole through to the No. 2 entry on one cut, but to do so he went at least several feet beyond supported roof in violation of the roof control plan (Tr. 867, 858, 954). Not only did Palmer go beyond supported roof to cut through but he pushed the coal into a pile to the further side of the No. 2 entry (Tr. 447, 677). As shown by the engineer's map, pushing the coal required Palmer to go far beyond where he should have stopped (Tr. 858, 995) (Op. Exhibit 4). Sikora stated that at the time Palmer was improperly cutting through the crosscut, he (Sikora) was doing his pre-shift examination for the next shift (Tr. 617-618). He stated that when he returned, Palmer was cleaning up and he (Sikora) did not notice

the wide and deep cut because a danger sign had been hung (Tr. 623, 626, 655). Therefore, he did not go into the crosscut (Tr. 620-627). However, testimony of others demonstrates that the improperly deep and wide cut was visibly obvious as was the pile of coal (Tr. 177, 869). Sikora said it was "funny" he did not notice the improper cut but again gave the excuse he was in a hurry to go home (Tr. 687). The on-coming day shift was a maintenance shift and the roof was bolted on the afternoon shift of May 30 (Tr. 105-106).

The foregoing facts demonstrate an egregious lack of reasonable and due care by the section foreman. When Sikora told Palmer to cut coal in this crosscut, the cut previously taken was way off sight. Yet Sikora gave Palmer no instructions about how to proceed and did not supervise him (Tr. 617-618). Indeed, by his own admission Sikora did not even recognize the existing cut was wide because it was the end of the shift and he was in a hurry to go home (Tr. 659-660, 718). Yet it was Sikora himself who set the sight lines for the crosscut and as he admitted, it was his responsibility to see Palmer did not make wide cuts (Tr. 638-639, 661). Moreover, Sikora acknowledged he had heard Palmer cut a little wide (Tr. 632). In addition, the union safety committeeman testified Palmer was a fast worker who did not bother to clean up and who had a tendency to go to the limit to get as much coal as he could (Tr. 306, 334-335, 341). Palmer's own testimony demonstrates his unreliability both as a continuous miner operator and as a witness. Thus, Palmer admitted he did not pay much attention to excessively wide or deep cuts (Tr. 427-428). His attempt to excuse his wide cuts because of a missing lug was contradicted by every other witness who addressed the issue (Tr. 422-424, 455, 632-633, 740, 950). So too, his general justification of his conduct on the grounds the company encouraged such actions is undercut by his acknowledgment that management did not tell him to take wide or deep cuts (Tr. 461, 484, 486-487). Finally, Palmer described himself as one of the fastest workers there is (Tr. 428). The picture is, therefore, clear. Palmer was a fast and careless worker who gave little, if any, thought to safety and whose excuses are unsupported by anyone else and are lost in a maze of self-contradictions.

It was to such an individual that Sikora assigned the task of cutting coal in the crosscut near the end of the shift. But Sikora turned his back on the time element and on the off sight nature of the pre-existing first cut, both of which increased the pressure on the continuous miner operator to complete the crosscut on that shift in one cut. When the circumstances under which this task was assigned are combined with the nature of the individual to whom the job was given, what happened was all but inevitable, i.e. the taking of all coal on one cut and the continuous mine operator in violation by going far beyond supported roof. The union safety committeeman testified the circumstances made it "tempting" to take all the coal on one cut (Tr. 329). To an individual like Palmer it would be virtually irresistible to get the extra 10 tons in the one cut (Tr. 720). Sikora must have realized this. He knew Palmer and he knew the conditions under

which he was assigning him this task. Sikora's conduct is far worse than mere lack of supervision. It was he who created the circumstances under which the violation was all but bound to happen. And it was he whose first priority was not safety but getting home as fast as he could at the end of the shift. The operator put Sikora in his position of supervisory and managerial responsibility. His careless, reckless and wilful behavior is attributable to the operator which must bear the consequences. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982). I conclude the operator is guilty of gross negligence. 2/

Clearly too, Palmer was extremely negligent and since his work habits were well known, his conduct was foreseeable and therefore also attributable to the operator, A. H. Smith, 5 FMSHRC 13 (1983). However, for purposes of determining assessment of the amount of the penalty in light of negligence, consideration of Sikora's behavior is sufficient.

The operator's size is large (Tr. 972, 980). In absence of evidence to the contrary I find imposition of a penalty will not affect its ability to continue in business. The parties agreed that since October 1982 there were two violations at this mine, for going under unsupported roof (Tr. 380). Overall, the operator had a worse than average history of violations but it was improving by the time of the hearing, and the operator was now showing a positive attitude toward safety (Tr. 384-387). I accept the evidence regarding prior history, but as appears herein evidence of improvement is after-the-fact insofar as this case is concerned. Finally, in absence of any evidence to the contrary I find there was good faith abatement.

In light of the foregoing considerations and in accordance with the statutory criteria in section 110(i) a penalty of $5,000 is assessed.

ORDER

It is Ordered that the subject 104(d) citation is Modified to a 104(a) citation.

2/ I have not overlooked testimony regarding the operator's generally cooperative and positive attitude. But that evidence cannot overcome what occurred in this case.

It is further Ordered that a penalty of $5,000 is assessed which the operator is ORDERED TO PAY within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 15, 1986

TURRIS COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 85-12-R
v.	:	Citation No. 2323276; 10/16/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 85-31-R
	:	Citation No. 2491962; 12/12/84
	:	
	:	Docket No. LAKE 85-32-R
	:	Citation No. 2491965; 12/12/84
	:	
	:	Docket No. LAKE 85-35-R
	:	Citation No. 2491973; 12/18/84
	:	
	:	Elkhart Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. LAKE 85-53
	:	A.C. No. 11-02664-03547
	:	
v.	:	Docket No. LAKE 85-68
	:	A.C. No. 11-02664-03551
TURRIS COAL COMPANY,	:	
Respondent	:	Docket No. LAKE 85-70
	:	A.C. No. 11-02664-03552
	:	
	:	Elkhart Mine

ORDER DENYING MOTION TO APPROVE SETTLEMENT

On January 13, 1986, Petitioner filed a motion to dismiss these proceedings and approve a settlement reached between the parties.

Four alleged violations are involved. The first is included in Order 2323276 which charges a violation of 30 C.F.R. § 75.200 because of an alleged inadequately supported roof. The violation was originally assessed at $900, and the parties propose to settle for $750. The motion states that the violation resulted from a high degree of negligence and that "if a roof fall would have occurred two miners could have been killed." The order indicates that the occurrence

of the event against which the cited standard is directed was highly likely. The motion states that the proposed assessment is reduced because of an amendment to the order which presumably (this is not clear) reduces the area of unsupported roof. In my judgment this is not a sufficient reason for the proposed reduction.

The two other roof control violations contained in Docket No. LAKE 85-70, the parties propose to settle for the amount originally assessed.

Order 2491973 (issued under section 104(d)(2)) was originally assessed at $850. It charged a violation of 30 C.F.R. § 75.503 because of a permissibility violation on a battery powered scoop. The motion states that the violation resulted from a high degree of negligence and that one miner could have been killed from operating equipment not in permissible condition. The motion further states that Petitioner has agreed to amend the citation from a 104(d)(2) order to a 104(a) citation and that Respondent "did not intentionally operate its machine in violation of the Act. . ." In my judgment, the motion does not show justification for the reduction in the penalty, based on the criteria in section 110(i) of the Act.

Therefore, the motion to dismiss and approve settlement is DENIED. The matter will be rescheduled for hearing by a subsequent notice.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 16 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 85-134
	:	A.C. No. 01-01401-03609
v.	:	
	:	No. 7 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

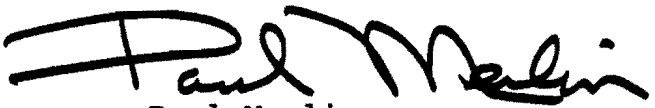
Before: Judge Merlin

The Solicitor has filed a motion to approve a settlement for the two violations involved in this matter. The originally assessed amounts totalled $2,500 and the proposed settlements are for $1,200.

The first citation was issued for failure to make a diligent search for a fire after cutting operations. After an acetylene and oxygen torch was used to cut a belt header, employees checked for fire and found nothing. But several hours after again searching and using appropriate measuring instruments a fire was found. The Solicitor states inter alia, that the only evidence he has that a diligent search was not made was the failure to find the fire immediately. I have some difficulty understanding the Solicitor's representations but interpret him to be saying that the degree of diligence shown by the operator was not as great as it should have been rather than the inspector's original thought that there was no diligent search. On this basis I accept the Solicitor's representation and approve the recommended settlement of $300.

The second citation was issued for an accumulation of combustible materials. The Solicitor states that although an accumulation admittedly existed, MSHA does not know its extent. On this basis I accept the recommended settlement which is a substantial amount and adequately reflects the described gravity of the violation.

Accordingly, the recommended settlements are Approved and the operator is Ordered to Pay $1,200 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 16, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-64-M A. C. No. 04-04230-05506
v.	:	Quarry-Quarry Plant
SOUTHWESTERN PORTLAND CEMENT COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements of the three violations involved in this matter. The original assessments totaled $1,800, and the proposed settlements total $600.

Citation No. 2364967 was issued for a violation of 30 C.F.R. § 56.14-1 when an inspector observed that the clinker belt conveyor tail pulley was not guarded. The original assessment for this violation was $600, and the proposed settlement is $200. The original assessment was based on the operator's failure to abate the violation which had been previously reported to management by the company's safety department. The Solicitor advises however, that the violation itself was of low gravity and that the operator which is large has an exceptionally small prior history of violations. Also the proposed settlement is almost twice as much as would have been assessed under the regular formula. I accept the Solicitor's representations and approve the proposed settlement. However, a failure to abate promptly is a matter for concern and the operator should take steps to see this does not happen again because if it does, I will not accept such a settlement from the Solicitor regarding this operator.

Citation Nos. 2364968 and 2364969 were issued for violations of 30 C.F.R. § 56.9-7 and 30 C.F.R. § 56.11-12, respectively. An inspector observed lack of an emergency stop cord on the clinker belt and unguarded openings at the tail pulley area of the belt. The Solicitor advises that the same considerations already set forth apply here as well. Accordingly, I approve the proposed settlements of $200 for each of these violations.

Accordingly, the operator is ORDERED TO PAY $600 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-98 A.C. No. 15-13881-03555
v.	:	
PYRO MINING COMPANY, Respondent	:	Pyro No. 9 Slope William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks a civil penalty assessment in the amount of $206 against the respondent for an alleged violation of mandatory safety standard 30 C.F.R. § 75.1103-4(a)(1). The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in Evansville, Indiana, on December 3, 1985. The parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the hearing in the adjudication of this case.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory health standard, and (2) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalty will not adversely affect the respondent's ability to continue in business. They also stipulated that the violation was abated in good faith by the respondent (Tr. 26).

Discussion

Section 104(a) "S&S" Citation No. 2505477, issued on January 7, 1985, cites a violation of 30 C.F.R. § 75.1103-4(a)(1), and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit, I.D. 003 in that the automatic fire sensor line was not installed the entire length of the beltline going to the unit 3 tailpiece. The automatic fire sensor line was installed up to within two crosscuts outby the tailpiece (140 ft. from the end of the sensor line to the tailpiece).

Petitioner's Testimony

MSHA Inspector George Siria testified as to his background and experience, and he identified exhibit P-7 as a copy of the citation issued by Inspector Frank R. Gerovac on January 7, 1985. Mr. Siria stated that Mr. Gerovac was relatively new in the area and was not familiar with the mine or MSHA's policies and that he accompanied Mr. Gerovac in order

to be available should any problems arise. He confirmed that Mr. Gerovac has retired for health reasons and is presently residing somewhere in Michigan (Tr. 33-41).

Mr. Siria confirmed that he also conducted an inspection of the mine on January 7, 1985, while he was with Mr. Gerovac, and that he issued a citation for some violative conditions. He identified exhibit P-5 as an official copy of an MSHA inspection report which indicates that he and Mr. Gerovac inspected the mine and issued citations. He confirmed that the report verifies that Mr. Gerovac issued the citation for a violation of section 75.1103-4(a)(1) after finding that the fire sensor line had not been installed for the entire length of the beltline on the number three unit (Tr. 43).

Mr. Siria stated that the hazard associated with the violation concerns a lack of warning in the event of a fire on the beltline. The fire sensors are activated by a sensoring head located at 125-foot distances, and they are required to alert miners in the event of a fire on the conveyor belt. The sensors are interconnected with the warning device boxes which sound an alarm in the event of a fire. Possible sources of ignition along the beltline would be loose coal, coal dust, and float coal dust (Tr. 45-57).

On cross-examination, Mr. Siria confirmed that Mr. Gerovac's prior experience was in metal and non-metal inspections, and he did not know the extent of his experience in underground coal mining. He confirmed that he did not travel the belt with Mr. Gerovac during his inspection, and petitioner's counsel stipulated that Mr. Gerovac did not issue any citations for coal spillage on the beltline during his inspection (Tr. 49). Counsel also stipulated that no citations were issued for lack of water or rock dust on the beltline (Tr. 52-53).

Mr. Siria did not know when the belt was last added on the unit in question, and could not state whether it was installed within 24 hours of the issuance of the citation by Mr. Gerovac (Tr. 54). When asked to explain his understanding of an exception found in section 75.1103-4(a)(1), Mr. Siria responded as follows at (Tr. 54-56):

> Q. Based on what you just read, if the belt -- hypothetically speaking -- if the belt had been put on in the past twenty-four hours, would there be a citation associated with what was written.

A. Really. . . you can't always go by the book . . .

MR. HILL: Just tell me yes or no.

WITNESS: Repeat the question.

Q. If, according to the standard, the belt had been put on within twenty-four hours of the citation and it was within a hundred and twenty-five feet, would there be a violation.

A. I didn't make the belt.

BY THE COURT: No, he wants you to assume that it was. In other words, what he's trying to establish is whether or not this section would apply in this case given the assertion that . . . the argument that twenty-four hours hadn't elapsed yet and, therefore, they weren't required to have the belt sensors at the places where Mr. Gerovac thought they should be.

WITNESS: Your Honor, it's hard to answer that question yes or no. There's always extenuating circumstances.

BY THE COURT: All right, you can explain whatever . . . go ahead and explain that.

A. If the . . . if I felt that there was a danger with the beltline being back, with the fire sensor line being a . . . ah, more than a hundred twenty-five outby . . . really, I mean, I'm not meaning argumentative and I'm not trying to be smart, but I wouldn't care when the belt had been moved if I thought there was a danger to a coal miner, I would require the belt be . . . the sensoring line to be moved up if there was any . . . this is a dust problem area and, like I previously stated, . . .

Q. Based on what has already been stipulated, do you know of any problems in that area that would have dictated that to be considered a problem area to the point a citation would be written beyond the standard of the law.

A. I'm sure if . . . with Mr. Gerovac's observation and his judgment, if there had been another violation of the standard, he would have issued additional citations.

Q. So if there would have been additional problems that would have warranted writing the citations above and beyond the standard of the law, he would have also written citations to correspond with that.

A. In his judgment.

Q. And within his judgment, he did not.

A. We don't see them.

Mr. Siria stated that the presence of coal dust mixed with fire clay on the unit did not present an ignition problem, and even though he independently found an exposed cable wire in another area during his inspection, any fire resulting from that condition would not be detected by the required sensor in question in the area cited by Mr. Gerovac because the cable was too far from the cited belt (Tr. 58). Mr. Siria found no excessive levels of methane on the unit (Tr. 60), and he confirmed that he did not personally observe the conditions cited by Mr. Gerovac (Tr. 61).

Respondent's Testimony

Ray Taylor, respondent's chief electrician testified that his responsibilities include the operation of the beltlines at the mine and to insure that they are properly installed. He was on the unit on the day of Mr. Gerovac's inspection. He stated that the belt extension was installed during the 2:00 a.m. shift on January 6th, and it was moved two or three crosscuts for a distance of approximately 120 feet. The fire sensors were installed by his crew during the day shift on January 7th within 24 hours of the extension and installation of the belt, and he believed they were installed before 4:00 p.m. that day (Tr. 62-70).

Mr. Taylor stated that based on his interpretation of the regulation, once a belt extension is completed, the respondent has 24 hours within which to install the sensors. In his view, regardless of the number of feet that the belt is extended, the respondent would still have 24 hours within which to advance and install the sensor line. He confirmed

that he was present when the mechanic arrived to install the sensor, but was not present when he completed the job (Tr. 71-72). He confirmed that the first sensor line was installed within 24 hours of the installation of the belt (Tr. 74). The belt extension was installed by the morning of January 7, and the installation of the sensor line began before he left the unit that day, and the citation was abated on January 8 (Tr. 75).

Mr. Taylor described the fire sensor system and the installation procedures, and he confirmed that in the event of a malfunction of one of the sensors, the entire system will malfunction and a warning light or alarm will indicate that the faulty sensor needs to be repaired (Tr. 103-104).

Arguments Presented by the Parties

Petitioner's interpretation of the standard is that it requires that belt sensors be installed at the beginning and end of a beltline regardless of its length. Petitioner maintains that the regulatory exception allowing 24 hours for the installation of sensors only applies to the distances between the beginning and end of a beltline and does not apply to the requirement that a sensor be at the end of the beltline regardless of its distance. Assuming a beltline is 375 feet long, petitioner argued that a sensor must be installed at the beginning and end at the time the belt or any extension is installed, and that the remaining sensors in between the beginning and end may be installed within 24-hours (Tr. 84, 92, 128-129).

Petitioner argued that since there is electrical power at the belt tailpiece, and since shuttle cars are operating in that area, there is a likelihood of coal accumulations and a potential fire at that location, and the rationale of an interpretation that a sensor is required at the end of the belt is a reasonable one (Tr. 96).

Assuming that the regulatory exception is applicable to the end of the belt line, which had been extended for a distance of 140 feet, petitioner concedes that the respondent would be allowed 24 hours within which to install a sensor at the 125 foot location (Tr. 98). Petitioner agrees that the inspector was apparently concerned about the lack of a sensor at the end of the 140 foot extended belt, and it took the position that subparagraph (1) of the regulation required a sensor at the end notwithstanding the 24 hour exception found in subparagraph (3) (Tr. 99).

Inspector Siria explained that the respondent's beltlines begin as belt headers and extend to the tailpiece. As the belt is further extended, the tailpiece is advanced in an inceremental series of headers and tailpieces (Tr. 108-109). Respondent explained that the belt is advanced by its production personnel, and once this is done, its maintenance personnel will advance the fire sensor line (Tr. 116-117).

The respondent explained that its belts are advanced for distances of 120, 180, or 210 feet at a time depending on the crosscut centers. The fire sensors are purchased in 500 foot rolls, with sensors at 75 foot intervals. The sensors are premeasured, and the sensor line is uncoiled and advanced for installation after the belt has been advanced (Tr. 103). Assuming the belt is advanced 140 feet, as it was in this case, the sensors would be advanced for this same distance up to the tailpiece end of the extended belt, and respondent believes that the regulatory exception permits a 24-hour period for this to be done (Tr. 87).

The respondent does not dispute the fact that the fire sensor line was not immediately advanced for 140 feet at the time the belt was extended that distance. However, respondent takes the position that when the distance from the tailpiece to the loading point reaches 125 feet, it has 24 hours to advance the sensor heads to the end loading point (Tr. 127). On the facts of this case, the respondent points out that Inspector Gerovac arrived at the scene four hours after the belt had been extended, and even though it had been extended for more than 125 feet, the respondent believes that it was not required to immediately advance the fire sensor line because of the 24 hour "grace period" exception found in subparagraph (3) of section 75.1103-4(a) (Tr. 85-85; 101).

The respondent points out that the fire sensor line had been extended up to the point where the belt extension started, and that automatic fire suppression devices were located at the tailpiece feeders (Tr. 113). In response to the petitioner's assertion that the regulatory exception applies only to the 125 foot belt increments, or the points between the beginning and end, respondent points out that requiring the immediate installation of a sensor at the end of the belt while allowing 24 hours to install one in the middle makes no sense because the sensors operate in sequence and not independently of each other. A sensor located at the end of a belt will not operate until such time as the middle one is installed (Tr. 94).

Inspector Sirià was recalled as the court's witness and he was asked to explain his interpretation of the exception found in section 75.1103-4(a)(1). He stated that he personally preferred the application of subsection (1) which requires sensors at the "beginning and end of each belt flight," and that he did not fully understand the application of the exception found in subparagraph (3) (Tr. 106). When asked to give an opinion as to what the standard writers had in mind when the regulation was promulgated, he responded "I don't know what this guy was thinking about when he wrote that" (Tr. 107-108).

Mr. Siria candidly conceded that accepting the petitioner's argument that the 24 hour exception applies only to the sensors between the beginning and end of a beltline could result in a 500 foot belt without fire sensors between the beginning and end of the belt over a 24-hour period. When asked to explain the logic of requiring an immediate sensor at the end of the belt and not in the middle, he responded "because that's the most likely place for a fire to begin, at the tailpiece" (Tr. 108).

When asked for his opinion about the theory of the respective positions of the parties in this case, Mr. Siria responded "I think they're both right" (Tr. 110), and he explained further as follows (Tr. 113-114):

> I think you have twenty-four hours to get the sensoring head if it's in excess of a hundred and twenty-five feet. But I think the sensoring are supposed to be from the beginning to the end of the belt like it states in the first part of the paragraph. But like the guy . . . like I said, maybe the guy that wrote this said . . . when they extend their sensoring wire, they're automatically on a hundred and twenty-five, they don't have to put them on. Ray said now they're seventy-five. So they don't have to add these sensoring heads. But I'm sure that when the law first came into effect, they put a line in and they added sensoring heads later. But I think, like the first paragraph, like Tom, Mr. Grooms said, it should be from the beginning to the end. And I think . . . like Bruce says that it should be . . . they should have twenty-four hours to put that in, any in between. Now, this would be an exception to them because they don't have to

put them in; they're already built in, they come built in.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.1103-4(a)(1), which provides as follows:

> (a) Automatic fire sensor and warning device systems shall provide identification of fire within each belt flight (each belt unit operated by a belt drive).
>
> (1) Where used, sensors responding to temperature rise at a point (point-type sensors) shall be located at or above the elevation of the top belt, and installed at the beginning and end of each belt flight, at the belt drive, and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) of this section. (Emphasis added.)

The exception referred to in paragraph (a)(1), provides in relevant part as follows:

> (3) When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached. * * * (Emphasis added.)

The parties agreed that the respondent's belt fire sensors are point-type sensors. The term "flight" as applied to a belt system is defined by the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968 Edition as "a term sometimes applied to one conveyor in a tandem series."

Inspector Gerovac noted in his citation that the required fire sensor line in question had been installed up to the flight connection point in question at the time he viewed the cited condition. The parties assumed and agreed that the

respondent was in compliance up to the point of the newly installed belt flight connection, and that the sensor line up to that point was in place and functional (Tr. 97). They also agreed that at that point in time the newly extended belt extension or "flight" had been extended in excess of 125 feet for a distance of 140 feet and the fire sensor line had not been immediately extended to the end of the newly advanced belt flight. The termination notice issued by Inspector Gerovac states that the violation was abated by extending the fire sensor line to the belt tailpiece. Since the fire sensor line is one that is simply uncoiled and advanced as the belt flight is advanced, I assume that the respondent uncoiled it and extended it for 140 feet to the end of the newly extended tailpiece and loading point location to achieve abatement and compliance.

It seems to me that the starting point for the application of the regulatory language found in section 75.1103-4(a) is the newly installed belt flight connection location. According to the credible testimony the belt flight was installed on the immediate shift prior to the inspector's arrival, and it had been in place some 4 hours prior to his arrival. The parties agreed that the fire sensor line was in place up to and including the belt flight connection location, but disagree as to what was required from that point on. The petitioner relies on the language found in paragraph (1) which requires the installation of sensors at the beginning and end of each belt flight and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet. The petitioner's interpretation of this regulatory language is that it imposes a requirement that sensors be installed at the beginning and end of each belt flight. Since there was no sensor at the end of the newly extended belt flight in question, petitioner maintains that a violation has been established.

With regard to the application of the 24 hour exception found in paragraph (3), petitioner's interpretation is that it only comes into play when the extended belt flight tailpiece reaches a point 125 feet from the last outby sensor at the flight connecting point. In the instant case, petitioner agrees that the respondent had 24 hours from the time the belt flight in question was installed to advance the fire sensor 125 feet in order to comply with the requirement that sensors be located at distances not to exceed 125 feet, but insists that the sensor at the end of the 140 foot belt flight should have been installed immediately upon completion of the installation of the advanced belt flight. In short, the petitioner suggests that the sensor line should have been

extended up to and including the end of the 140 flight extension when that work was completed.

The respondent's interpretation of the regulatory language found in paragraphs (1) and (3) of section 75.1103-4(a), is that the 24 hour exception applies to the sensors at the beginning and end of a belt flight as well as the sensors which are required at intervals of 125 feet along the belt flight. Respondent's representative conceded that when the belt was advanced 140 feet, sensor's were required at the beginning and end of that belt flight. However, he took the position that the fire sensor line would be advanced to the beginning of the flight when the belt is advanced, and that the respondent would still have 24 hours within which to advance the line to the end of the flight (Tr. 87-88). Respondent's representative argued that section 75.1103-4 does not impose any time period within which the sensors must be located at the beginning and end of a belt flight, and he asserted that since the regulation does not differentiate as to when sensors must be installed at the beginning and end of a belt flight, the respondent is free to rely on the 24 hour for the installation of sensors at both locations (Tr. 99-100). His interpretation of the exception noted in paragraph (1) is that it also applies to the end of a belt flight (Tr. 101).

Respondent argues that requiring a sensor at the end of the belt flight immediately upon the completion of the installation of the belt flight, while permitting 24 hours to install one at the beginning, is inconsistent because the beginning and intervening 125-foot locations will be without fire sensor protection for a 24-hour period, while the end of the belt will be immediately protected. Petitioner maintains that requiring a sensor at the end immediately within the completion of the belt flight will insure fire protection at the critical tailpiece loading point where equipment is operating and coal accumulations or spillage are most likely to occur. Since the remaining portion of the belt will be protected with sensors located at intervals of 125 feet, petitioner maintains that requiring the immediate location of the sensor at the end of the belt will simply insure that the entire belt flight has fire sensoring devices when it is installed and operational.

Petitioner maintains that the acceptance of the respondent's interpretation of the standard will result in the use of an unprotected belt flight during coal production. Since the 24 hour exception applies to production hours, petitioner

points out that the respondent could be operating a belt during two or more production shifts with no fire sensor at the end loading point, and that the standard was never intended to be interpreted in such a way as to permit such a hazard to exist.

The respondent asserts that allowing 24 hours to install intervening sensors on a belt flight while at the same time insisting that a sensor be immediately installed at the end when the flight is installed is illogical because its belt sensors operate in sequence or in tandem much like a "string of Christman lights," and that in the event one sensor malfunctions, the entire sensor system will not work. In support of this claim, the respondent relies on the testimony of its Chief Electrician Ray Taylor.

Mr. Taylor's testimony does not support the respondent's suggestion that one malfunctioning sensor along a belt flight will render the entire sensor system useless or cause it to shut down. Mr. Taylor testified that if one sensoring device should fail at one location along a belt flight it will trigger an alarm or signal to indicate that there is a malfunction or fault in the system which needs attention. He specifically stated that one malfunctioning sensor will not shut down the entire sensoring apparatus, but will simply give an alert that repairs are required (Tr. 103-104). The only malfunction which will shut the entire system down is one caused by the cutting of the sensoring cable itself (Tr. 104).

Paragraph (1) states that where used, sensors must be located at the beginning and end of a belt flight. This language is clear and unequivocal. In my view, once a belt flight is installed sensors must be located at the beginning and end of the belt flight regardless of the length of the flight. If the flight is 100 feet long, two sensors are required; one at the beginning and one at the end. If the flight is 150 feet long, three sensors are required; one at the beginning, one at the end, and one at an intervening location not in excess of 125 feet from the first one. As additional belt flights are added, the requirements for additional sensors must be determined by using the last installed sensor at the new tailpiece location as a new starting reference point.

With regard to the exception found in paragraph (3), I agree with the petitioner's interpretation that it applies only to the location of sensors which must be located at intervening locations along a belt flight not in excess of

125 feet of the last installed sensor. In my view, paragraph (1) imposes two separate requirements for the installation of fire sensors along a belt flight. The first requirement is that sensors be located at the beginning and end of a belt flight, and a second requirement is that sensors be located in increments and distances not to exceed 125 feet. The regulatory exception in my view modifies the requirements for locating sensors at locations which exceed 125 feet, and does not affect the requirement that they be at the beginning and end of a belt flight. The first sentence of the exception found in paragraph (3) provides that when the distance from a belt tailpiece to the first outby sensor reaches 125 feet such sensors shall be installed and put in operation within 24 production shift hours after the 125 feet distance is reached. Thus, I conclude that the phrase "such sensors" only applies to the sensors which are required at 125 foot intervals along a belt flight, and not to those required at the beginning and end of the flight.

On the facts of this case, I conclude and find that the petitioner's interpretation and application of the standard in question is correct, and I reject the interpretation advanced by the respondent. I conclude and find that a sensor was required at the point where the cited belt flight reached a distance of 125 feet as well as at the end of the flight. Since the flight had been installed 4 hours prior to the arrival of the inspector on the scene, I conclude that the exception found in paragraph (3) of section 75.1103-4 allowed the respondent an additional 20 production shift hours within which to advance and install a sensor at the 125 foot distance, but did not allow the respondent any additional time within which to advance and install a sensor at the end of the flight. I conclude that a sensor at the end of the belt flight was required immediately upon the installation of the operational belt flight. Since the belt flight was in use and operational at the time the citation was issued, and since there is no dispute that a sensor was not located at the end of the flight, I conclude that a violation has been established and the citation IS AFFIRMED.

History of Prior Violations

Exhibit P-1 is a computer print-out summarizing the respondent's compliance record for the period January 1, 1983 through January 6, 1985. That record reflects that the respondent paid civil penalty assessments totalling $75,033 for 800 violations, 29 of which were for violations of the fire sensor requirements found in 30 C.F.R. § 75.1103, 75.1103-1, 75.1103-4, and 75.1103-5. Taking into account the

size of the respondent's mining operations, I do not consider the respondent's history of compliance to be a particularly good one, and I have considered this in the civil penalty assessment made for the violation in question in this case.

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

The parties have stipulated as to the scope of the respondent's mining operations and agreed that the payment of civil penalty will not adversely affect the respondent's ability to continue in business. I adopt these agreements as my findings on these issues.

Good Faith Abatement

The parties stipulated that the conditions cited as a violation in this case were corrected in good faith by the respondent within the time fixed by the inspector. I agree and conclude that the respondent exercised good faith in abating the violation.

Negligence

I conclude and find that the respondent knew or should have known of the requirement for locating the sensor at the end of the belt flight in question and that its failure to advance the sensor line before the inspector found the violative condition is the result of its failure to exercise reasonable care. Although I have taken into account the testimony of Chief Electrician Taylor that work had begun to advance the sensor line during the shift when the violation was issued, the fact is that the line was not extended to the end after the belt flight was installed. Considering Mr. Taylor's interpretation of the standard, there is a strong inference that had the shift ended, the respondent would have waited until subsequent shifts to advance the line to the end of the belt.

Gravity

I conclude and find that the violation was serious. Failure to extend the fire sensoring device to the end of the belt flight after it was installed presented a hazard in that in the event of a fire at the end of the belt, there would be no warning device available to alert the miners of such a hazard. Although the respondent's representative asserted that a fire suppression device was installed at the end of the belt, there is no credible testimony to support his assertion.

Even if the fire suppression device was present, the lack of a warning device still presented a hazardous condition.

Significant and Substantial Violation

There is no credible testimony to support a finding that the violation in this case was significant and substantial. The burden of proof in this regard is on the petitioner, and since the inspector who issued the citation did not testify as to any factors which could contribute to an accident, I have no factual basis, other than the fact that the sensor at the end of the belt was missing, to support an "S&S" finding. Inspector Siria did not view the cited conditions, and he was not with Inspector Gerovac when the citation was issued. Under the circumstances, the "S&S" finding in this case IS VACATED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, respondent is assessed a civil penalty in the amount of $175 for section 104(a) Citation No. 2505477, issued on January 7, 1985, for a violation of 30 C.F.R. § 75.1103-4(a)(1).

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $175 within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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Mr. Bruce Hill, Safety Manager, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-181
	:	A.C. No. 15-13881-03568
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY, Respondent	:	William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks civil penalty assessments against the respondent for three alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in Evansville, Indiana, on December 3, 1985. The parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the hearing in the adjudication of this case.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and

(2) the appropriate civil penalty to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent's operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business. They also stipulated that the violations were abated in good faith (Tr. 26).

Procedural Ruling

During the course of the hearing in this case, the parties raised the question of the validity of the section 104(d)(2) unwarrantable failure order issued by the inspector. In a bench ruling, I held that the "unwarrantable failure" issue in connection with the order is not an issue in a civil penalty case. I also ruled that the validity of the underlying order is irrelevant, and I advised the parties that the issue here is whether or not a violation of mandatory safety standard 30 C.F.R. § 75.316 occurred, and if so, the appropriate civil penalty which should be assessed taking into account the civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 2508809, issued on May 16, 1985, cites a violation of 30 C.F.R. § 75.316, and the condition or practice is stated as follows:

> The approved ventilation, methane and dust control plan (approved 2/28/85 see page 1 paragraph A) was not being followed on the

No. 5 unit, I.D. 005 because permanent stoppings were not installed up to the loading point (tailpiece of the belt) on the intake side. The permanent stoppings terminated two crosscuts outby the loading point.

Section 104(a) "S&S" Citation No. 2508577, issued on June 3, 1985, cites a violation of 30 C.F.R. § 75.400, and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit Sec. ID 003 in that an accumulation of loose coal approximately 4 feet wide, 14 feet long and 18 inches in depth was present on the north side of the ratio feeder. The accumulation of loose coal was on a trailing cable of one of the joy shuttle cars.

Section 104(a) "S&S" Citation No. 2508574, issued on May 23, 1985, cites a violation of 30 C.F.R. § 75.400, and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit ID No. 003 in that an accumulation of loose coal approximately 3 to 8 inches in depth, 10 feet wide, and 30 feet long was present in front of the ratio feeder in the belt entry of this unit. Loose coal also had accumulated around side of feeder on and around the main contact switch panels.

Petitioner's Testimony

MSHA Inspector James Franks testified that he conducted a section 103(i) spot inspection of the mine on May 16, 1985, and confirmed that he issued section 104(d)(2) Order No. 2508809 because of a violation of the respondent's ventilation and methane and dust-control plan. The mine was on a "spot inspection" status because it liberates in excess of 200,000 cubic feet of methane in a 24-hour period. He identified exhibit P-9 as the applicable plan in question and confirmed that the respondent failed to install permanent stoppings up to the loading points between the intake aircourse and beltline as required by Paragraph A, pg. 1 of the plan. Two crosscuts had been developed and no stoppings were installed as required by the plan.

Mr. Franks identified exhibit J-1, as a sketch of the area where the violation occurred. The sketch was made from

notes that he took during the inspection, and he identified the two stoppings or brattices which were not installed as required by the plan. He indicated that the stoppings were required to be constructed with concrete blocks and mortar up to the loading point in order to provide a smoke-free intake escapeway for the use of miners in the event of an emergency such as a mine fire. The failure to provide the required stoppings increased the chances of a fire spreading. One of the crosscuts had no curtain across it, and it was possible that the other one did. The stoppings are also required to isolate the belt in the event of a fire, and to insure adequate ventilation and air control on the beltline (Tr. 135-143).

Mr. Franks stated that coal was being mined at the time of his inspection, and that four entries were being driven to develop a longwall. He observed no stopping materials or work being performed to erect the stoppings in question, and he discussed the matter with the face boss and with respondent's safety manager Tom Hughes. They informed him that they intended to install the stoppings, but Mr. Franks saw no evidence of any work being done to accomplish this (Tr. 145).

Mr. Franks explained the reasons for issuing a section 104(d)(2) order, and while he believed that the respondent was going to install the stoppings, he saw no evidence of any materials in the area and saw no work taking place which would indicate when this would be done. His impression was that the respondent wanted to run coal and build the stoppings when they got around to doing it. Under the circumstances, he believed that there was a high degree of negligence and that is why he issued the order (Tr. 147).

Mr. Franks confirmed that he did not consider the violation to be "significant and substantial" because the ventilation was good and he found no dangerous amounts of methane present at the faces. He did not believe that the circumstances presented indicated a reasonable likelihood of an accident (Tr. 147).

Mr. Franks stated that coal production ceased at 2:00 a.m. on May 16, 1985, but would have continued again at 7:00 a.m. Five people were on the unit for the purpose of installing a beltline and the stoppings, and he estimated that it would take 45 minutes to an hour to install a stopping at one crosscut, assuming the materials were at the location (Tr. 149).

On cross-examination, Mr. Franks confirmed that he found an adequate supply of air and no dangerous amounts of methane on the unit. He confirmed that five men were used to install the beltline between 2:00 a.m. and 7:00 a.m. on May 16, and while he agreed that it may not have been practical to put the stoppings in before the beltline was installed, he believed that it could have been done. He confirmed that other mines install stoppings before a beltline is completed, but conceded that the respondent's longwall system presents some problems in this regard, particularly when shuttle cars are used (Tr. 154).

Although Mr. Franks could not recall the presence of an air lock by the beltline, he conceded that one could have been present. The purpose of the air lock is to control the air current and to keep the air from going away from the faces and down the beltline. Mr. Franks confirmed that the two required stoppings were installed and abatement was achieved within an hour of the issuance of the violation (Tr. 157). Although he could not recall a scoop at the end of the track with cement blocks on it when he first arrived at the scene, he conceded that it was possibly present and that his delay in arriving at the scene of the violation could have been caused by the fact that the travelway was blocked by the scoop and blocks. He did not know how long it took to bring the blocks to the stopping areas, and he could not recall seeing anyone working in one of the breaks before he issued the order (Tr. 157-160).

Mr. Franks confirmed that he marked the gravity section of the order "unlikely" and did not consider the violation to be "significant and substantial" (Tr. 163-164).

In response to further questions, Mr. Franks confirmed that coal was being loaded on the beltline, and that a continuous miner and possibly three shuttle cars were being used during the time he was at the scene. He expressed surprise that production was not halted in order to construct the stoppings. He did not consider the use of temporary brattice curtains to be dangerous (Tr. 170). Petitioner's counsel confirmed that an air lock was in fact installed as shown on the sketch and that Inspector Franks was simply unclear as to this (Tr. 172).

Respondent's Testimony

Thomas E. Hughes, respondent's safety manager, testified that he was familiar with the cited conditions and he confirmed that the beltline had been installed on the morning of

May 16. He confirmed that he travelled with Inspector Franks, and when they arrived at the end of the track of the number five unit, the third shift was leaving, and a supply trip and a scoop added to the congestion in the area. He and the inspector were held up because of this congestion. Mr. Hughes confirmed that the unit was running and that Mr. Franks was concerned that it was running with two open stoppings. The unit was then shut down. Although he recalled some blocks in one of the "open holes" on the unit, he could not recall that any brattice men were on the unit. However, preparations were being made to construct the stoppings (Tr. 176), and the brattice men would be assigned to do this work (Tr. 177).

On cross-examination, Mr. Hughes confirmed that he was not present when the beltline was installed, and he explained that someone could have told him that it was installed the evening before, or he may have read that in a report (Tr. 178-179).

Findings and Conclusions

Fact of Violation - Order No. 2508809

The respondent does not dispute the fact of violation in this case (Tr. 183-184). In mitigation of the violation, respondent's representative argued that the respondent intended to install the stoppings regardless of the presence of the inspector on the scene (Tr. 184). In support of this argument, respondent asserted that the blocks for the construction of the stoppings were either stored on the unit or about to be transported to the stopping areas while the inspector was at the scene (Tr. 165-166). Respondent candidly admitted that it contested the violation in order to mitigate the proposed $1,000 penalty assessment levied by MSHA for the violation (Tr. 164).

The unrebutted testimony of Inspector Franks clearly establishes that the required permanent stoppings were not installed up to the loading point or tailpiece of the beltline on the intake side of the unit in question. The respondent's approved ventilation and methane and dust-control plan required that permanent stoppings be installed at that location, and the failure by the respondent to follow its plan constitutes a violation of mandatory safety standard 30 C.F.R. § 75.316 as charged in the order issued by the inspector. Accordingly, the violation IS AFFIRMED.

Section 104(a) Citation Nos. 2508577 and 2508574

During the course of the hearing, the respondent stated that it no longer wished to contest the coal accumulations violations and admitted that they occurred as stated by the inspector in the citations. Respondent requested that it be permitted to pay the full amounts of the proposed civil penalty assessments made by MSHA for the violations, and petitioner's counsel agreed to this proposed disposition (Tr. 7-8).

The respondent agreed to the negligence and gravity findings made by the inspector at the time the citations were issued, and I took note of the fact that the cited coal accumulations were cleaned up and abated within 30 minutes of the issuance of the citations.

I considered this matter as a joint settlement proposal pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and after consideration of the six statutory criteria found in section 110(i) of the Act, the settlement was approved from the bench, and it is herein reaffirmed.

History of Prior Violations

Exhibit P-2 is a computer print-out summarizing the respondent's compliance record for the period June 4, 1983 through June 3, 1985. That record reflects that the respondent paid civil penalty assessments totaling $93,693 for 918 violations. Eighty-three of these prior violations were for violation of mandatory safety section 75.316, and 187 are for violations of section 75.400.

Taking into account the size of this respondent, I do not consider its history of compliance to be a good one, and I believe that the respondent needs to pay closer attention to its coal accumulations cleanup procedures and the requirements of its ventilation and methane and dust-control plans. I have considered the respondent's compliance record in assessing the civil penalties in this case.

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

The parties have stipulated to the size and scope of the respondent's mining operations and they agreed that the payment of civil penalties will not adversely affect the respondent's ability to continue in business. I adopt these stipulations as my findings on these issues.

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations in this case were corrected in good faith by the respondent within the time fixed by the inspectors. The stopping violation was abated within an hour of its issuance, and as previously noted, the coal accumulations violations were abated within 30 minutes of the issuance of the citations. I conclude that the respondent exercised rapid good faith abatement of the violations.

Negligence

With regard to the stopping violation, Inspector Franks believed that the respondent exhibited a high degree of negligence in failing to construct them before the unit was placed in operation. In mitigation of its negligence, the respondent argued that it fully intended to construct the stoppings and had the materials available. Although this may be true, the inspector believed that the available manpower on the unit was insufficient for such a project, and he saw no evidence of any actual work in progress to construct the stoppings. However, he conceded that constructing the stoppings on an operating longwall section presented some practical problems, and he believed the respondent's contention that it fully intended to construct the stoppings. The inspector's view is that the stoppings should have been constructed when the section ceased operating on the shift prior to his arrival on the scene, and I am convinced that the inspector's arrival prompted the immediate movement of materials necessary for the construction of the stoppings. I conclude that at the time the violation was discovered, the respondent had made preparations for the construction of the stoppings, and that the arrival of the inspector simply speeded up the process. Once the work began, the stoppings were completed within an hour.

I have considered the respondent's preparatory efforts in constructing the stoppings, including the presence of materials for this work on the unit, as factors mitigating the civil penalty assessed for the violation. However, I conclude and find that the respondent knew or should have known of the stopping requirements of its own ventilation plan, and that its failure to construct the required stopping before the inspector found the violative condition is the result of its failure to exercise reasonable care.

Gravity

I conclude and find that the failure by the respondent to construct the required stoppings in question constitutes a serious violation. While it is true that the inspector did not consider the violation to be "significant and substantial," found no dangerous amounts of methane, and that adequate air and an air lock were present on the unit, the stoppings were required to maintain a smoke-free escapeway in the event of a fire and to insure the adequate control of air ventilation on the beltline.

Civil Penalty Assessments

The respondent has agreed to pay the full $168 assessment for Citation No. 2508574, May 23, 1985, 30 C.F.R. § 75.400, and the full $168 assessment for Citation No. 2508577, June 3, 1985, 30 C.F.R. § 75.400.

On the basis of the foregoing findings and conclusions with respect to Order No. 2508809, May 16, 1985, 30 C.F.R. § 75.316, respondent is assessed a civil penalty in the amount of $900.

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts indicated above within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 21 1986

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-33-D
ON BEHALF OF	:	MSHA Case No. MORG CD 83-18
ROBERT RIBEL,	:	
Complainant	:	Federal No. 2 Mine
v.	:	
	:	
EASTERN ASSOCIATED COAL	:	
CORPORATION,	:	
Respondent	:	

SUPPLEMENTAL DECISION AND ORDER

Before: Judge Koutras

On December 18, 1985, the Commission issued its decision in this matter affirming my decision of September 24, 1984, 7 FMSHRC 2203, and my supplemental decision on remand of July 10, 1985, 7 FMSHRC 1059, that the respondent discriminated against the complainant in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). With regard to the issue of attorneys' fees for the complainant's private counsel, the Commission ruled that Mr. Ribel's counsel is entitled to a limited attorney's fees award, and it remanded the matter to me for further limited adjudication of this issue.

In response to my order of December 31, 1985, the parties have submitted a stipulation with respect to the amount of attorneys' fees due to Mr. Ribel, and it states as follows:

> That the amount of attorneys' fees due to Mr. Ribel in connection with the participation of his private attorney in obtaining an award of costs in the amount of six hundred and five dollars ($605) is seven hundred and twenty one dollars and fifty cents ($721.50);

That this Stipulation is without prejudice and shall not constitute a waiver of the right of either party to petition for review of the aforementioned decisions of Judge Koutras and the Commission, including specifically the disposition by Judge Koutras and the Commission of Mr. Ribel's motion for an award of attorneys' fees and costs.

ORDER

The respondent IS ORDERED to pay to Mr. Ribel's private attorney the agreed upon amount of $721.50, and payment is to be made within thirty (30) days of the date of this supplemental decision and order.

George A. Koutras
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-187
	:	A.C. No. 15-13881-03570
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY, Respondent	:	William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks civil penalty assessments against the respondent for two alleged violations of certain mandatory safety standards in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in Evansville, Indiana, on December 3, 1985. The parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the hearing in of this case.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and

(2) the appropriate civil penalty to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent's operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business. They also stipulated that the violations were abated in good faith within the time allotted (Tr. 26).

Procedural Ruling

The subject of this civil penalty proceeding is a section 104(d)(2) "unwarrantable failure" order issued by Inspector Stanley on May 21, 1985. The petitioner seeks a civil penalty assessment for a violation of mandatory safety standard 30 C.F.R. § 75.316, as stated on the face of the order. In support of his order, Inspector Stanley made reference to a previously issued section 104(d)(1) Order No. 2508757, issued at the mine on May 9, 1985 (Exhibit P-10).

The parties stipulated that there was no intervening "clean inspection" of the mine during the period May 9, 1985, the date of the underlying order, and May 21, 1985, the date the order in this case was issued.

Petitioner's counsel asserted that since the underlying order of May 9, 1985, has been contested by the respondent, he was unclear as to whether or not the validity of that order had to be first established in order to support the order issued by Inspector Stanley on May 21, 1985.

In a ruling made from the bench, I advised the parties that the "unwarrantable failure" aspect of the order which is

the subject of this civil penalty case is not in issue in this proceeding. I ruled that the validity of the order is not an issue to be determined in a civil penalty case, and that the validity of the preceding underlying order is irrelevant. The parties were advised that the issue here is whether or not a violation of mandatory standard section 75.316, has been established, and if so, the appropriate civil penalty which should be assessed for that violation, considering the civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 2507449, issued on May 21, 1985, cites a violation of 30 C.F.R. § 75.316, and the condition or practice is stated as follows:

> The ventilation and methane and dust control plan was not being followed in the working section in south entries off 2 east off 2 north of main east (ID 0030) in that permanent-type stoppings were not erected up to and including the third connecting crosscut outby the faces between the intake and return as required. There were 3 open crosscuts which had no permanent stopping in them and the faces were driven far enough through the crosscuts.

Section 104(d)(2) Order No. 2507452, issued on May 20, 1985, cites a violation of 30 C.F.R. § 75.400, and the condition or practice is stated as follows:

> Loose coal was permitted to accumulate on the floor of the Nos. 1 through 5 entry in the working section in east entries off 4 north (ID 002-0). The coal was from rib to rib and 8 to 14 inches deep. The accumulation was from the faces outby for 50 to 60 feet. In the feeder entry the coal was accumulated from the face to the feeder (120 feet).

Petitioner's Testimony

MSHA Inspector Louis W. Stanley testified as to his background and experience, and he confirmed that he inspected the mine on May 16, 1985, and issued the order in question. He stated that he inspected the return side of the number three unit and found that permanent type stoppings had not been erected up to and including the third connecting crosscut

outby the faces. He identified exhibit P-9 as the applicable ventilation and methane and dust-control plan, and exhibit P-17 as a sketch of the area where the violation occurred. He testified that he found a line curtain installed where the permanent stopping should have been erected, and he confirmed that he discussed the violation with Mr. Doug Harris, the respondent's safety representative who was with him during the inspection (Tr. 192-197).

Mr. Stanley testified that the section foreman admitted that he was aware of the fact that the required stoppings had not been installed and advised him that men had been assigned to obtain material to build the stoppings. Mr. Stanley saw no evidence of any construction taking place, and there were four or five men on the section. The section was a conventional mining section, and coal was drilled, shot, and then loaded out. When Mr. Stanley arrived on the section, the power was on all of the equipment, and a loading machine and coal drill were at the face, and a cutting machine was outby. Although someone advised him that no work had been done that morning, the section foreman admitted that coal had been shot at one place in the number four entry. Mr. Stanley stated that he found 2.4 percent methane in the number four entry and issued a section 107(a) imminent danger order because of the methane. The methane was cleared up after a curtain was hung across the last open break through and into the number four entry (Tr. 200).

Mr. Stanley stated that he issued the unwarrantable failure order because of the admission by the section foreman that an entire shift had been worked without installing the required permanent stoppings. He confirmed this by noting that the face had been advanced past the third crosscut and coal had been removed from these areas inby the last open crosscut (Tr. 201). The reason for requiring the stoppings is to insure positive air ventilation at the faces, and to prevent curtains being torn down, thereby short circuiting the air. Failure to maintain proper ventilation will allow methane and coal dust to accumulate, thereby presenting a hazard of an ignition or explosion (Tr. 201-203).

Mr. Stanley confirmed that he did not consider the violation to be "significant and substantial" because his air readings indicated a sufficient quantity of air present in the area and he did not believe that an accident was likely (Tr. 203). He confirmed that coal had been mined on the previous shift and he did so by checking the onshift mine records (Tr. 205). The required stoppings were erected within 35 minutes of the issuance of the violation (Tr. 205).

On cross-examination, Mr. Stanley testified to the air readings which he took, and he confirmed that the unit was not "running" when he first arrived. He confirmed that coal had been mined during the previous shift and that the mine foreman admitted that had he not appeared on the scene coal would have continued to be mined and the stoppings would have been constructed on the intake. Mr. Stanley also determined that coal had been extracted from the last open crosscut inby for a distance of 50 to 60 feet, and he confirmed that 2.4 percent methane is not within an explosive range (Tr. 209-211). He confirmed that only one required stopping had not been constructed, and he identified the location by placing an "X" on his sketch (exhibit P-17) (Tr. 213).

Mr. Stanley identified a previous citation he issued at the mine on March 5, 1985, citing a violation of section 75.316, for a missing brattice and he explained why he considered that one to be "S&S," and the one in issue in this case to be unwarrantable (Tr. 213-215).

Respondent's Testimony

David Winebarger, respondent's Director of Support, identified exhibit R-2 as a sketch of the operating unit as it appeared on the day the violation was issued. He stated that the belt was installed that same morning, and confirmed that the line brattices shown on the sketch were required to be installed on the return when there are three open breaks. He also confirmed that there were no permanent brattices on the intake up to the loading point, and that five or seven brattices had to be installed that day. He stated that no coal had been loaded up to the time Inspector Stanley arrived on the scene, but that power was on the equipment, and adequate air was present across the last open crosscut. The belt was running in order to load out coal which needed to be cleaned up. He indicated that he ordered the crew not to run coal until the brattices were installed, and also instructed them to build seven brattices (Tr. 217-224).

On cross-examination, Mr. Winebarger stated that Inspector Stanley arrived on the unit after he (Winebarger) had been there and that he informed Mr. Stanley that coal was not being run and that he intended to install the brattices. Mr. Winebarger testified as to the activities taking place both before and after Mr. Stanley's arrival (Tr. 224-229).

Findings and Conclusions

Fact of Violation - Order No. 2507449

Respondent's representative conceded that the ventilation plan required the installation of a permanent stopping at the location noted by Inspector Stanley, and that the failure to install the stopping in question constituted a violation of the plan. However, he took the position that as long as coal is not being mined, there is no requirement for the stoppings. He argued that since no coal had been mined immediately prior to the arrival of Inspector Stanley, the respondent was not required to construct the stoppings. He also argued that construction of the stopping could not take place while coal was being mined because this would violate the plan, but he conceded that the stopping was required to be constructed before the start of any coal production (Tr. 231-232).

When asked to explan his position that a stopping is not required unless coal is being produced, respondent's representative referred to Paragraph A, pg. 1 of the plan (Tr. 232). The plan provision in question, exhibit P-9, provides as follows: "Permanent stoppings shall be maintained up to and including the third crosscut outby the face on the return side and up to the loading point on the intake side."

Mr. Winebarger was asked to point out the plan provision that provided for the construction of stoppings only when coal was being mined, and he responded "I don't know" (Tr. 237). Mr. Winebarger stated that coal was last produced on the unit on the 4:00 p.m. to 12:00 shift on May 20, 1985, the day before the citation was issued, and on the midnight shift of May 21, 1985 (Tr. 234). Although the morning shift from 7:00 a.m. to 5:00 p.m. on May 21, was a production shift, Mr. Winebarger insisted that no coal was produced, but he confirmed that at 8:50 a.m., work was being performed on the unit, including the cleaning up and loading out of coal by means of the belt, a loader, and shuttle cars (Tr. 235-236).

Respondent's representative stated that three crosscuts were mined several days prior to the issuance of the violation, and that the last one was opened up during the second night shift prior to the inspector's arrival on the scene. He conceded that the opening of these crosscuts constituted the mining of coal (Tr. 238), but believed that the stopping was required to be constructed when the crosscut is cleaned up and travelable (Tr. 239).

Respondent's representative conceded that the third crosscut had been completely mined through at the time the inspector arrived on the scene. He argued that in the normal course of business the required stopping would have been constructed before further coal production took place and that this indicates good faith on the respondent's part (Tr. 243, 253). In response to questions from the bench, respondent's representative stated further as follows (Tr. 256-257):

> BY THE COURT: . . At the time the inspector arrived on the scene, it was clear to him that the third crosscut outby the face, there was no permanent stopping there, is that correct.
>
> MR. HILL: That's correct.
>
> BY THE COURT: Technically, that was a violation or realistically that was a violation in his eyes correct.
>
> MR. HILL: Correct.
>
> BY THE COURT: You agree with that.
>
> MR. HILL: That's correct, he wrote it.
>
> BY THE COURT: Given those facts, it was a violation, wasn't it.
>
> MR. HILL: That's correct.
>
> BY THE COURT: You were three crosscuts out by the face and no permanent stopping had been erected.
>
> MR. HILL: Correct.
>
> BY THE COURT: That violates the ventilation plan, doesn't it.
>
> MR. HILL: That's correct.

Petitioner's counsel took the postion that when the third crosscut was mined through, it became a crosscut, and that at that point in time the third stopping was required to be constructed. Since it was not constructed when the inspector viewed it, a violation has been established and the fact that coal was not being produced at that precise moment is irrelevant Tr. 240-242).

Inspector Stanley was recalled and he confirmed that the last open crosscut outby the face was completely opened and travelable at the time he issued the violation. Had it not been opened, but simply cut into, he would not have issued the violation. He confirmed that once he determined that the last open crosscut was completed, he then determined the location of the third crosscut outby the face where the stopping was required, and when he found that it was not constructed as required by the plan, he issued the violation. Mr. Stanley stated that the fact that coal was not being mined is irrelevant, and he believed that the respondent raised this issue only to support its contention that it intended to construct the stopping in question (Tr. 264-265). In his opinion, had the respondent intended to construct the stopping, the required materials would have been present and it would have been constructed when the crosscut was opened up. Instead, the respondent ran the previous production shift for four or five cuts of coal without the stopping being constructed in violation of the plan during the previous shift (Tr. 266-267).

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that the petitioner has established by a preponderance of the evidence that the failure by the respondent to construct the stoppings in question constituted a violation of the requirements of its approved ventilation and methane and dust-control plan. It is clear that the stopping up to and including the third connecting crosscut outby the faces between the intake and return was not constructed as required by the plan, and the respondent conceded that this was the case. A violation of the requirements of the plan constitutes a violation of mandatory safety standard 30 C.F.R. § 75.316 as charged in the order issued by Inspector Stanley.

I find nothing in the plan to support the respondent's contention that the active mining of coal has to be taking place before the stopping requirements come into play, and this defense is REJECTED. The evidence establishes that at the time the inspector arrived at the scene, coal had been produced on the immediate preceding shift, the critical crosscut had been completely mined through and developed, and work was taking place on the unit when the inspector viewed the violative conditions, including the loading out of coal on the belt and with the use of shuttle cars and a loader. At that point in time, the plan required the stopping in question to be completed and in place. Under all of these circumstances, the violation IS AFFIRMED.

Order No. 2507452

With regard to Order No. 2507452, respondent's representative stated that the respondent does not contest the violation and admits that it occurred as alleged by the inspector (Tr. 8). Respondent requested that it be permitted to pay the full amount of the proposed civil penalty assessment made by MSHA for the violation, and the petitioner's counsel agreed to this proposed disposition. The respondent agreed to the negligence and gravity findings made by the inspector at the time the order was issued. Under the circumstances, I considered the matter as a joint settlement proposal pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and after consideration of the six statutory criteria found in section 110(i) of the Act, the settlement was approved from the bench and it is herein reaffirmed.

History of Prior Violations

Exhibit P-2 is a computer print-out summarizing the respondent's compliance record for the period June 4, 1983 through June 3, 1985. That record reflects that the respondent paid civil penalty assessment totalling $93,693 for 918 violations. Eighty-three of these prior violations were for violation of mandatory safety section 75.316, and 187 are for violations of section 75.400. In addition, exhibit P-1, which is a computer print-out of the respondent's compliance record for the period January 1, 1983 through January 6, 1985, reflects six additional violations which occurred within 2 years of the violations issued in this case, two of which are for violations of section 75.316, and one for a violation of section 75.400.

Taking into account the size of this respondent, I do not consider the respondent's history of compliance to be a particularly good one, and I believe that the respondent needs to pay closer attention to its coal accumulations cleanup procedures and the requirements of its ventilation and methane and dust control plans. I have taken the respondent's compliance record into account in the civil penalty assessments made for the violations in question.

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

The parties have stipulated as to the scope of the respondent's mining operations and agreed that the payment of civil penalties will not adversely affect the respondent's

ability to continue in business. I adopt these agreements as my findings on these issues.

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations in this case were corrected in good faith by the respondent within the time fixed by the inspectors. I agree and conclude that the respondent exercized good faith in abating the violations.

Negligence

With regard to Order No. 2507449, I conclude and find that the respondent knew or should have known of the stopping requirements of its own ventilation plan, and that its failure to construct the required stopping before the inspector found the violative condition is the result of its failure to exercise reasonable care.

Gravity

With regard to Order No. 2507449, I conclude and find that the failure of the respondent to construct the stopping in question was a serious violation. Although the inspector found an adequate supply of air on the unit, the failure to install the stopping presented the possibility of improper ventilation in the unit, thereby contributing to a possible ignition or explosion hazard.

Penalty Assessments

Respondent has agreed to pay the full $1,000 assessment for Order No. 2507452, issued on May 30, 1985, for a violation of 30 C.F.R. § 75.400.

On the basis of the foregoing findings and conclusions with respect to Order No. 2507449, issued on May 21, 1985, for a violation of 30 C.F.R. § 75.316, respondent is assessed a civil penalty in the amount of $975.

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date

of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

CLIMAX MOLYBDENUM COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 85-98-RM
v.	:	Citation No. 2358527; 3/21/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Climax Mine

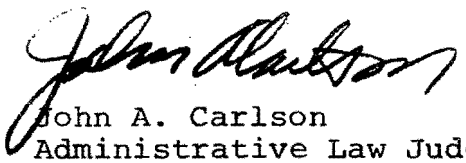
DECISION APPROVING WITHDRAWAL

Appearances: Richard W. Manning, Esq., Climax Molybdenum Company, Greenwich, Connecticut, for Contestant;
Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Carlson

This contest case was consolidated for hearing with dockets WEST 85-96-RM, WEST 85-97-RM, WEST 85-99-RM, and WEST 85-120-M. During the hearing, the parties presented extensive evidence concerning WEST 85-98-RM. Before the presentations were complete, however, the contestant, Climax Molybdenum Company, moved for leave to withdraw its notice of contest of the single citation in that docket. The Secretary did not oppose the motion.

Accordingly, Climax's motion is granted. The contest proceeding, docketed as WEST 85-98-RM (citation 2358527), is severed from those cases with which it was earlier consolidated, and is hereby ORDERED dismissed.



John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 84-98 A. C. No. 33-00968-03568
v.	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO., Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for Petitioner
Robert C. Kota, Esq., St. Clairsville, Ohio, for Respondent

Before: Judge Kennedy

Foreword

Without passing on the sufficiency of the findings of fact and conclusions of law set forth in the bench decision of May 31, 1985 as confirmed and incorporated in the final order issued August 8, 1985, 7 FMSHRC 1185, the Commission by its order of September 17, 1985, 7 FMSHRC 1335, remanded this matter to the trial judge for issuance of his bench decision as a written decision as required by Rule 65 or issuance of a new decision setting forth the trial judge's findings on all the material issues of fact, law or discretion presented by the record.

Thereafter, the trial judge issued an order dated October 4, 1985, setting forth in a signed writing the tentative bench decision together with his reasons for declining to sit as a board of review on the sufficient of the record made by MSHA in support of its Part 100.5 special assessments. The trial judge found that since the Commission had refused to acquiesce in the proposition that its trial judges are bound by the penalty point formula of

penalty assessment set forth in Part 100, it was unnecessary to make findings for determination of penalty amounts as outlined in 30 C.F.R. 100.3 and 100.5. See Sellersburg Stone Company, 5 FMSHRC 287, 2 MSHC 2010 (1983), aff'd sub nom. Sellersburg Stone Company v. FMSHRC, 736 F. 2d 1147, 1150-1153 (7th Cir. 1984), rehearing en banc denied July 24, 1984; United States Steel Mining Company, Inc. 6 FMSHRC 1148, 3 MSHC 1362 (1984).

Ignoring the fact that (1) the operator's reliance on Allied Products v. FMSHRC, 666 F. 2d 890, 894-896 (5th Cir. 1982) was misplaced, if not frivolous, and (2) that the operator had failed to avail itself of the opportunity to challenge the sufficiency of the trial judge's findings on any other ground, the Commission refused to treat the written transcript of the judge's bench decision, which contained his findings of fact, conclusions of law and the bases therefor, as part of his final order and remanded the matter for the insufficiency of the final order which adopted and confirmed the findings and conclusions set forth in the written transcript of the bench decision.

Accepting the Commission's curious remand in good grace, the trial judge included in his order of October 4, 1985, a direction to the parties to file post-hearing briefs, including their proposed findings of fact, annotated to the record, with respect to the material issues of fact, law and discretion presented by the record. On October 31, 1985, one day before its post-hearing brief was due, counsel for the operator filed a second petition for review with the Commission seeking vacation of the trial judge's order to file a post-hearing brief. The only ground asserted was the "futility" of attempting to attack the trial judge's bench decision. On November 1, 1985, the Commission denied Youghiogheny & Ohio's second petition for interlocutory review and thereafter on November 25, 1985, the trial judge issued an order to show cause why counsel's failure and refusal to file a post-hearing brief should not be deemed a default and a summary order entered assessing as final the penalties assessed in the bench decision of May 31, 1984. Counsel for Youghiogheny & Ohio made no response and offered no execuse for his contemptuous refusal to file a post-hearing brief.

The premises considered, therefore, it is ORDERED that the operator be, and hereby is, determined to be in DEFAULT. It is FURTHER ORDERED that the penalties assessed in my decision of May 31, 1985 as adopted and confirmed in my final order of August 8, and my supplemental order of

October 4, 1985 in the amount $1,950 be, and hereby are, deemed final and directed to be paid.

Finally, I find the penalties assessed were not arbitrary, capricious, excessive or an abuse of discretion for the reasons set forth in the findings and conclusions contained in the written transcript of my bench decision of May 31 as adopted and confirmed in my final order of August 8, 1985 and reiterated in my supplemental order of October 4, 1985.

Under section 557(c) of the APA and Commission Rule 65 a judge's decision must be in writing and must "include findings of fact, conclusions of law, and the reasons and bases for them, on all the material issues of fact, law or discretion presented by the record." The written transcript of May 31, 1985 and my supplemental order of October 4, 1985 both set forth in writing the findings, conclusions and reasons in support of my penalty assessments, including (1) the fact of violation, which in each instance was never disputed, and (2) the six statutory criteria which, except for gravity and negligence, were the subject of stipulations and/or undisputed documentary evidence.

In Sellersburg Stone, supra, the court held that a judge's decision complies with the APA and Rule 65 if it considers a contention and discusses it, whether or not the judge makes a specific finding on it. Further, the court held that the Commission should not overturn or remand a case if the judge's position on a contention is "reasonably to be discerned." Indeed, the court commended to the Commission the practice of modifing a judge's decision to include undisputed record evidence. In Sellersburg the Commission did this as to four of the statutory criteria on which the judge had made no findings. The undisputed record evidence here showed that Youghiogheny & Ohio is a medium sized coal operator and that its ability to continue in business would not be impaired by any penalty found appropriate. The other four criteria (1) prompt abatement, (2) gravity, (3) negligence and (4) history of prior violations are all set forth in the findings, conclusions, and discussion of the tentative bench decision which the operator declined the opportunity to challenge. What more the Commission may want is impossible for me to discern at this time.

To insure compliance with the order of remand and because the circumstances of this case provide a unique

opportunity to consider what a trivial, if dangerous, pursuit MSHA's $20 penalty assessment program has become, I provide the following supplemental findings and conclusions.

Ventilation at Nelms #2

For years, ventilation has been a problem at the Nelms #2. More specifically, between March 14, 1982 and March 13, 1984, the mine was cited for 83 ventilation violations, for an average of 3.5 violations a month. If the violations found by the UMWA safety committeemen were included the rate would be even higher. Despite the dangerous pattern established, 87 percent or 72 of the cited violations were allegedly harmless and assessed single penalties of $20. Ten others were assessed penalties that averaged approximately $100 and one was vacated.

Ventilation problems continued throughout 1984 and up to the time of the hearing in May 1985. In the areas that are the subject of this case, this was principally due to the fact that the sections being developed were almost a mile, 4,000 feet, from the main air shaft and because the air had to travel over or around many obstacles and obstructions to reach the working faces. A new air shaft was under construction but its completion was not expected until late 1985 or early 1986. Because MSHA had been tolerant of the problem and the Union had not pressed the matter, most, approximately 90 percent, of the violations were treated as minor and insignificant.

It came as a distinct shock therefore that within a period of less than 30 days MSHA suddenly decided to upgrade enforcement and specially assess the recirculation violations that occurred on March 14, and April 5, 1985. Upset over this crackdown, Youghiogheny & Ohio took both citations to conference. When the district manager held fast and refused to rescind or vacate his staff's recommendations for special assessments and when they were later assessed a total of $1,800 Youghiogheny & Ohio filed a notice of contest.

Youghiogheny & Ohio admitted the existence of both violations. Its contest was bottomed on the claim that because the violations were not serious the special assessment determination was clearly erroneous and the amounts assessed excessive, arbitrary, capricious and an abuse of discretion. Citing Allied Products v. FMSHRC, supra, counsel for the operator insisted that the penalties were assessed erroneously because the District and Assessment Offices failed to make the findings required by Part 100 or that such findings

as were made were not supported by the evidence. Counsel wanted a de novo review of only the MSHA administrative (Part 100) record not a de novo determination of the merits based on the evidence adduced at the hearing. Counsel obdurately refused to recognize that under Rule 29(a) and section 110(i) of the Mine Act the Commission and its trial judges exercise their independent judgment in applying the six criteria and are in no way bound by the determinations made by MSHA.

More specifically, however, the operator's challenge was to the time allowed for abatement of Citation #2203748; to its special assessment since the inspector had initially characterized it as non-S&S; and, most importantly, to the finding that a special assessment was warranted because of management's negligent failure to prevent a recurring recirculation problem in the northern sections of the mine. Nothing causes management to send its legal gladiators into the adversarial arena faster or with greater forensic ferocity than a finding that top management was guilty of negligence, especially a "high" degree of negligence, with respect to a safety violation.

Cognizant of the sensitivity of this issue, the Commission early on decided to assiduously avoid making findings as to the degree of management's culpability. Penn Allegh Coal Co., Inc., 4 FMSHRC 1224, 1127, 2 MSHC 1781, 1783; Monterey Coal Company, 7 FMSHRC 996, 1002, 3 MSHC 1833, 1836 (1985). This refusal to "quantify the degree of the operator's negligence," no matter how great, tends to minify violations in a way that is contrary to the intent of Congress.

With respect to Citation #2327363, issued April 5, 1985, the operator specifically challenged the findings of negligence, gravity, S&S, and the alleged failure to give it the 30 percent discount allowable for prompt abatement. Finally there was the bold assertion, summarily denied, that despite the record made at the hearing the judge must remand the matter to the Assessment Office for reassessment because the narrative findings were not in accord with Part 100.5.

The Youghiogheny & Ohio Coal Company

Youghiogheny & Ohio, a subsidiary of Panhandle Eastern Corporation, is a medium sized coal operator with production of approximately 900,000 tons of bituminous coal a year. Its home office is in St. Clairsville, Ohio. The Nelms #2 Mine is located in Hopedale, Harrison County, Ohio. It is the only mine operated by Youghiogheny & Ohio. At the time

of the violations in question, the mine employed 312 contract miners and 57 management or supervisory employees. Youghiogheny & Ohio's counsel agreed that any penalty found warranted would not adversely affect its ability to continue in business.

Walking the 013 Section

Because of recurring complaints and problems with the recirculation of return air in the northern part of the Nelms #2 Mine, two MSHA inspectors, Robert Cerena, a ventilation specialist, and Mark Eslinger, a supervisory mining engineer and ventilation expert, were sent to make a ventilation technical inspection of the mine on March 14, 1984. Both worked out of District 8 in Vincennes, Indiana. Both were experienced underground coal mine inspectors.

Cerena and Eslinger arrived at the mine at 0745 hours, and at 0800 hours, went underground accompanied by Larry Ward, a UMWA safety committeeman, and Lawrence (Ozzie) Wehr, a member of Youghiogheny & Ohio's safety compliance staff. The four men traveled to the 013 section. The inspectors picked this section because recirculation citations had been written on this section in January and February. Nine miners worked the section with a continuous mining unit. Other electrically energized machinery on the section consisted of ram cars, a roof bolting machine, a battery powered scoop, and an auxiliary ventilation fan.

The inspection party approached the face area through the "A" entry. Mr. Wehr testified the mathane reading at the working face was one to two tenths of one percent, well within safe limits. The mine emitted 1.5 million cubic feet of methane every 24 hours which put it in the category of a gassy mine with a pervasive extrahazardous condition. The party then proceeded through the last open crosscut to the "B" entry. In the "B" entry Cerena found a ram car with a permissibility violation. After the citation for the permissibility violation was abated, the party inspected the face of the "B" entry where a continuous miner was producing coal in the last crosscut to the left off the "B" entry. Exhaust tubing was installed on the right rib. The tubing extended from the working face down the right rib and outby the "B" entry into the last open crosscut between the "B" and "C" entries. At this point the exhaust tubing was attached to an auxiliary fan.

Intake air which came down the "A" entry became return air once it swept across the working face. The return air was then exhausted through the last open crosscut, the vent

tubing and the auxiliary fan across the inactive faces in the "C" and "D" entries and out the "D" entry. In the last open crosscut between the "B" and "D" entries Eslinger and Cerena could see float coal dust in suspension and at this point suspected a recirculation problem. Proceeding outby in the "C" entry the inspectors and the others observed perceptible amounts of float coal dust in the "C" entry. At the first man door along the return stoppings Cerena made a smoke tube test and confirmed that return air was coming through the cracks in the man door. This air was then being drawn up the "C" entry to the check curtain and diverted through the second crosscut (8 plus 28) outby the face area and drawn up the "B" entry where it was recirculating across the working face to be vented out the tubing through the auxiliary fan and once again into the return.

At this time, 1015 hours, Cerena advised the section foreman, Clifford Bolen, that a recirculation condition existed for which a citation would be written. Since no methane was detected in the "C" entry or along the stopping line, Cerena, following standing instructions, permitted coal production to continue and considered the violation not reasonable likely to result in a serious injury or illness if abated within the time set, 1215 hours. Because this was the third recirculation violation cited in as many months and others had been reported on this and other sections, Eslinger and Cerena believed management should have been more alert to discover the problem, had failed to exercise the high degree of care imposed by the Mine Act, and could point to no mitigating circumstance. They also believed that if the hazards against which the standard is directed occurred they could result in permanently disabling injuries.

Because at 1015 hours Cerena and Eslinger were not aware of the total extent of the recirculation and did not consider the condition an immediate hazard they did not press for rapid abatement. They apparently believed that allowing 2 hours and 15 minutes for abatement would permit the section foreman to mesh his production with his abatement effort without undue interruption of production. All the members of the inspection party agreed that abatement should have been accomplished within 45 minutes to 1 hour.

The inspection party continued to walk outby in the "C" entry. Recirculation was discovered again at the next two man doors outby. The man doors were installed at every five crosscuts along the stopping line. Thus, the recirculation problem extended over an area of 10 or more crosscuts outby the last open crosscut along the stopping line.

The float coal dust encountered, while clearly visible and palably perceptible, was not so dense as to impair vision. It apparently resembled a fine mist and was determined to be filtering through all three man doors and some of the permanent stoppings. It was steadily accumulating on the surface of the rock dust. Because the standard prohibits "any recirculation of air at any time," neither Eslinger nor Cerena nor the operator made any attempt to measure the actual volume or velocity of air recirculating. 30 C.F.R. 75.302-4(a). Eslinger, when pressed, estimated the volume at up to 3,000 cfm which would be approximately half the amount of air, 6,700 cfm the operator's engineer calculated to be sweeping the working face.

The estimate of the amount of air recirculating seems reasonable, because, as the inspection party later discovered, return air was also recirculating over two battery charging stations in the "C" entry at the 3 plus 50 station. The air vents for the battery chargers measured 8 x 8 or 9 x 9 inches. It is obvious that a considerable volume of air could recirculate through these large vents. A citation was written for this condition because impermissible battery chargers located on intake air must be ventilated through return air vents to remove any hydrogen gas fumes and to preclude the circulation of any noxious gases, including carbon monoxide, to the face area in the event of a fire or explosion. Overall Cerena estimated the area affected by recirculation extended from the working face in the "B" entry across the other two face areas and down the "D" entry outby and back to the working face for a distance of approximately 1,300 feet.

The inspection party completed its observations and returned to the face area around 1100 hours. At that time, they found that Bolen, the section foreman had been unsuccessful in his attempts to abate the recirculation. Bolen said he first tightened the check curtain in the "C" entry and when this did not help installed a tail tube on the exhaust end of the auxiliary fan and extended it down the crosscut into the return. The effort was designed to reduce the auxiliary fan pressure and keep it from overriding the mine pressure. At the time, the intake air was measured at 14,000 cfm and the return at 19,800 cfm.

As Eslinger pointed out, a system wide deficiency in the amount of air available to the section markedly contributed to the problem. This had been corrected previously by adjusting the regulators so as to rob air from one section to make up for a deficiency in another. This is a temporary

and, at times, a very dangerous solution. The immediate problem here, however, was caused by the fact that the auxiliary fan which was exhausting air at a velocity of 5,000 feet per minute in an ambient air atmosphere of 170 feet per minute was "robbing" or short circuiting intake air from the "B" and "C" entries. This created a negative air pressure or vacuum along the return stoppings line of the "D" or return entry. As Eslinger explained:

> ". . . there was a higher pressure in the return entry, which is the "D" entry than the "C" entry and what was causing the higher pressure in the "D" entry than the "C" entry was due to the velocity pressure or the velocity of the air exiting from the fan. Okay.
>
> That pressure created a higher pressure in the "D" entry than the "C" entry; therefore air flows from a high pressure to a low pressure, it was flowing from the "D" entry to the "C" entry. Once back in the "C" entry, the fan was wanting air and, therefore, it was drawing it from the "B" entry. Well, air that's in the "C" entry fills into the "B" entry and, therefore, part of the [recirculated] air was going back through the tubing." Tr. 157.

Wehr pitched in trying to help Bolen. The fan was repositioned and the tail tubing changed twice. All curtains were tightened and curtains were hung in the crosscuts where the return air was leaking through the man doors. But nothing seemed to work. Bolen believed he asked Cerena if he could suggest a solution. Cerena said he was not asked but that in any event he would not have known of a solution. Eslinger, the most expert of all present, said he was never asked for a suggestion and did not believe he should volunteer. Operators, of course, are rightly jealous of their perogative of managing their mines. An inspector who volunteers a plan of abatement can find himself compromised if the plan does not work. Since the section was reasonably clean, dry and rock dusted and the methane readings remained within a safe tolerance there was no reason, the inspectors believed, not to permit the abatement effort to proceed as the operator saw fit.

For reasons not disclosed by the record, the section foreman did not seek assistance from his shift foreman. He said he was not authorized to contact anyone else. Finally, when the abatement time expired, the section foreman advised Eslinger and Cerena he had exhausted his knowledge and resources and had given up trying to abate the condition. At this point, the inspectors decided the only thing they

could do was issue a 104(b) closure order. The section foreman did not ask for an extension of the time to abate and testified he believed the time given was reasonable and issuance of the closure order proper. Mr. Wehr agreed and immediately called out to his supervisor, Mr. Wood, who apparently communicated the problem to the mine foreman and the mine superintendent.

Shortly thereafter the mine foreman and superintendent arrived on the section. Mr. Wurschum, the mine superintendent and a former MSHA inspector, immediately recognized that the recirculation problem was resulting from the venturi effect of the auxiliary fan. He had discussed such a problem with Mr. Jay Haden of MSHA's district office in Pittsburgh in February. Haden told him the solution was to install baffle curtains between the exhaust end of the fan and the return entry to deflect and slow the velocity and negative pressure on the air along the stopping line. With this done, the recirculation abated and the closure order, written at 1230 hours, was conditionally terminated at 1330 hours. The conditional termination allowed production to resume pending an evaluation of the adequacy of the operator's ventilation plan for the entire section. This evaluation never occurred as the operator idled the section on March 16, 1984 and the order was terminated unconditionally on April 4, 1984.

Negligence

I find the mine superintendent was negligent in failing to pass on to the section foreman and his safety compliance staff the information given him in February by Mr. Haden of MSHA. Both Bolen and Wehr testified they had never been told that baffle curtains could be used to decrease the negative pressure caused by an auxiliary fan. In view of the number and frequency of citations and complaints of ventilation problems, including recirculation problems, the mine superintendent should have promptly disseminated all the corrective action information available to him and directed the holding of training sessions to insure section foreman and other line personnel were capable of detecting, recognizing, and abating hazardous recirculation conditions.

Mr. Ingold, the operator's mine engineer, indicated Mr. Wurschum sought a solution to localized negative pressure problems because the condition was fairly pervasive in the mine. He further stated that as of the time of the hearing the operator was still experiencing problems with diffusing the pressure from its auxiliary fans and building baffles on its fans to diffuse the pressure on its return

airways. The preponderant evidence clearly established that in failing to train its section foreman in the methods and practices for abating a venturi effect on a return airway top management at the Nelms #2 was highly negligent.

Gravity

The operator claims the inspector's evaluation of the violation as non-S&S and the gravity as "unlikely" as of the time it was discovered, 1015 hours, is conclusive of the fact that the violation was not serious, indeed was harmless, and any penalty in excess of $20 unwarranted.

This, of course, is nonsense, but dangerous nonsense because it finds support in MSHA's practice of treating violations that do not pose an immediate or imminent danger as insignificant and insubstantial. Both inspectors testified they initially considered the recirculation condition a non-S&S violation because the concentration of methane, one to two tenths of one percent, was well within safe limits. Both realized, of course, that if normal mining operations continued, as they did, and the condition remained unabated, as it did, it could make a significant and substantial contribution to a mine fire or explosion. What MSHA's training apparently overlooks is the provision of the law that makes even a nonserious or seemingly harmless conditions S&S if, as must be assumed, mining operations were to continue with the condition ignored or undiscovered and unabated.

Thus, despite the fact that the citation in question reflected the inspectors' belief that if unabated the condition "could reasonably be expected" to result in "permanently disabling" injuries to the nine miners working on the section, the controlling finding, absent the closure order, insofar as the penalty assessment was concerned was the erroneous non-S&S finding.

Many violations, considered in isolation, are not serious in the sense that they present no immediate or imminent danger of a permanently disabling or fatal injury. But that does not mean that, if not detected and abated, they could not in the course of continued mining operations "significantly and substantial contribute to the cause and effect of a mine safety or health hazard." The Commission has made clear that if a violation is of such a nature as to create a recognizable health or safety hazard that in the course of continued mining operations could reasonable be expected to contribute to a serious injury or fatality it should be classified as S&S, regardless of the seriousness

of the condition or practice "at the precise moment of inspection." United States Steel Mining Co., Inc. 6 FMSHRC 1573, 1574, 3 MSHA 1445 (1984); United States Steel Mining Co., Inc. 6 FMSHRC 2058, 2069-2070, 3 MSHC 1622 (1984).

Thus, all violations are to be evaluated in terms of the probable consequences of the continued existence of the violation under normal mining operations, without any assumptions as to the time of abatement. In other words, for a violation to be deemed significant and substantial, S&S, it need not be one. The sole requirement is that its "contribution" be S&S. United States Mining Co., Inc. 7 FMSHRC 1125, 1129, 3 MSHC 1871, 1872 (1985).

The corollary of this interpretation is that an operator is entitled to mitigation for prompt abatement but not for getting caught. An operator is not to be accorded leniency because the inspector found the violation before it made a possibly lethal contribution to a fatal hazard but only to consideration for moving quickly and effectively to abate the condition found and cited. United States Steel Mining Co., Inc., supra 7 FMSHC 1130, 3 MSHC 1974.

The passage of time and the failure to abate while mining operations continued increased the inspectors' apprehension over what at first blush and under the erroneous standard applied appeared to be an inconsquential violation. At 1215 hours, Cerena and Eslinger reevaluated the situation and, as noted, at 1230 hours issued a 104(b) closure order. This, of course, guaranteed the safety of the section until the condition was corrected and the order terminated. It also had the effect of superseding the non-S&S finding and making the violations immediately eligible for a regular or special assessment. 30 C.F.R. 100.4. Counsel apparently overlooked the fact that one of the circumstance that justifies special assessment of a citation designated as non-S&S is the failure to abate the condition cited within the time set by the inspector.

Belatedly, if inadvertently, sensing this hole in its non-S&S defense to the amount of the penalty, the operator asserted but never proved that the time allowed for abatement was unreasonable and the issuance of the closure order arbitrary, capricious and unwarranted. To the contrary, neither the mine superintendent nor the mine foreman protested issuance of the closure order and both the section foreman and the operator's walkaround, Mr. Wehr, testified that in their opinion the time for abatement was reasonable and issuance of the closure order proper.

The rapidity of the attention given the problem by top management after issuance of the closure order demonstrates the striking difference between the tokenism of the $20 single penalty enforcement scheme and meaningful enforcement. The comparison in reaction was not unlike that which Mark Twain made between lightning and lightning bug. The mine superintendent, who almost never appeared underground, and the mine foreman appeared on the scene within a very short period of time and quickly directed installation of the three baffle curtains. By 1330 hours the curtains had been installed, the fan restarted and the air along the return stoppings tested to show that the pressure was now positive from the intake to the return.

Inspector Eslinger remarked upon the aclarity with which top management gave its time and attention to the condition after the closure order issued. While he considered the means adopted a mere "band-aid" upon a problem endemic to the operator's entire ventilation system, he believed the closure order much more "attention getting" than allowing the operator to "eat $20 penalties" indefinitely while largely ignoring the gravity of the systemic problem.

The operator's history of prior violations shows that during the 2-year period March 1982 to March 1984 only 92 out of 552 violations were designatd S&S. In other words, for 83 percent of the violations cited during this period the operator got off with a $20 penalty. As noted, during this same period the operator was cited for 83 ventilation violations 87 percent of which were designated non-S&S and assessed only $20. Of these 83 violations 9 involved recirculation problems 7 or 75 percent of which were designated non-S&S and assessed at $20. At least five additional recirculation violations occurred in 1984, only one of which was designated S&S. A recirculation violation was also cited on February 5, 1985. The record shows no further specifics but the testimony by Mr. Ward, the Union safety committeeman, indicated recirculation violations were frequent and expected to continue until the new air shaft was completed.

As Inspector Eslinger noted the ease with which operators "eat" $20 penalties shows it is not a credible deterrent. When coupled with MSHA's misapplication of the non-S&S designation, enforcement becomes a largely trivial pursuit. Top management was well aware of the ventilation problem in the northern sections of the mine. But top management also knew it was more cost effective to just pay the $20 fines and get on with producing coal than to train

the work force in the procedures necessary to insure safe production methods.

The recirculation ceased when the baffle curtains were installed. These curtains were available to the section foreman but he had never been trained in their use. Management's failure to train the section foreman in the use of this device for abating a serious reciculation problem was negligence clearly and directly imputable to the mine superintendent. It measureably increased the gravity of the violation as every hour of delay in abatement measureably contributed to the risk of a major mine hazard.

On gravity, therefore, I find that by the time the closure order issued the likeihood of a major mine hazard if mining operations continued was high and the severity of the consequences for the nine miners, two inspectors, and two walkarounds serious to extreme.

The Special Assessment

The operator's attack on the MSHA's special assessment procedures is without merit. The Commission has repeatedly held that the procedures by which penalty assessments are proposed by the Secretary of Labor are irrelevant and immaterial to a penalty assessment by the Commission or its trial judges. Black Diamond Coal Company, 7 FMSHRC 1117, 1121-1122, 3 MSHC 1889, 1892-1893 (1985). Had counsel done his homework he would have known that his reliance on Allied Products Company v. FMSHRC 666 F. 2d 890 (5th Cir. 1982) was misplaced. As the court pointed out in Sellersburg Stone Company v. FMSHRC, 736 F. 2d 1147, 1152 (7th Cir. 1984), rehearing en banc denied, the reasonableness of penalties assessed in Commission penalty proceedings are not measured by the penalty point formula set forth in Part 100. I note in passing, however, that a special assessment in the amount of $850 for a ventilation violation that significantly and substantially contributed to hazards similar to those involved in this violation was made and upheld in Monterey Coal Company, 7 FMSHRC 996, 999, 3 MSHC 1833, 1834 (1985).

The violation in this case was S&S. In addition a closure order was necessary to get sufficient attention from top management to bring about abatement. Short of issuing a closure order there was no way to do this. By 1230 hours, the inspectors knew they had a serious problem on their hands, especially since the section foreman stated he had exhausted his resources for abating the condition. At this point, and to their credit, Cerena and Eslinger concluded

that enough was enough and that management's recidivism justified the closure. As Eslinger testified,

> ". . . the frequency of occurrence . . . was probably the key factor . . . the fact that it was a reoccuring problem that seemed to be happening again and again and only band-aid type solutions were being applied to it." Tr. 165.

On March 29, 1984, Eslinger wrote a memorandum to the District Manager in which he made an independent evaluation of the violation and concluded that to overcome the operator's "reluctance" to provide sufficient intake air and encourge compliance a special civil penalty assessment was in order.

My only disagreement with the inspectors is over the degree of the operator's culpability. They found "high" negligence. I find the operator's failure to provide the necessary preventive training and instruction to the section foreman when, as the record shows, the mine superintendent was possessed of that information demonstrated a reckless disregard for safety that warrants an increase in the penalty from $850 to $1,000.

Walking the 021 Section

Three weeks later, on the morning of April 5, 1984, Inspector Cerena accompanied by a union walkaround and company escort, made another ventilation technical inspection in the 021 section of the Nelms #2 Mine. The undisputed facts show the inspector found a recirculation violation that involved the last open crosscut and two crosscuts outby in the "B" entry involving an area of about 300 feet. The recirculation resulted from the removal of a tail tube from the auxiliary fan. The methane reading at the working face was .5 percent. Recently an outburst of 1.8 percent had occurred.

The inspector issued a 104(a), S&S citation because he believed the potential for a methane buildup was reasonably likely if mining operations continued and therefore the condition could significant and substantially contribute to the hazard of a mine fire or explosion. He also believed the amount of float coal dust in suspension presented a respirable dust hazard that could significantly and substantially affect the health of miners working or traveling in the area.

The inspector believed the section foreman was negligent in failing to discover the condition; that he had alerted the foreman to watch for a recirculation problem when a mean air violation was corrected by removing the tail tube; and that the mine superintendent was "highly" negligent in failing to instruct and train the section foreman in the use of baffle curtains to diffuse the venturi effect caused by the high velocity of air coming from the exhaust fan.

Because this was the fourth occurrence of a serious recirculation violation in as many months, and followed closely after the closure order issued on March 14, Inspector Eslinger recommended the violation be specially assessed. In his judgment the mine superintendent was highly negligent in failing to give his ventilation problems the time and attention they deserved; was applying only band-aid remedies to a systemic problem of considerable magnitude; and had aggravated the problem by his failure to train and instruct his section foreman in the use of baffle curtains to relieve the negative pressure created by use of high velocity auxiliary fans.

The operator admitted the violation but claimed the special assessment, $950, was, in view of mitigating circumstances, excessive. The record shows the condition was timely, but not rapidly, abated only because the inspector told the foreman to use baffle curtains. Counsel failed to prove the existence of any mitigating circumstances.

I find the preponderant evidence supports the inspector's finding that the violation was serious and could significantly and substantially contribute to a mine health or safety hazard.

Gravity and Negligence

With respect to the special finding, the record shows the hazards associated with inadequate ventilation, of which recirculation is a symptom, are among the most serious encountered by the mining industry. A basic reason for the total prohibition on recirculation of return air is the danger of an ignition of an explosive concentration of methane, either alone or mixed with coal dust, liberated at the face during mining operations. When coal is freshly cut, methane can be liberated in dangerous amounts in short periods of time. Although methane itself becomes explosive at a 5 percent concentration, even a smaller percentage concentration of the gas mixed with float coal dust can generate an explosion. Crickmer and Zegeer (ed.), Elements

of Practical Coal Mining, 264-265, 296-298, 312-315 (1981); R. Lewis & G. Clarke, Elements of Mining 695 (3d ed. 1964).

The legislative history of the Mine Act shows Congress was acutely aware of these, and related, dangers associated with inadequate ventilation. S. Rep. 181, 95th Cong., 1st Sess. 41 (1977). The Nelms #2 is a gassy mine that liberates excessive amounts of methane and is under the extrahazardous inspection cycle required by section 103(i). The citation was issued at a working face where coal was being cut. The discrete hazard contributed to by the recirculation of return air was a potential buildup at the face of methane and coal dust that could result in a possible methane ignition or that could propogate a dust explosion.

I further find that if the hazards contributed to occurred it was reasonably likely that one or more miners would suffer fatal or disabling injuries. As the inspector testified, methane in an explosive concentration could have been liberated at any time and with the turbulence caused by the recirculation could have achieved an explosive concentration within a relatively short time. The continuous mining machine, the operation of which may cause arcing and sparking, was a ready and potential source of ignition. I conclude MSHA carried its burden of showing a discrete safety hazard contributed to by the violation, namely the possible accumulation of mathane and coal dust in the presence of a potential ignition source.

Finally, I find the inaction of the mine superintendent in the face of the recurring recirculation problems at the Nelms #2 demonstrated a reckless disregard for the safety of the miners. Indeed, management of the Nelms #2 developed a pattern of ventilation violations which fully warranted application of the sanctions provided in section 104(e) of the Mine Act. As the Senate Committee Report observed, "The existence of such a pattern should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient." Sen. Rep., 95-181, 33 (1977).

Under section 104(e) of the Act, the Secretary of Labor was authorized to issue a pattern of violations notice to a mine operator if the mine showed a pattern of S&S violations. Congress established this provision to address the problem of mine operators who have recurring violations of health and safety standards. The principle expressed was that a 104(e) pattern of violations notice should be available as

an enforcement tool against chronic violators. Congress made clear that chronic violators demonstrate a reckless disregard for the safety and health of miners by allowing the same mine hazards to occur again and again without addressing the underlying problems. Id, at 32-33. That describes this case precisely.

Had the sanctions of 104(e) been applied, a pattern of violations notice would have been issued to Youghiogheny & Ohio long before March 14 or April 5, 1984. Consequently, by that time the chronic ventilation deficiency would either have been abated or 104(e) closure orders would have brought the condition forcefully to the attention of management.

This did not and could not happen because section 104(e) of the Mine Act is a dead letter. For the past 8 years, since its enactment and through the administrations of two Presidents, four Secretaries of Labor, and four Assistant Secretaries of Labor for Mine Health and Safety, the Executive Branch's duty to "take care that" section 104(e) "be faithfully executed" and enforced has been ignored.

After considering the other statutory criteria as set forth in my findings and as stipulated to by the parties, I find the amount of the penalty warranted for this violation is $950.

ORDER

To impress upon the operator the need to address in a more urgent and resolute manner chronic problems with the ventilation system at the Nelms #2 Mine it is ORDERED that the operator pay the penalties assessed in the total amount of $1,950, on or before Friday, February 21, 1986.

Disciplinary (Rule 80) Reference

Rule 80 of the Commission's rules provide for the imposition of disciplinary sanctions for violations of the standards of professional conduct. Except as provided in Rule 80(e), however, a trial judge is required to refer such matters to the Commission which, by majority vote, determines whether the circumstances reported warrant disciplinary action. Having carefully reviewed the record in this matter, I find the following circumstances warrant reference:

1. Counsel for the operator refused to comply with the trial judge's order to file a post-hearing brief

and persisted in that refusal even after the Commission denied his appeal from the judge's order.

2. Before, during, and after the trial, counsel for the operator persisted in citing Allied Products v. FMSHRC, supra, as the controlling precedent on the issue of the alleged excessiveness of the penalties, ignoring and failing to distinguish in any way controlling precedent to the contrary.

3. Throughout the trial of this matter, counsel for the operator persisted in badgering the witnesses and the trial judge with the totally erroneous claim that Part 100.3 of the Secretary's penalty assessment formula was controlling of the amount of the penalties properly to be assessed.

4. Throughout the trial of this matter, counsel for the operator persisted in badgering the witnesses and the trial judge with the clearly erroneous claim that MSHA misapplied Part 100.5 when resonable inquiry would have demonstrated that by virtue of issuance of the closure order on March 14, 1984, special assessment of the citation in question was mandated by Part 100.5.

5. Throughout the trial of this matter, counsel for the operator persisted in ignoring controlling precedent on the definition of an S&S violation.

6. Counsel for the operator persisted throughout the trial of this matter in advancing frivolous arguments and claims with respect to both the facts and the law as the findings on the merits demonstrate.

With respect to specification 1, Disciplinary Rule 7-106 of the Code of Professional Responsibility provides:

> "(A) A lawyer shall not disregard . . . a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such . . . ruling."

Despite this clear injunction, counsel for the operator failed and refused, after denial of his appeal, to comply with the trial judge's order to file his post-hearing proposals and brief. While, under appropriate circumstances, it is not uncommon for a party to waive the filing of a

brief, Bradford Coal Company, 7 FMSHRC 862, 3 MSHC (1985), in this case counsel's appeal from the trial judge's order requiring a brief was denied. While the basis for the denial was not stated, it followed closely upon the Commission's earlier grant of counsel's appeal from the trial judge's claimed failure to consider the arguments he wished to present in support of his position.

As Ethical Consideration 7-22 notes, "Respect for judicial rulings is essential to the proper administration of justice." By failing to comply with the trial judge's order, counsel not only showed his disrespect for this tribunal but failed in his duty to protect the interests of his client by pressing his argument, if legitimate, that the tentative bench decision was erroneous. If, on the other hand, he had no legitimate argument to present he should have accepted the bench decision and avoided waste of the Commission's time and resources by filing a frivolous appeal. The Preamble to the Code of Professional Responsibility states that the Disciplinary Rules are mandatory in character and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

With respect to specifications 2 through 6:

Rule 1.1 of the Model Rules of Professional Conduct impose a duty of competence on a lawyer that includes a duty to make thorough and adequate preparation for the trial of a matter. The record in this proceeding shows that counsel for the operator failed to make the necessary inquiry and analysis of the factual and legal issues controlling of the outcome with the result that much time, effort, and expense was incurred by both parties and the Commission in disposing of a matter that should never have been contested.

Rule 3.1 of the Model Rules provides that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . ." An action is "frivolous" if it cannot be supported by a "a good faith argument for an extension, modification or reversal of existing law." Counsel for the operator never advanced a legitimate argument for modifying or reversing the law governing the assessment of civil penalties in Commission proceedings. An advocate has a duty to use legal procedure to the fullest benefit of a client's cause, but also a duty not to abuse legal procedure, including the Commission's administrative process. The litigation process may, of

course, be abused for reasons other than delay. See Advisory Committee Note to amended Rule 11 of the FRCP (1983).

Rule 3.3 of the Model Rules provide that "A lawyer shall not knowingly . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." The record shows that with the exercise of reasonable diligence, as required by Rule 11 of the Federal Rules of Civil Procedure, counsel for the operator should have known that Allied Products, supra, was not controlling precedent in this Commission proceeding.

Under the circumstances presented, the trial judge recommends that if the Commission finds the unprofessional conduct alleged warrants disciplinary action, Robert C. Kota, Esq., a member of the bar of the State of West Virginia, be publicly reprimanded for contempt of the Commission and suspended from practice before the Commission for 6 months.

The premises considered, therefore, it is ORDERED that the actions heretofore specified as violative of the standards of professional conduct by Robert C. Kota, Esq., a member of the bar of the State of West Virginia, be, and hereby are, REFERRED to the Commission pursuant to Rule 80 for such disciplinary action as the Commission deems appropriate.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 85-47-DM Docket No. CENT 85-68-DM
v.	:	MD 85-04
EISENMAN CHEMICAL COMPANY, Respondent	:	Corpus Christi Mine

DECISION APPROVING SETTLEMENT

Appearances: Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Complainant
Steven R. Baker, Esq., Houston, Texas, for Respondent

Before: Judge Maurer

STATEMENT OF THE CASE

This is a consolidated discrimination proceeding initiated by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, charging the respondent with unlawful discrimination against Mr. Juan Gilberto Pena, for exercising certain rights afforded him under the Act. A hearing in this matter was convened in Corpus Christi, Texas on December 18, 1985. At that time the parties advised me of a proposed settlement disposition of the dispute.

Counsel for the Secretary read the settlement into the record as follows:

MR. OSTRANDER: Comes now the Secretary of Labor, Complainant, and Eisenman Chemical Company, Respondent in the above styled case, and agree to settle this case on the basis of the following stipulations:

A. Respondent agrees to pay Complainant, Juan G. Pena, the sum of $13,000 in full and complete satisfaction of back wages due to Complainant under Section 105(c)

of the Act, without admitting a violation of the Act.

B. Secretary agrees to waive a civil penalty in this case upon payment of the sum of $13,000 to Juan G. Pena.

C. the intent of this agreement is to settle all claims Complainant may be due under the provisions of Section 105(c) of the Act.

D. Complainant waives any right to reinstatement and any right to reapply for a position.

E. Eisenman Chemical will remove from the personnel file any references of Juan G. Pena's termination, including the letter of discharge. Such documents and/or references, however, may become a part of any relevant litigation file, and this agreement in no way prejudices Respondent's rights to use any such documents and/or references in any relevant litigation or investigation.

F. Respondent will give Juan G. Pena neutral references in the future.

CONCLUSION

After careful review and consideration of the settlement terms and conditions proposed by the parties in this proceeding, I conclude and find that it reflects a reasonable resolution of the complaint. Further, since it seems clear to me that all the parties, including Mr. Pena personally, are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement is APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply with the terms of the agreement.

Upon full and complete compliance with the terms of the agreement, this matter is dismissed.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 85-132 A. C. No. 01-00328-03585
v.	:	Bessie Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENTS
ORDER TO PAY

Before: Judge Merlin

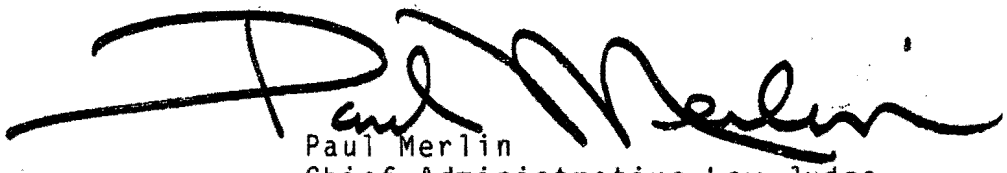
The Solicitor has filed a motion to approve settlements of the three violations involved in this matter. The originally assessed amounts were $15,000, and the proposed settlements are for $9,500.

Order No. 2482343 cites the operator for a violation of 30 C.F.R. § 77.500 because work was performed inside a wall-mounted, 520-volt, a.c., three-phased switchbox while the box was energized and the violation contributed to a fatal accident. An employee was working on energized terminals inside the box when he was electrocuted. Had the box been deenergized and locked out, the accident would not have occurred. A settlement is recommended for the original amount of $5,000. I approve this settlement.

Citation No. 2483515 cites the operator for a violation of 30 C.F.R. § 77.505 because a cable, supplying power to a distribution center at the motor pit, had not been installed through proper fittings. This violation was serious because it contributed to the accident. However, the Solicitor advises that if the wall mounted switchbox had been deenergized and locked out, (the first violation discussed above) there would have been no electrical exposure to the electrician who was killed. In other words, this citation is part and parcel of the entire situation for which Order 2482343 sets forth the principal violation. I accept the recommended settlement of $2,000.

Order No. 2482352 cites the operator for a violation of 30 C.F.R. § 77.501 because the pole-mounted power-disconnecting devices which controlled the power to the safety switchbox, was not disconnected. Here again, the Solicitor advises that this condition would not have been a violation if the wall mounted switchbox had been deenergized and locked out (the first violation discussed above). For the reasons already set forth I accept the recommended settlement of $2,500.

The operator is ORDERED TO PAY $9,500 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-76 A.C. No. 46-05121-03501
v.	:	Wayne Mine
FRONTIER-KEMPER CONSTRUCTORS, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The parties have filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalties in the amount of $7,500 within 30 days of this Decision. Upon such payment this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-43-M A. C. No. 41-03162-05504
v.	:	Chadwick Pit
EL PASO SAND PRODUCTS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements of the eight violations involved in this matter. The originally assessed amounts were $3,600 and the proposed settlements are for $3,600. The Solicitor's motion is wholly inadequate because it does not analyze the violations or demonstrate why the proposed settlements should be allowed beyond reciting the bare conclusion that they are fair and reasonable. Moreover, the Solicitor erroneously refers to section 105(b)(1)(B) of the Act which concerns the Secretary's assessment of civil penalties instead of section 110(i) which sets forth the Commission's authority. However, MSHA's narrative findings fully explain and justify the violations and penalty amounts in light of the statutory criteria set forth in section 110(i). On the basis of MSHA's analysis, I accept the recommended proposals.

Accordingly, the recommended settlements are Approved and the operator having paid, this matter is Dismissed.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN [illegible]

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-160-M A.O. No. 15-00034-05506
v.	:	Greenville Quarry and Mill
GREENVILLE QUARRIES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN for Petitioner,
Rees Kinney, Esq., Jarvis, Payton and Kinney, Greenville, KY for Respondent

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Subsequent to their opening statements at the hearing on December 6, 1985 at Nashville, Tennessee, the parties jointly moved for approval of a settlement agreement and dismissal of the case. The violations in this case were originally assessed at a total of $1600 and the parties propose to reduce the penalty to a total of $800. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of a settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $800 within 30 days of this decision. Upon payment, these proceedings are DISMISSED.

Roy J. Maurer
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

JAN

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 85-236
Petitioner	:	A.C. No. 36-02713-03509
v.	:	
	:	Frenchtown Strip Mine
POWER OPERATING COMPANY, INC.,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This case concerns a civil penalty proposal initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $20 for an alleged violation of the reporting requirements of 30 C.F.R. § 50.20(a). The alleged violation is stated in a section 104(a) citation served on the respondent's representative by an MSHA inspector on April 15, 1985.

The matter was scheduled for a hearing on the merits. However, the hearing was subsequently cancelled after the parties agreed to submit the matter to me for summary decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64. The parties have filed cross-motions for summary decision, with supporting stipulations and arguments.

Issue

The issues presented here is whether the respondent violated the requirements of 30 C.F.R. § 50.20(a), and if so, the appropriate civil penalty which should be assessed taking into account the requirements of section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 85-164, 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 C.F.R. § 2700.1 et seq.

4. 30 C.F.R. § 50.20(a).

Discussion

Section 104(a) Citation No. 2403692, issued on April 15, 1985, cites a violation of 30 C.F.R. § 50.20(a), and the cited condition or practice is stated as follows:

> The operator has omitted on Section A, the company name. Section C, No. 9, the condition contributing to the accident. No. 10, equipment involved. No. 11, name of witness to accident, if any, on the Mine Accident and Injury and Illness Report, MSHA Form 7000-1, for accident that occurred on 3-21-85.

The facts in this case are not in dispute. The parties have stipulated that on March 21, 1985, at 9:30 a.m., Mr. John J. Podliski, a miner employed by the respondent, slipped while on duty and bruised his right knee. He continued to work the remainder of the work day on March 21, but was off from work on March 22, for reasons associated with the injury he sustained.

The parties stipulated that the respondent filed the required accident report with MSHA on March 25, 1985, and there is no dispute that when it was filed the company name was omitted from Section A, line two of the report, and that items 9, 10, 11 of Section C were left blank. Item 9 is the space provided for the full description of the conditions contributing to an accident; item 10 is the space for describing any equipment involved in an accident; and item 11 is the space for listing the name of any witness. The citation was issued because of these omissions.

In support of the citation, petitioner argues that the reporting requirements of 30 C.F.R. Part 50 implements sections 103(a) and (b) of the Act, and are intended to achieve the statutory objective or acquisition and analysis of accident, injury, and illness data for the purpose of reducing

mine safety and health hazards. Petitioner states that the reporting requirements established by Part 50 provide a mechanism for the identification of those aspects of mining which need intensified attention through health and safety regulation. 44 Fed. Reg. 52827 (1979). Part 50 requires the reporting of all occupational injuries irrespective of whether there exists a causal nexus between the miner's work and the injury sustained. Secretary of Labor v. Freeman United Coal Mining Company, 3 MSHC 1447 (1983).

The petitioner points out that the form in question requires the respondent to fully describe the conditions contributing to an occupational injury and to quantify the resulting damage or impairment. Petitioner maintains that the failure of the respondent to complete question No. 9 on the form on its face violates 30 C.F.R. § 50.20(a), and directly impinges upon MSHA's ability to comprehensively compile data on injury causation factors. Petitioner also believes that a delay in the reporting and description of an occupational injury can impede the investigative capability of MSHA, and that an omission on the reporting form defeats the twin goals of the reporting requirements of Part 50-- swift investigation of accidents and compilation of injury causation factors. Since these objectives are central to MSHA's efforts at health and safety regulation, petitioner concludes that the partially completed form violated 30 C.F.R. § 50.20(a) as a matter of law.

The respondent concedes that the purpose and scope of Part 50 is to implement MSHA's authority to investigate, to obtain and utilize information pertaining to mine accidents, injuries, and illnesses, and that the information received will be used to develop the rates of injury occurrence, and, data respecting injury severity.

Respondent acknowledges that 30 C.F.R. § 50.20-4 sets forth the criteria for completion of Section A of the form, and that this includes identification data such as the mine identification number (I.D.), and the mine and company name. Conceding that the obvious purpose for this information is to identify the mine location and name for investigation purposes, the respondent argues that the information should be read together with the information at the end of the form which requires the name of the person completing the form, the title, date, and the area code and phone number. The respondent asserts that when it provided the mine I.D. number, the location of its mine, the name of its clerk, and its phone number, MSHA had all the information it needed to promptly investigate. Respondent suggests that had MSHA dialed the

listed phone number, the first thing which would be learned is the company's name, and coupled with its listed I.D. number, the respondent's involvement would have been readily identified.

With regard to item No. 9, Section C of the form, the respondent points out that 30 C.F.R. § 50.20-6 states that the condition contributing to the accident should be described, and that this means stating what happened, the reasons therefor, and the factors which contributed to the injury and damage. Respondent asserts that these requirements should be read together with item Nos. 20, 21, and 22 of the form. Respondent points out that in the report which it filed on March 25, 1985, it was stated that the employee slipped and bruised his right knee. The amended form which MSHA accepted as abatement stated that the employee was "walking around the dozer and sprained knee," and the information provided in the initial report stated the same "slipping and bruising the knee" information, and that nothing more could be said.

With regard to item No. 10 as to "equipment," respondent states that it was left blank since no equipment was involved. Item No. 11 as to "witnesses" was left blank because no witnesses were involved. Respondent suggests that when all of the information it submitted on its initial form is read together, MSHA had all the information necessary to carry out the purposes of the Act and regulations. Respondent points out that even with the amended form which was accepted by MSHA to abate the violation, nothing more was added.

Respondent asserts that the alleged violation and proposed $20 civil penalty assessment is based on a de minimus and highly technical construction of the regulations. Respondent concludes that the information provided was in substantial compliance with the regulation, and was sufficient for MSHA to perform its information gathering duties.

Findings and Conclusions

I conclude and find that the injury suffered by Mr. Podliski was an "occupational injury" as defined by 30 C.F.R. § 50.2(e), and that it was required to be reported on MSHA Form 7000-1, as stated in 30 C.F.R. § 50.20(a). While I agree with the respondent's assertion that the information furnished on the form as originally filed with MSHA was in substantial compliance with the reporting requirements of section 50.20(a), I conclude and find that the failure of the respondent to fully describe the conditions contributing

to the accident in question, coupled with the total omission of the information required in question No. 9, constitutes a violation of section 50.20(a). While it is true that the information submitted by the respondent indicated that the accident victim slipped and bruised or sprained his knee, there is no information to explain how it occurred, what caused the slip, etc. The applicable criteria found in section 50.20-6(a)(3), required that this information be supplied.

Respondent suggests that since the form was filled out by one of its office clerks, the omissions were the result of clerical oversight. While this may be true, I take note of the fact that section 50.20(a) requires that the form in question be completed or reviewed by the respondent's principal officer in charge of health and safety at the mine or the supervisor of the mine area in which the accident or injury occurred. I find nothing in this case to suggest that this was done. It seems to me that the preparation or review of the form by the mine safety officer, or some supervisory foreman at the area where the accident occurred, before it was submitted may have resulted in the full completion of the form and may have prevented the issuance of the citation.

With regard to the respondent's assertion that its failure to include the name of the operator and to complete item Nos. 10 and 11 were de minimus oversights, while it may be true that no equipment or witnesses were involved in the accident, MSHA has no way of knowing that unless the person submitting the form clarifies it by indicating "none" or otherwise explaining it. MSHA may wish to clarify its instructions to preclude future oversights and omissions of this kind. With respect to the omission of the company name, while it is true that the mine I.D. and telephone number were supplied, the requirement that the company name be included on the form seems like a rather basic and innocuous requirement that should be complied with.

In view of the foregoing, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Civil Penalty Assessment

The parties have filed no information concerning the six statutory criteria found in section 110(i) of the Act. However, I take note of the fact that the violation was assessed as a "single penalty" by MSHA. The information contained in the pleadings and proposed assessment made by the pleadings reflects that the respondent is a small operator. I conclude

that a civil penalty of $10 is appropriate and reasonable for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $10 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
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 17 1985

LADY JANE COLLIERIES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 85-116-R
	:	Citation No. 2403626; 2/5/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 85-117-R
	:	Citation No. 2403627; 2/5/85
	:	Docket No. PENN 85-151-R
	:	Order No. 2403644; 2/21/85
	:	Docket No. PENN 85-152-R
	:	Order No. 2403645; 2/21/85
	:	Stott No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-216
	:	A.C. No. 36-00880-03533
v.	:	
	:	Stott No. 1 Mine
LADY JANE COLLIERIES, INC., Respondent	:	

SUMMARY DECISIONS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern two citations issued to the contestant/respondent Lady Jane Collieries (hereinafter Lady Jane), on February 5, 1985, for two alleged violations of mandatory health standard 30 C.F.R. § 90.103(b). The citations were issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a), because of the alleged failure by Lady Jane to maintain the pay status of two "Part 90" miners who were transferred to other jobs. The citations were timely contested by Lady Jane in Docket Nos. PENN 85-116-R and PENN 85-117-R.

On February 21, 1985, two section 104(b) orders were issued to Lady Jane because of its alleged failure to timely abate the previously issued section 104(a) citations. Lady Jane timely contested the issuance of these orders in Docket Nos. PENN 85-151-R and PENN 85-152-R. MSHA subsequently filed a proposal for assessment of civil penalties pursuant to section 110(a) of the Act seeking civil penalty assesments of $90 for each of the alleged violations.

The parties mutually agreed to waive a hearing on the merits, and agreed to submit the matters to me for summary decisions pursuant to Commission Rule 64, 29 C.F.R. § 2700.64. The parties have filed cross motions for summary decision, a joint stipulation of facts, and briefs in support of their respective positions.

Issues

The principal issue presented in these proceedings is whether or not Lady Jane violated the provisions of 30 C.F.R. § 90.103(b) by failing to adequately compensate the two "Part 90 miners" in question. Additional issues raised by the parties are disposed of in the course of these decisions.

Stipulations

The parties have stipulated to the issuance of the citations and orders, the size and scope of Lady Jane's mining activities, and to the relevant civil penalty assessment criteria found in section 110(i) of the Act. The joint stipulation of facts with respect to the remaining issues in these proceedings are as follows:

> 1. The Stott No. 1 Mine was a medium sized mine producing approximately 200,000 tons annually.
>
> 2. Lady Jane Collieries, Inc., is ultimately owned by Pennsylvania Power and Light Company. Captive coal mines owned by Pennsylvania Power and Light Company produced 2,925,361 tons of coal in 1984.
>
> 3. Lady Jane employed approximately 100 employees, while operating two active working sections.

4. The mine operated 5 days a week on three production shifts and produced approximately 1,000 tons of coal per day.

5. In the middle 1970's, the company built a cleaning plant which processed the coal from the mine and also from coal purchased from neighboring operations.

6. During 1983, it was determined that the workable coal seam was being exhausted and would in fact be depleted sometime late in 1984.

7. In April 1983, the company met with its employees and informed them of the fact that the mine's life was nearing an end.

8. It then indicated to the employees that at the conclusion of the underground reserves Lady Jane would remain as a surface facility.

9. The surface facility would consist of a preparation plant which would handle coal purchased locally from various operators.

10. The employees were informed that fewer jobs would be available at the plant, probably 15 or 20 as a maximum.

11. The employees were further advised that they would be informed in the near future as to who was chosen to remain at Lady Jane.

12. Additional employees would be afforded opportunities, if they so chose, at either construction jobs at Pennsylvania Power and Light Company or at mining positions with Pennsylvania Mine Corporation and its various related companies.

13. Additionally, the opportunity for severance pay and for early retirement was discussed at a meeting with the employees.

14. On May 23, 1983, a list of personnel to remain at Lady Jane was published. That list included names of personnel and the jobs

for which they had been selected. Selection was done on the basis of seniority and ability to perform the position in question (Exhibit 1).

15. Shortly thereafter, some employees who were not designated to remain at Lady Jane began to take advantage of jobs with PP&L or PMC. Exhibits 2 and 3 show employee displacement activity as of June 24, 1983 (Exhibit 2) and January 28, 1985 (Exhibit 3).

16. Exhibits 4 and 5 show organization charts of Lady Jane as it existed in 1982 (Exhibit 4) and in August 1984 (Exhibit 5).

17. The underground mining operations at Lady Jane ceased on December 14, 1984.

18. At that time, all underground coal production ceased at Lady Jane; the only underground activity which remained was the recovery of the equipment and the mine sealing work.

19. The equipment recovery took a relatively short time while the mine sealing work currently continues, and it is estimated that the sealing project will be completed sometime prior to the end of 1985.

20. On December 17, 1984, a reorganization took place at Lady Jane. That reorganization is exemplified by an organizational chart (Exhibit 6) which shows the structure of the organization effective December 17, 1984.

21. At that time, Lady Jane began functioning as a coal preparation facility. Coal from various local suppliers was trucked into Lady Jane, processed through its preparation plant and shipped via Conrail to the Sunbury Power Plant of PP&L. The only underground activity that continued was the sealing project which would continue well into 1985.

22. On December 14, 1984, a number of employees were displaced from Lady Jane. Each was given an option election in which they could chose the following:

Option 1 - Possible employment with PP&L or PMC

Option 2 - Early retirement with severance allowance

Option 3 - Severance allowance

Each employee had 30 days following the date of his layoff to make his determination.

23. Prior to December 14, 1984, Arnold McCracken had been employed as the general outside foreman. His job responsibilities were those as listed on Exhibit 7. With the closing of the underground mining operation, many of Mr. McCracken's duties as outside shop foreman were eliminated since a majority of his activities had to do with the repair of underground mining equipment which was no longer called for. Based upon the completion of underground mining, Mr. McCracken's position and that of a number of other employees were terminated as no longer needed.

24. In May 1983, Mr. McCracken had been designated to stay at Lady Jane as a sampler (Exhibit 1). The rate on the sampler position was $10.78 per hour. That rate did not become effective for Mr. McCracken until January 2, 1985, since from December 17 until January 2, he was on vacation (Exhibit 8).

25. In 1983, when positions were assigned for the surface facilities, it was determined by management that Mr. McCracken did not have the necessary experience to perform the position of plant foreman. He had never performed that task in the past, and the incumbent, Clair Ireland, was designated to perform that task subsequent to the termination of underground mining operations at Lady Jane.

26. Some tasks formerly done by Mr. McCracken were now assigned as additional responsibility to Mr. Clair Ireland or other Lady Jane employees; other tasks formerly

assigned to Mr. McCracken were completely eliminated due to the closing of the underground facilities. (Exhibit 9 shows those tasks involved).

27. On January 2, 1985, Arnold McCracken assumed the position of coal sampler which had been designated to him since May 23, 1983. During that period of time, Mr. McCracken would have had opportunities to move to other facilities of PP&L or PMC had he so chosen. Even though he designated to stay at Lady Jane, he could have opted to transfer as several others on the designated list had done.

28. On January 11, 1985, Mr. McCracken retired.

29. He indicated in his option election form the option of early retirement with severance allowance. This option entitled Mr. McCracken to retire at full retirement even though he had not reached the age of 65 and the severance option permitted him 1 week of severance pay for each full year of Lady Jane service. (Exhibit 10.)

30. On January 15, 1985, Mr. McCracken filed a discrimination complaint with the Mine Safety and Health Administration.

31. In November 1984, Lady Jane was notified by MSHA that Mr. McCracken was a Part 90 Miner who must be working in an environment which meets the respirable dust standard (Exhibit 11).

32. Mr. McCracken was sampled for dust and MSHA was advised by letter dated December 3, 1984, that he was already working in an atmosphere which complied with the reduced standard and there was no need to transfer him from his position as outside foreman (Exhibit Nos. 12 and 13).

33. On January 14, 1985, Lady Jane wrote to MSHA informing them that Mr. McCracken had retired (Exhibit 14).

34. Lady Jane received a letter dated April 16, 1985, from Ronald J. Schell, Chief, Office of Technical Compliance and Investigation for MSHA, concerning Mr. McCracken's 105(c) discrimination complaint. The Schell letter concluded" "A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that a violation of Section 105(c) has not occurred" (Exhibit 15).

35. On November 9, 1979, Lady Jane was informed that Raymond R. Graham was a Part 90 miner (Exhibit 16).

36. On August 27, 1980, Raymond R. Graham transferred from his position as belt maintenance man to the position of car dropper-surface, retaining his underground rate of pay (Exhibit 17).

37. Pursuant to the May 23, 1983, reorganization plan, Mr. Graham was designated to stay at Lady Jane as a greaser and mechanic (Exhibit 1).

38. On December 17, 1984, the Lady Jane facility was reorganized from a deep mine facility into a surface preparation facility.

39. Immediately prior to December 17, 1984, Mr. Graham's rate of pay was $15.12 per hour as a car dropper. (The normal rate of pay for this surface position was $13.38). Mr. Graham had retained his high rate from underground.

40. On December 17, 1984, Mr. Graham's position was changed from a car dropper-surface to a greaser-surface. His new rate of pay was $13.38 per hour, which is the surface rate of pay.

41. The car dropper-surface position was not eliminated but is currently filled by Ardell Wallace.

Discussion

Section 101(a) of the Act authorizes the Secretary to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines."

Section 101(a)(7) of the Act provides in pertinent part as follows:

> [W]here appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazard in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. * * * (emphasis added).

The mandatory health standards covering miners who have evidence of the development of pneumoconiosis were promulgated pursuant to section 101 of the Act, and they became effective on February 1, 1981, 45 Fed. Reg. 80760-80774. The regulations appear at Part 90, Title 30, Code of Federal Regulations.

A "Part 90 Miner" is defined at 30 C.F.R. § 90.2, as follows:

> "Part 90 miner" means a miner employed at an underground coal mine or at a surface work

area of an underground coal mine who has exercised the option under the old section 203(b) program (36 FR 20601, October 27, 1971), or under § 90.3 (Part 90 option; notice of eligibility; exercise of option) of this part to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights.

The term "transfer" is defined by 30 C.F.R. § 90.2, as follows:

> "Transfer" means any change in the work assignment of a Part 90 miner by the operator and includes: (1) Any change in occupation code of a Part 90 miner; (2) any movement of a Part 90 miner to or from a mechanized mining unit; or (3) any assignment of a Part 90 miner to the same occupation in a different location at a mine.

30 C.F.R. § 90.3(b) and (c) provide as follows:

> (b) Any miner who is a section 203(b) miner on January 31, 1981, shall be a Part 90 miner on February 1, 1981, entitled to full rights under this part to retention of pay rate, future actual wage increases, and future work assignment, shift and respirable dust protection.
>
> (c) Any Part 90 miner who is transferred to a position at the same or another coal mine shall remain a Part 90 miner entitled to full rights under this part at the new work assignment.

30 C.F.R. § 90.103 (Compensation), provides in pertinent part as follows:

> (a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the option under § 90.3 (Part 90 option; notice of eligibility; exercise of option).

(b) Whenever a Part 90 miner is transferred, the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.

(c) The operator shall compensate each miner who is a section 203(b) miner on January 31, 1981, at not less than the regular rate of pay that the miner is required to receive under section 203(b) of the Act immediately before the effective date of this part.

(d) In addition to the compensation required to be paid under paragraphs (a), (b) and (c) of this section, the operator shall pay each Part 90 miner the actual wage increases that accrue to the classification to which the miner is assigned.

Lady Jane is charged with a failure to maintain the pay status of Part 90 miners Arnold M. McCracken (Citation No. 2403626), who was transferred from his occupation of outside shop foreman to surface coal sampler, and Raymond R. Graham (Citation No. 2403627), who was transferred from his occupation of surface car dropper to surface greaser. The factual stipulations provide the information upon which this matter arises. The stipulations reveal that in April 1983, Lady Jane met with the mine employees and informed them that the workable coal seam would soon be exhausted and at the conclusion of the underground reserves, Lady Jane would remain as a surface facility. The surface facility would consist of a preparation plant which would prepare coal purchased from various local operators. Arnold M. McCracken and Raymond G. Graham were employees at Lady Jane at that time. The employees were further informed that as a result of this change in circumstances, fewer than 15 to 20 jobs would be available at the preparation plant and that a list of employees chosen to fill those jobs would soon be posted. The remaining employees would be afforded the opportunity to go to work at construction jobs with Pennsylvania Mines Corporation and its various related companies.

On May 23, 1983, a list of personnel to remain at Lady Jane was posted. The personnel were selected on the basis of seniority and ability to perform the position. Mr. McCracken's name appeared on the list as a sampler. Mr. Graham's name appeared on the list as a greaser and mechanic. On

December 14, 1984, the underground mining operations at Lady Jane ceased, and on December 17 1984, the reorganization as reflected on the May 23, 1983, list took effect. As of December 17, 1984, Lady Jane began functioning as a coal preparation facility.

MSHA's Arguments

In support of its position in these proceedings, MSHA relies on the specific wage protection provisions found in Part 90, as well as its comments and policy statements made during the rulemaking process in connection with the promulgation of the regulations. The relevant comments deal with the transfer and compensation rights of the affected miners, and one significant area of comment concerns changed circumstances at a mine which may require changes in job assignments. These comments are noted in pertinent part as follows at 45 Fed. Reg. 80761:

> The operator may transfer a Part 90 miner without regard to these job and shift limitations if the respirable dust concentration in the position of the Part 90 miner complies with the dust standard, but circumstances require changes in job assignments at the mine. Reductions in workforce or changes in operational methods at the mine may be the most likely situations which would affect job assignments. Any such transferred Part 90 miners would still be protected by all other provisions under this Part. (Emphasis added.)

Another relevant rulemaking comment relied on by MSHA in connection with section 90.3, is found at 45 Fed. Reg. 80764, and it is as follows:

> Although the incidence of pneumoconiosis among miners in surface occupations is thought to be less than that of underground miners, dust levels in certain surface jobs, for example, at cleaning and preparation plants, may frequently exceed average respirable dust concentrations of 1.0 mg/m^3. Accordingly, under this rule, any Part 90 miner who is transferred by the operator to any surface position, including positions at surface coal mines, remains a Part 90 miner in the new surface job and is entitled to all Part 90 protections. (Emphasis added.)

MSHA also relies on the comment made at 45 Fed. Reg. 80767, in connection with the promulgation of section 90.103, that "This wage protection afforded miners by this regulation is consistent with Section 101(a)(7) of the Act and the legislative history pertaining to the enactment of that section."

With regard to the circumstances in connection with the citation for failure to adequately compensate Arnold McCracken, MSHA states that prior to December 14, 1984, Mr. McCracken had been employed at Lady Jane as the general outside foreman earning $20.70 per hour. A lot of his duties would be eliminated during the conversion of the facility because as foreman he had been responsible for the repair of underground mining equipment. This job would no longer be necessary at the preparation facility. His new position in the reorganization would be a coal sampler, and the rate of pay for the sampler position was $10.78 per hour.

By letter dated November 13, 1984, Lady Jane was notified by MSHA that Mr. McCracken was a Part 90 miner, who had exercised his option to work in a less dusty atmosphere. The letter informed Lady Jane that by the 21st calendar day after receipt of the letter, Mr. McCracken must be working in a low dust area. If however, he was already working in an atmosphere which complied with the reduce standard, there would be no need to lower the dust concentration or to transfer him, but he nevertheless retained his Part 90 rights until he waived them.

In response to this letter, Lady Jane advised MSHA by letter dated December 3, 1984, that Mr. McCracken was already working in an atmosphere which complied with the reduced standard, and thus, there was no need to transfer him to another position. To support its position, Lady Jane took five samples of dust from Mr. McCracken from December 3, 1984 to December 7, 1984, which revealed low dust levels.

On December 17, 1984, the date that the reorganization took effect, Mr. McCracken began his vacation. He did not return to work until January 2, 1985. Upon his return on January 2, he assumed the position of coal sampler. On January 11, 1985, Mr. McCracken retired pursuant to the option of early retirement with severance pay.

On January 15, 1985, Mr. McCracken filed a section 105(c) discrimination complaint with reference to his transfer. During the course of that investigation, section 104(a) Citation No. 2403626 was issued, because Lady Jane had failed to maintain Mr. McCracken's pay status as an outside general

foreman. He had been transferred to the coal sampler position and paid the coal sampler's lower rate of pay.

In response to Lady Jane's assertions that it had no obligation to continue to pay Mr. McCracken at the rate of pay of an outside general foreman because a year and a half earlier, on May 23, 1983, he was made aware of his transfer based upon the mine reorganization and not his Part 90 status, MSHA submits that the preamble to Part 90 clearly recognizes no exceptions to the provisions found in Part 90, and that any transfer of a Part 90 miner pursuant to a reduction in work force or change in operational methods does not negate the protections afforded by Part 90. Further, MSHA points out that any Part 90 miner who is transferred to any surface position, including positions at a surface coal mine, remains a Part 90 miner in the new surface job. MSHA concludes that upon Mr. McCracken's transfer on December 17, 1984, his Part 90 rights remained with him, and the record is void of any decision on his part to waive his Part 90 rights. Accordingly, MSHA believes that the compensation provisions found at Part 90.103(b) followed Mr. McCracken to his new position, and his rate of pay as a coal sampler should have been the same rate of pay he received as an outside general foreman, i.e. $20.70. MSHA concludes that Lady Jane's failure to compensate him accordingly was clearly a violation of Part 90.103(b), and that the citation was appropriately issued.

With regard to the issuance of the citation in connection with the failure by Lady Jane to adequately compensate Raymond S. Graham, MSHA states that on August 27, 1980, Mr. Graham was transferred from his underground position as belt maintenance man to the surface position of car dropper. This transfer occurred as a result of Lady Jane's notification on November 9, 1979, that Mr. Graham was a Part 90 miner who had elected to transfer. As a result of the transfer, Mr. Graham incurred no lost wage rate in that he retained his underground rate of pay.

The May 23, 1983, reorganization plan indicated that Mr. Graham was to remain at Lady Jane as a greaser and mechanic. Prior to December 17, 1984, Mr. Graham's salary was that of an underground belt maintenance man, i.e. $15.12 per hour, although he actually worked on the surface as a car dropper. The normal rate of pay for the car dropper was $13.38 per hour. As of December 17, 1984, Mr. Graham's new position became effective, i.e., greaser and mechanic-surface, and his new rate of pay became the normal rate of pay for said

position, i.e. $13.38 per hour. Mr. Graham's former position, of car dropper was not eliminated during the reorganization.

MSHA states that Mr. Graham was transferred from one surface position to another surface position as a result of Lady Jane's change in operational method, and that during this transition he never declined to exercise his Part 90 option. Relying on the rulemakers comments at 45 Fed. Reg. 80764, MSHA maintains that Mr. Graham was in fact a Part 90 miner who was protected by the Part 90 provisions at the time of the proposed reorganization, as well as at the time of the actual reorganization. Accordingly, his rate of pay as of December 17, 1984, should have continued to have been that of an underground belt maintenance man. MSHA concludes that the reduction in pay which Mr. Graham incurred as a result of his transfer was clearly a violation of section 90.103(b), and that the citation was appropriately issued.

With regard to the issuance of the section 104(b) orders, MSHA argues that Lady Jane's failure to abate the violations within the time allowed by the inspector (February 19, 1985), appropriately resulted in the issuance of the orders. Citing Judge Melick's decision in Consolidation Coal Company v. Secretary of Labor, 3 FMSHRC 2201 (September, 1981), MSHA asserts that the criteria for examining the validity of the orders are (1) the degree of danger that any extension would have caused to miners, (2) the diligence of the operator in attempting to meet the time originally set for abatement, and (3) the disruptive effect an extension would have upon operating shifts.

Although conceding that the violation did not present any immediate health or safety threat to any miner, MSHA maintains that the violations presented a "chilling effect" upon the miner's guaranteed statutory Part 90 rights. Since Congress guaranteed these rights to miners affected by pneumoconiosis without exception, MSHA concludes that Lady Jane's lack of diligence in attempting abatement, and its continued failure to date to abate the violations, compounds the "chilling effect" upon statutorily guaranteed compensation rights.

Lady Jane's Arguments

Lady Jane states that in April of 1983, it met with its employees and informed them that the life of the underground mine was coming to an end. On May 23 1983, a list of personnel to remain at the mine along with job titles was posted. On that list Arnold McCracken was listed as a sampler and Raymond Graham was listed as a Greaser-Mechanic. Underground

mining operations ceased on December 14, 1984, and on December 17, 1984, a reorganization took place and the mine began functioning as a surface coal preparation facility.

Lady Jane asserts that in November of 1984, it was notified that Mr. McCracken had Part 90 status. After Mr. McCracken was sampled for dust, it was determined there was no need to transfer him. On January 2, 1985, Mr. McCracken assumed the position of coal sampler-surface. Prior to the closing of the underground mine, he had been outside shop foreman, but that position was eliminated as of December 14, 1984. Prior to December 14, 1985, Mr. McCracken's rate of pay as outside shop foreman was $20.70 per hour and his rate of pay as coal sampler was $10.78 per hour. On January 11, 1984, Mr. McCracken retired, choosing an early retirement with severance pay option. On January 15, 1985, Mr. McCracken filed a discrimination complaint with MSHA, and by MSHA letter of April 16, 1985, to Mr. McCracken, it was determined that no violation had occurred. No appeal of that decision has been taken.

Lady Jane points out that it was not notified of Mr. McCracken's Part 90 status until November of 1984. However, in May of 1983, Mr. McCracken had been designated to stay at Lady Jane as a sampler. Under the circumstances, Lady Jane maintains that it did not violate Part 90 in his case by reducing his compensation upon transfer to the sampler position because that designation had been made in May 1983, approximately 6 months prior to Lady Jane being notified of his Part 90 status.

Lady Jane points out that section 101(a)(7) of the Act states in pertinent part that "any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer." However, in Mr. McCracken's case, Lady Jane maintains that no transfer "as a result of such exposure" ever took place. In support of this argument, Lady Jane points out that after it was notified of Mr. McCracken's Part 90 status in November of 1984, he was sampled for dust and MSHA was advised by letter of December 3, 1984, that he was already working in an atmosphere which complied with the reduced dust standard and there was no need to transfer him from his outside foreman position.

Lady Jane concedes that there is a substantial difference in the pay rate of $20.70 an hour received by Mr. McCracken while serving as an outside shop foreman, and

the $10.78 hourly rate he received in his coal sampler's job. However, Lady Jane states that the $10.78 hourly coal sampler's pay is the prevailing pay rate on that particular job classification, and it points out that Mr. McCracken had ample opportunity from May 1983 to seek other job opportunities with either Pennsylvania Power and Light Company or Pennsylvania Mines Corporation, but did not do so. Instead, he expects to be paid approximately twice as much per hour as of December 17, 1984, as a similarly situated employee, and Lady Jane believes that this is windfall which makes no economic sense.

Lady Jane states that Mr. McCracken filed a discrimination complaint in which he made the following complaint:

> They transferred me from general outside foreman to sampler at the scales for truck coal and in doing this they cut my wages, and still have another man doing my original job. They said my job was no longer there so if I wanted to work it would be the sampling job.

Lady Jane points out that Mr. McCracken's complaint was thoroughly investigated by MSHA, and that on April 16, 1985, MSHA made a determination that Lady Jane had not discriminated against Mr. McCracken, and that a violation of section 105(c) the Act did not occur. Mr. McCracken did not appeal that ruling.

With regard to Mr. Graham, Lady Jane asserts that on November 9, 1979, it was informed that Mr. Graham was a Part 90 miner. On August 27, 1980, Mr. Graham transferred from his underground position as belt maintenance man to the surface position of car dropper, retaining his underground rate of pay. On May 23, 1983, Mr. Graham was designated to stay on after the reorganization as a greaser and mechanic. Immediately prior to December 17, 1984, Mr. Graham's rate of pay was $15.12 per hour as a car dropper. (The normal rate of pay for this surface position was $13.38). Mr. Graham had retained his high rate from underground. On December 17, 1984, Mr. Graham became a greaser-surface at $13.38 per hour. The car dropper surface position was not eliminated, but is currently filled by Ardell Wallace. The rate for that job is $13.38 per hour. Mr. Graham's previous underground position of belt maintenance man was eliminated on December 14, 1984.

Lady Jane maintains that the purposes of the Act are not served by requiring it to continue paying Mr. Graham underground pay rates after the closing of its underground mine.

Lady Jane states that although Mr. Graham transferred from the underground mine in August of 1980 and retained his underground rate of pay until December 14, 1984, when the underground mining operation ceased, MSHA would now require Lady Jane to pay him $15.12 per hour when his fellow surface employees are receiving $13.38 per hour for a like position.

Lady Jane submits that as of December 14, 1984, it ceased underground coal mining operations and became a surface preparation facility only for coal from other mines. Since it was no longer an "underground coal mine" or a "surface work area of an underground coal mine" as stated in 30 C.F.R. § 90.3(a), Lady Jane maintains that the cited mandatory health standard 30 C.F.R. § 90.103(b), is no longer applicable and the citations and orders should be dismissed.

Lady Jane argues that the legislative history of the Act reflects a congressional intent that Part 90 miners be protected when they are transferred because of a dust problem, and not when they are transferred because of independent legitimate business reasons. Further, Lady Jane argues that MSHA's Part 90 rules must be interpreted and applied in light of their underlying statutory goals and purposes, and since it is clear in these proceedings that Mr. McCracken and Mr. Graham were indisputably transferred for legitimate business reasons rather than any dust problems, MSHA's policy determinations with respect to the interpretation and application of its Part 90 rules in these proceedings conflict with the legislative intent and should not be followed.

Lady Jane submits that MSHA's Part 90 rules should not be interpreted to create a class of "elite miners" who are immune to the economic forces that affect everyone else, and that simply because a miner has exercised his Part 90 option, does not mean that he has acquired economic invulnerability. Lady Jane asserts that the rules must be interpreted with an eye to protecting miners who may be developing black lung and to encourage them to exercise their right to transfer, without, in the process, "turning them into demigods."

Lady Jane submits that so long as no discrimination is shown under the Act, a Part 90 miner should be able to be discharged for cause or laid off as a result of a down turn in employment. So too, given a reorganization from an underground mine to a surface preparation facility and a work force of substantially smaller proportion, the mine operator should not be required to pay a Part 90 miner a premium rate for surface work when the purpose for the regulation no longer exists.

Assuming that MSHA prevails in these proceedings, Lady Jane believes that any payment to Mr. Graham should only be the pay differential between $13.38 and $15.12 per hour from December 17, 1984, to the present for hours worked. Lady Jane does not believe that a penalty and/or interest would be appropriate under the instant circumstances. As to Mr. McCracken, Lady Jane believes that the pay differential would be the difference between $10.78 per hour and $20.70 per hour for hours worked between January 2, 1985, (prior to this Mr. McCracken had been on vacation) when he took the sampler position, and January 11, 1985, when he retired (Stip. 36, 37, 38 and Exhibit 10). Lady Jane does not believe that a penalty and/or interest would be appropriate under the circumstances.

Findings and Conclusions

With regard to Mr. McCracken, MSHA does not dispute the fact that upon elimination of Lady Jane's underground mining operation and the conversion to a surface mining coal preparation facility, many of Mr. McCracken's duties as a general outside foreman would be eliminated, and his prior responsibilities for the repair of underground equipment would no longer be necessary. MSHA concedes that Mr. McCracken's new position in the reorganization would be as a coal sampler at the regular rate of pay of $10.78 per hour for such a position.

MSHA takes the position that when Lady Jane was notified on November 13, 1984, that Mr. McCracken was a Part 90 miner who had exercised his option to work in a less dusty atmosphere, his rights at a Part 90 miner vested, and the fact that a subsequent reduction in the work force or change in operational methods resulted in the elimination of the underground mine, including Mr. McCracken's surface position, did not divest him of his Part 90 miner rights.

At the time Lady Jane was advised that Mr. McCracken had Part 90 miner status, MSHA also advised Lady Jane that there would be no need to transfer Mr. McCracken if he were already working in an atmosphere which complied with the reduced dust standard. Lady Jane advised MSHA that Mr. McCracken was already working in an atmosphere which complied with the reduced dust standard, and that there was no need to transfer Mr. McCracken. When the reorganization took effect on December 17, 1984, Mr. McCracken's prior position as a general outside foreman was eliminated, and he was placed in the position of coal sampler. He assumed the duties of this position on January 2, 1985, when he returned from vacation, and

served in that capacity until his retirement on January 11, 1985.

Mr. McCracken had prior notice that his outside foreman's job would be eliminated and that he would assume the job as a coal sampler when Lady Jane posted a list of employees who were slated to remain at the new surface facility on May 23, 1983, approximately six months prior to Mr. Mcracken's designation as a Part 90 miner. Under the circumstances, I conclude and find that Lady Jane's decision in connection with its reorganized operations and realignment of the remaining workforce was communicated to Mr. McCracken prior to his transfer option eligibility as a Part 90 miner, and there is nothing to suggest that the decision in this regard was other than a legitimate and good faith business decision made by Lady Jane in the face of changed economic circumstances. It seems clear to me that the placement of Mr. McCracken in the coal sampler position came about as a result of the reduction of the workforce rather than any hazardous dust exposure.

I conclude that Mr. McCracken was entitled to take advantage of the "wage savings" provisions of section 101(a)(7) of the Act and 30 C.F.R. § 90.103(b), provided it is established that his placement or "transfer" in the new position was the direct result of his exposure to hazardous levels of dust. I construe the transfer language found in section 101(a)(7) to require a showing of a nexus between the dust exposure and the transfer. The statute requires that a miner exposed to hazardous levels of dust be removed from such exposure and reassigned. If he is transferred as a result of such exposure, he is entitled to be compensated according to his regular rate of pay for the job held immediately prior to his transfer. The miner's exposure to hazardous dust levels is a condition precedent to his removal and reassignment.

The purpose of the protected wage provisions found in the Act and rule with respect to Part 90 miners is to encourage miners to exercise their transfer option to a job in a less dusty atmosphere. By not having to take a pay cut upon transfer to a position which may pay less, the miner is more likely to transfer to protect his health than he would be otherwise. In Mr. McCracken's case, at the time Lady Jane was advised of Mr. McCracken's Part 90 status no transfer took place, and Lady Jane had no duty to transfer him because it was in compliance with the dust exposure requirements connected with Mr. McCracken's working environment. As a matter

of fact, Mr. McCracken ended up in the position of coal sampler after a legitimate reduction in force eliminated his prior position.

MSHA's argument that Part 90 recognizes no exceptions with respect to the reasons for a miner's transfer IS REJECTED. I find nothing in the legislative history to suggest that Congress intended that an eligible Part 90 miner or potential transferee be forever insulated from the economic realities of the mining business. Nor do I find anything to suggest that a mine operator must forever guarantee a miner's wages in any subsequently acquired jobs which may come about as the result of changed economic circumstances.

I find nothing in the legislative history to suggest that when Congress enacted the remedial provisions of section 101(a)(7), it intended to guarantee a miner continued job security, or to insulate a miner from any future adverse economic consequences which may flow from a mine operator's legitimate business concerns and decisions. Further, I find nothing in the legislative history to suggest that Congress intended to forever penalize a mine operator economically in the case of a Part 90 miner transferee. The intent of the statute is to afford the miner an opportunity to remove himself from dusty work environment, and I take note of the fact that while a transferred miner is entitled to the pay rate of his old position, any future pay increases are based on his new position. If the new position is at a pay rate lower than that of the previous job held by the miner, the miner would only be entitled to future raises computed on the basis of the lower pay scale of the new job classification, notwithstanding the fact that his regular salary remains tied to his former job. It seems to me that had Congress intended to fully guarantee a miner's pay, it would have enacted a provision to ensure that any future salary increases be maintained at the higher rate of pay. However, rather than doing that, Congress placed a special limitation on any subsequent wage increases received by a transferred miner.

I take note of MSHA's rulemaking comments at 45 Fed. Reg. 80767. In referring to the legislative history from the Conference Committee Report, MSHA quotes language which reflects a Congressional concern that miners reassigned jobs pursuant to section 101(a)(7) should not suffer an immediate financial disadvantage. While this suggests an intent that a miner not be penalized economically at the time he exercises his option to transfer to a job in a less dusty atmosphere, it does not suggest that he be forever insulated from the prospects of receiving a lower wage in any future jobs which

come about as a result of events which are far removed from the conditions which placed him a Part 90 status in the first place.

I find no rational support for MSHA's suggestion that once transferred, a Part 90 miner is entitled to perpetual wage protection as long as he remains on a mine payroll, even though that mine may no longer fall within the parameters of section 101(a)(7) of MSHA's Part 90 regulations. I note that during the rulemaking comment period when it was suggested that Part 90 miners who are so situated on the effective date of the rules receive retroactive wage increases, MSHA was of the view that there would be no benefit in terms of enhanced health protection to be gained from applying the rule retroactively, 45 Fed. Reg. 80767. Similarly, I cannot conclude that there is any enhanced health benefit to be gained by requiring a mine operator to forever guarantee a miner's wage when he finds himself in another job that is the direct result of changed economic circumstances rather than health or safety circumstances.

I conclude and find that Mr. McCracken's placement in the coal sampler's job was the result of a legitimate and good faith reorganization and reduction in force, rather than an exposure to hazardous dust levels. Under the circumstances, and in view of my findings and conclusions concerning my interpretation and application of section 101(a)(7) and 30 C.F.R. § 90.103(b), I conclude that Lady Jane was under no obligation to maintain Mr. McCracken's pay status as an outside shop foreman at the time he was placed in the coal sampler's job. Accordingly, MSHA has not established a violation of 30 C.F.R. § 90.103(b), and section 104(a) Citation No. 2403626, February 5, 1985, and section 104(b) Order No. 2403645, February 21, 1985, are VACATED. MSHA's civil penalty proposal for the citation IS REJECTED AND DISMISSED.

As stated earlier, the purpose of the wage provision found in the Act and rule with respect to Part 90 miners is to encourage miners to exercise their transfer option to a job in a less dusty atmosphere. By not having to take a pay cut upon transfer to a position which may pay less, the miner is more likely to transfer to protect his health than he would be otherwise. In Mr. Graham's case, his August, 1980, transfer from underground belt maintenance man to surface car dropper was an option exercised by Mr. Graham to preclude his further exposure to hazardous dust, and the transfer was accomplished by Lady Jane in response to MSHA's earlier notification of Mr. Graham's Part 90 miner status.

At the time of his transfer to the car dropper's position, Mr. Graham retained his underground belt maintenance man pay rate and continued to be paid at that rate while occupying the position of surface car dropper. Although he was subsequently designated by Lady Jane in May, 1983, to be retained in its employ as a surface greaser after the effective date of the reduction in force and reorganization, Lady Jane continued to pay him his underground rate until December 17, 1984, when he actually became a surface greaser. Under these circumstances, it seems clear to me that Mr. Graham's initial transfer and salary retention were accomplished in full compliance with the applicable statutory and regulatory requirements of the law. It also seems clear that Mr. Graham's initial transfer in 1980 was the direct result of his Part 90 miner status, and his decision to exercise his transfer option. There is no evidence to suggest that at that point in time Lady Jane or Mr. Graham had knowledge of the subsequent chain of events which gave rise to the reorganization and reduction in force.

With regard to Mr. Graham's subsequent placement in the surface greaser position, I conclude and find that it came about as the result of the reorganization and reduction in force, and not because of Mr. Graham's Part 90 miner status. On the effective date of the reorganization, the underground mine was no longer in existence, the remaining work force was realigned in accordance with seniority, and Mr. Graham was placed from one surface job to another. Even if he had not been a Part 90 miner, the result would have been the same, and his options were somewhat limited. He could have resigned, taken optional retirement, or sought employment in other positions within Lady Jane's corporate structure. He obviously opted to stay on as an employee of Lady Jane, and had no choice as to the position for which he was selected to be retained in the realigned work force.

I conclude and find that Mr. Graham's placement in the surface greaser's position was the result of a legitimate business need of Lady Jane, and that it was the result of a reduction in force and reorganization, rather than a transfer resulting from dust exposure. For the same reasons discussed with respect to my findings and conclusions concerning my interpretation and application of section 101(a)(7) and 30 C.F.R. § 90.103(b), in Mr. McCracken's case, I conclude and find that Lady Jane was under no obligation to maintain Mr. Graham's pay status as a greaser. Accordingly, I cannot conclude that MSHA has established a violation of section 90.103(b), and section 104(a) Citation No. 2403627, February 5, 1985, and section 104(b) Order No. 2403644,

February 21, 1985, ARE VACATED. MSHA's civil penalty proposal for the citation IS REJECTED AND DISMISSED.

Lady Jane's contentions that the citations and orders should be dismissed because it no longer operates an underground coal mine or a surface work area of an underground coal mine, and therefore 30 C.F.R. § 90.103(b) is no longer applicable, ARE REJECTED. I conclude that at the time of the operative violations in these proceedings, Lady Jane was subject to the provisions of section 90.103(b). When the underground mine was in operation, the surface cleaning plant processed coal from that mine as well as neighboring mines, and it was shipped to the Sunbury power plant of Pennsylvania Power & Light Company. When the underground mine was closed, the surface preparation plant continued to process coal from various local mine operators, and it continued to be shipped to the Sunbury plant. Thus, I conclude that the area of the new surface preparation plant was a surface work area of an underground mine at the time Mr. McCracken and Mr. Graham were designated and placed in their last work positions. I also conclude that the definition of "surface work area of an underground coal mine" found in 30 C.F.R. § 90.2, is broad enough to cover Lady Jane's surface preparation facility.

ORDER

On the basis of the foregoing findings and conclusions, Lady Jane's contests ARE GRANTED, and the citations and orders in question ARE VACATED. MSHA's civil penalty proposals ARE REJECTED, and the civil penalty proceeding IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-71-M A.C. 04-00157-05507
v.	:	
KAISER CEMENT CORPORATION, Respondent	:	Cushenbury Cement Plant

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon Petitioner's motion for approval of a proposed settlement, and the same appearing proper and in the full amount of the initial assessment as to 3 of the 4 violations involved, the settlement is approved.

The terms of the settlement are as follows:

Citation	Date	Health and Safety Standard Violated	Original Proposed Penalty	Settlement Amount
2245606	11/17/83	56.6-113	$2,000	$2,000
2245607	11/17/83	56.6-117	2,000	2,000
2245608	11/17/83	56.6-161	1,000	650
2245609	11/17/83	56.5-112	100	100
		Total	$5,100	$4,750

In the premises, approval of the settlement is warranted.

The documentary record in this matter reflects that while the violations were promptly abated by Respondent, they resulted from a high degree of negligence and were of a high degree of gravity since an injury resulted from the improper blasting procedures practiced.

The reduction in the penalty originally proposed by the Secretary with respect to Citation No. 2245608 appears justified since it is but one of the four infractions charged arising from the same incident and since a question of proof exists as to such violation as charged.

In the 24 months preceding the violation, no alleged violations were assessed against the Respondent at the facility involved.

The size of the Respondent, a large mine operator, ia approximately 2,025,808 man-hours per year. The size of the subject facility is approximately 550,000 man-hours per year.

The ability of the Respondent to continue in business will not be impaired by the payment of the settlement amounts specified.

In the premises, approval of the settlement is warranted.

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the sum of $4,750.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 85-242
	:	A.C. No. 46-06805-03509
v.	:	
	:	No. 1 Mine
VOLUNTEER COAL CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
William Stover, Esq., M.A.E. Services Inc., Beckley, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $800 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $800 within 30 days of this order.

Gary Melick
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 84-98 A. C. No. 33-00968-03568
v.	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO., Respondent	:	

ADDENDUM TO DISCIPLINARY REFERENCE

Appended to the trial judge's decision of January 22, 1986, in the captioned matter was a Disciplinary (Rule 80) Reference on Robert C. Kota, counsel for the operator. In support of Specifications 2 through 6, the trial judge cited provisions of the Model Rules of Professional Conduct. These rules are reflective of the standards of professional conduct imposed by Rule 11 of the Federal Rules of Civil Procedure as amended and promulgated in 1983.[1] Three recent decisions by United States Courts of Appeals show that amended Rule 11 imposes a duty of competence and diligence that is to be judged by a standard of objectivity designed to deter the filing and prosecution of unfounded claims.

Thus, in In Re TIC, Ltd., 769 F. 2d 441, 445 (7th Cir. 1985), the Court held that "If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious." The Court further held that lawyers who continue to litigate even initially plausible claims after it becomes clear they are unfounded violate Rule 11 Id. at 448-449.

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[1]Rule 1(b) of the Commission Rules of Practice provides that on any procedural question not otherwise covered by the rules "the Commission or its Judges shall be guided so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure as appropriate."

In Eastway Construction Company, 762 F. 2d 243, 253-254 (2d Cir. 1985), the Court admonished the bar as follows:

> No longer is it enough for an attorney to claim that he acted in good faith, or that he was personally unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.
>
> * * *
>
> In light of the express intent of the drafters of Rule 11, and the clear policy concerns underlying its amendment, we hold that a showing of subjective bad faith is no longer required to trigger sanctions imposed by the rule. Rather sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been imposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Accord: Davis v. Veslan Enterprises, 765 F. 2d 494, 497, n. 4 (5th Cir. 1985).

It is clear that the position taken by counsel for the operator in this proceeding was based on a legal theory that had been authoritatively rejected and sought remedies for which there was no precedent or statutory authority.

The premises considered, therefore, it is ORDERED that this addendum be made a part of the order of reference in this proceeding.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-121-M A.C. No. 15-00056-05502
v.	:	Jenkins Mine & Mill
ADAMS STONE CORPORATION, Respondent	:	

DECISION

Before: Judge Fauver

This case is scheduled for hearing in Lexington, Kentucky, on April 7, 1986.

Respondent has filed a statement that it will not attend the hearing. This statement is deemed to be a waiver of Respondent's hearing rights and a withdrawal of its contest of the Secretary's Proposal for Assessment of Civil Penalty.

ORDER

WHEREFORE IT IS ORDERED that:

1. The allegations in the Secretary's Order No. 2385598, January 16, 1985, and amended on January 20, 1985, are deemed to be true and are incorporated herein as Findings of Fact and Conclusions of Law.

2. Considering the criteria of section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., Respondent is ASSESSED a civil penalty of $180 for each of the four violations alleged in the attachments to the Secretary's Proposal for Civil Penalty.

3. Respondent shall pay the above-assessed civil penalties in the total amount of $720 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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