JANUARY 1987

There were no Commission decisions for January

ADMINISTRATIVE LAW JUDGE DECISIONS

12-30-86	(Order) Secretary of Labor for Yale E. Hennessee v. Alamo Cement Co.	CENT	86-151-DM	Pg. 1
01-05-87	Colorado Materials Co., Inc.	CENT	86-37-M	Pg. 18
01-06-87	Sec. Labor/Robert Corbin & James Corbin v. Terco, Inc., etc.	KENT KENT	86-131-D 86-132-D	Pg. 24
01-06-87	Consolidation Coal Company	WEVA	86-385	Pg. 26
01-08-87	Sec. Labor for Barry Mylan, Lester Poorman v. Benjamin Coal Co., and UMWA	PENN	86-125-D	Pg. 27
01-09-87	Jefferson County Road & Bridge Department	WEST	85-125-M	Pg. 56
01-09-87	Sec. Labor for Joseph Timko v. Dee Gold Mining Co.	WEST	85-132-DM	Pg. 66
01-12-87	Nelson Trucking	LAKE	86-6-M	Pg. 70
01-12-87	Charles F. Rose v. Consolidation Coal Co.	WEVA	86-379-D	Pg. 75
01-12-87	Sec. Labor for Johnny Vance v. Eastern Associated Coal Corporation	WEVA	86-424-D	Pg. 83
01-13-87	Amarillo Road Company	CENT	86-93-M	Pg. 84
01-13-87	Sec. Labor for Ronnie Beavers, et al. and UMWA v. Kitt Energy Corporation	WEVA	85-73-D	Pg. 93
01-14-87	Dairl Eddington v. Falcon Coal Company	KENT	86-164-D	Pg. 99
01-15-87	Jim Walter Resources, Inc.	SE	87-29-R	Pg. 102
01-21-87	Jim Walter Resources, Inc.	SE	86-83	Pg. 109
01-21-87	Sec. Labor for Sam Ball v. Westmoreland Coal Co.	VA	86-23-D	Pg. 116
01-21-87	West Elk Coal Company, Inc.	WEST	86-28-R	Pg. 118
01-21-87	Jay Tuft and Company, Inc.	WEST	86-60-M	Pg. 176
01-28-87	Jim Walter Resources, Inc.	SE	86-85-R	Pg. 181
01-28-87	Drummond Company, Inc.	SE	86-135	Pg. 184
01-29-87	Glen Irvan Corporation	PENN	86-64	Pg. 186
01-30-87	Webster County Coal Corporation	KENT	87-9-R	Pg. 188
01-30-87	U.S. Steel Mining Co., Inc.	WEVA	86-436	Pg. 191

JANUARY 1987

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

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Inc., Docket No. WEVA 86-371. (Judge Melick, December 17, 1986)

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

Ivan Moore v. Martin County Coal Corporation, Docket No. KENT 85-183-D. (Judge Fauver, December 12, 1986)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF YALE E. HENNESSEE, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 86-151-DM MSHA Case No. MD 86-35 1604 Quarry and Plant
v.	:	
ALAMO CEMENT COMPANY, Respondent	:	

ORDER DENYING THE RESPONDENT'S MOTION FOR MODIFICATION OF ORDER OF TEMPORARY REINSTATEMENT

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; David M. Thomas and Robert S. Bambace, Esqs., Fulbright & Jaworski, Houston, Texas, for Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns an Application for Temporary Reinstatement filed by MSHA pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, and Commission Rule 29, 29 C.F.R. § 2700.44(a), seeking the temporary reinstatement of the complainant Yale E. Hennessee to his job as an electrician at the respondent's 1604 Quarry and Plant. Mr. Hennessee was discharged by the respondent on April 22, 1986, for insubordination because of his alleged refusal to perform a job assignment. Mr. Hennessee claims that his refusal to perform the work in question was based on his belief that the work task in question could not be done safely. MSHA has since filed a discrimination complaint on Mr. Hennessee's behalf claiming that his work refusal was protected activity and that his discharge constitutes a violation of the Act.

A Temporary Reinstatement hearing was held on October 23, 1986, and on Novemer 6, 1986, I issued a decision finding that MSHA's complaint was not frivolous, and respondent was ordered to immediately reinstate Mr. Hennessee pending further adjudication of the merits of the discrimination complaint.

The respondent appealed my reinstatement order to the Commission, and while that appeal was pending, filed a request for modification of my order, and MSHA filed an opposition to the request. Since the matter was on appeal, no dispositive ruling was made with respect to the request.

On December 8, 1986, the Commission issued its decision affirming my reinstatement order, and remanded the matter for further adjudication. The respondent's pending request for modification of my order is now ripe for disposition.

Discussion

As part of its Application for Temporary Reinstatement, MSHA included an affidavit from Wilbert B. Forbes, Chief of Special Investigations, Metal and Non-metal Division, Arlington, Virginia, which states in pertinent part as follows:

> On December 4, 1984, Applicant was severly injured during the performance of his duties at Respondent's mine sustaining multiple broken bones in his right foot and severe damage to his left knee;
>
> As a result of the December 4, 1984, injuries Applicant was unable to work for 49 days and assigned to light duty for an additional 30 or more days;
>
> Applicant is permanently disabled as a result of his 1984 injuries and requires further surgery on his knee.

The question of Mr. Hennessee's prior injuries was first raised by Mr. Hennessee when he testified that "the company had always been good to me" and that when he was injured and in the hospital, company president Hopper visited him in the hospital (Tr. 53-54). When MSHA's counsel pursued the matter further, respondent's counsel interposed an objection on the ground of relevance (Tr. 56).

MSHA's counsel proffered that notwithstanding his prior injuries and disability, Mr. Hennessee is still capable of

performing full-time the duties of electrician, and has in fact so performed. Counsel also indicated that Mr. Hennessee's prior injury may have played some part in his refusal to remove the motor in question, and that this chore would have been more difficult for him than for someone who had not suffered an injury (Tr. 57-58).

The respondent's objection was overruled, and counsel interposed a continuing objection to any testimony concerning Mr. Hennessee's prior injuries (Tr. 58).

The coloquy concerning Mr. Hennessee's prior injuries is reflected as follows at (Tr. 56-58):

Q. Did you ever refuse any overtime?

A. No, sir.

Q. Did you ever refuse to perform a job at Alamo Cement?

A. No, sir.

Q. Had you ever refused to do anything at Alamo Cement?

A. No, sir.

Q. When you were injured -- when did that occur?

MR. THOMAS: Objection; relevance.

JUDGE KOUTRAS: I noticed that in the affidavit. What is the relevance of his prior injury and condition? As a matter of fact, I was intrigued by the statement in the affidavit in support of the application for reinstatement which alluded to the fact that -- (Perusing document.)

It says, "As a result of Mr. Hennessee's injuries, he is permanently disabled."

MR. MONCRIEF: Partially disabled, I believe.

JUDGE KOUTRAS: Well, this says permanently disabled. I was intrigued how a man who was permanently disabled in 1984 was working in an

area of the mine where he is required to take down motors and all that sort of thing.

MR. MONCRIEF: I was going to follow that, Your Honor, for the fact that I think it does have some relevance.

JUDGE KOUTRAS: Make a proffer. What is the relevance?

MR. MONCRIEF: The proffer is simply that in '84 -- I think it was December of '84, Mr. Hennessee was severely injured and, as a result, suffers a permanent partial disability, a disability well known to the company.

Notwithstanding that disability, Mr. Hennessee still performs and is capable of performing full-time the duties of electrician, including, as we have just heard, lowering a motor down a steep incline covered with marble-like material to the dome area, but that, in addition to that, in his condition, certainly, there may have been some -- his injury may have played some part in his refusal to carry that -- or attempt to drag that motor back out.

JUDGE KOUTRAS: But not down.

MR. MONCRIEF: He described, I think, the manner in which they took the motor down, and the difficulties. And I simply wanted, as part of the record, to have it known --

JUDGE KOUTRAS: All right. So you have already done that now. You made a --

MR. MONCRIEF: That was my proffer.

JUDGE KOUTRAS: You made an argument that he was injured in '84; he is partially disabled, and the company is aware of it and, notwithstanding those injuries, he still can perform his duties and is able to perform his duties, et cetera, et cetera.

MR. MONCRIEF: Yes, sir. And I think, too, Your Honor, there is a point that, because of

his condition, this attempting to retrieve this motor to carry it up -- this heavy motor up the ramp -- would have been a bit more difficult for him than for someone who had not suffered an injury.

JUDGE KOUTRAS: Did he tell that to --

MR. MONCRIEF: No, I don't believe he did; however, it was a fact well known to the company -- his condition.

JUDGE KOUTRAS: All right.

MR. MONCRIEF: That would be my proffer, if you want to accept it.

JUDGE KOUTRAS: That is all right. Go ahead. Continue.

MR. MONCRIEF: Okay.

JUDGE KOUTRAS: Overruled.

You made an objection as to relevance?

MR. THOMAS: Yes, sir. And we would continue that objection.

JUDGE KOUTRAS: Fine.

Mr. Hennessee testified as follows with respect to his injuries and the effect of those injuries on his ability to perform his duties (Tr. 59-61):

BY MR. MONCRIEF:

Q. Briefly describe the nature of your injuries.

A. I had torn ligaments and cartilage in my left knee, and my right foot was crushed. I have a pin in my second toe on my right foot.

Q. Are either of these conditions continuing or causing any difficulty at the present?

A. Yes, they do.

JUDGE KOUTRAS: You said yes?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: What difficulties?

THE WITNENSS: I have to wear a pad in my right shoe to keep my toes from curling up. After working a lot of long hours, my left leg will swell up, and my knee is tender at all times when it gets twisted or anything.

JUDGE KOUTRAS: All right.

BY MR. MONCRIEF:

Q. Was your knee essentially in the same condition on the 17th of April?

A. Basically, yes.

Q. When the injury occurred or the injuries occurred, how long were you off work?

A. Ten weeks.

Q. When you returned to work, to what assignment did you return?

A. I returned to light-duty shop work.

Q. For how long?

A. I am going to say about two months.

Q. So sometime in '85 did you eventually return to your normal duties?

A. Yes, I did.

Q. On the day of the 17th of April did the condition of your knee in any way enter into your consideration or deliberations as to whether to take that motor back up the ramp?

MR. THOMAS. Objection; leading.

JUDGE KOUTRAS: Yes. You are leading him a little bit.

MR. MONCRIEF: Yes, sir.

BY MR. MONCRIEF:

Q. What, if any part, did you knee play in your determination?

MR. THOMAS: Objection; leading.

JUDGE KOUTRAS: Overruled. I will let you answer it. Go ahead.

THE WITNESS: The condition of my knee and my foot ever since the accident is something I think about no matter what I am doing.

JUDGE KOUTRAS: Well -- okay.

THE WITNESS: Do you understand this, Judge? If I am walking down the street and I see a slippery spot on the sidewalk I naturally walk around it.

JUDGE KOUTRAS: All right.

THE WITNESS: The same thing at the plant; there are some areas where I am very careful when I walk there.

And, at (Tr. 63-64):

Q. Mr. Hennessee, at the time on the 17th, was the company aware of the extent or the degree of your injury to your knee and foot?

A. I am sure they were.

Q. Why?

A. Most of the guys in the maintenance department used to call me Hopalong.

Q. Why?

A. I limp at times; sometimes worse than others.

Respondent's counsel pursued the matter further on cross-examination as follows at (Tr. 68-69):

MR. THOMAS:

Q. Mr. Hennessee, since you talked about it on direct examination, I want to explore a little bit with you this injury matter.

Now, in your statement that you wrote on April 20, 1986, you made no mention of your injury, did you?

A. No.

Q. Okay. And when you spoke with Mr. Galindo and Mr. Pratt on the night of April 17, you made no mention of your injury, did you?

A. No, I didn't.

Q. In fact, the very first mention that you made of your injury, to the knowledge of anyone with the company, was today in this courtroom. Isn't that a fact?

A. Well, I think they all knew about my injury.

Q. I am going to ask you to answer my question, Mr. Hennessee. I will try to give you -- and be as precise as I can, and if you need to explain things, you can explain things later.

What I want to know and what I want you to answer is, between the date of your altercation at the plant and today, did you mention to anyone in the company that your injury was a consideration in what happened?

A. I don't believe so.

Respondent's Request for Modification

The respondent requests that my reinstatement order be modified to require Mr. Hennessee to undergo and pass a physical examination of his left knee and right foot as a condition precedent to his temporarily resuming employment. Respondent

requests that Mr. Hennessee be required to submit to such an examination by the respondent's physician, and that should he desire that his own physician also examine him, respondent states that it will pay the cost.

In support of its request, the respondent states that it had no knowledge of the continuing extent and severity of Mr. Hennessee's injuries until the reinstatement hearing. Respondent asserts that requiring Mr. Hennessee to undergo and pass a physical examination as a condition to his temporary reinstatement is necessary in order to assure that he is physically qualified to perform the duties of his position, to protect his safety and the safety of individuals who might be assigned to work with him, and to protect the respondent from potential liability in future workers' compensation or other claims.

In a letter dated November 14, 1986, to MSHA's Assistant Secretary, the respondent states that its request is in no way related to an effort to avoid compliance with the reinstatement order. Respondent states further that it only desires to insure that Mr. Hennessee is physically fit to perform the duties of his position, and believes that its request is reasonable and consistent with the requirements of safety which are present in all mining activities.

MSHA's Opposition

In response and opposition to the respondent's request for modification of the order of reinstatement, MSHA points out that when Mr. Hennessee's prior injuries were referred to during the reinstatement hearing, the respondent interposed an objection on the ground of relevance, and continued its objection to any further references to those injuries.

MSHA states that following the issuance of the reinstatement order, the respondent reinstated Mr. Hennessee on the evening shift, and he worked on November 10, 11, and 12, 1986. MSHA asserts that the issue of his physical capacity was raised for the first time on the morning of November 10, 1986, when upon reporting for work the evening of November 10 or 11, Mr. Hennessee was presented a statement for his signature stating for the first time the respondent's insistence on an examination by the respondent's physician prior to the evening shift of November 14, 1986. In support of this assertion, MSHA has included a statement dated November 11, 1986, by Plant Manager Ed Pierce which states in pertinent part as follows:

> Yale E. Hennessee was temporarily reinstated with Alamo Cement Company on November 10, 1986, by order of Mine Safety and Health (MSHA) of the United States Department of Labor. His first scheduled shift was the 10:00 p.m. to 6:00 a.m. shift on this date.
>
> * * * * * * *
>
> Alamo Cement is a non-union plant. Employees are to do what any supervisor asks them and no employee would be asked to do anything unsafe. Even though Mr. Hennessee is an electrician, because of our non-union status, he was told at times he would be required to do other jobs (i.e., motor painting, electric room sweeping, shoveling, etc.).
>
> Before reporting to work Friday, November 14, 1986, Mr. Hennessee is to have a physical by his doctor and the Company's doctor and give the results of these physicals to Alamo Cement on or before November 14, 1986. Mr. Hennessee was told that the Company would make an appointment with their doctor for him and let him know the time of the appointment.

MSHA states that thereafter, in the afternoon of November 13, respondent told Mr. Hennessee not to report to work that evening unless he had an examination by its physician. Respondent was advised at that time that Mr. Hennessee would be examined by his own physician. MSHA has included a statement by Mr. Hennessee's physician, Orthopaedic Surgeon Richard F. Cape, dated November 17, 1986, stating that Mr. Hennessee may return to work as of that date with no physical activity restrictions.

As a result of the respondent's unreasonable insistence that Mr. Hennessee submit to a physical examination by its physician as a condition to reinstatement, MSHA states that its special investigator issued two section 104(a) citations and a section 104(b) order on November 13, 1986. The following morning the respondent agreed to pay Mr. Hennessee from the previous evenings shift on November 13, through November 18, provided he was examined by his physician in the interim. On the basis of this "retroactive ersatz compliance" with the reinstatement order, the citations and order were vacated on November 14, 1986.

MSHA states that on the afternoon of November 17, the respondent informed Mr. Hennessee that he was to report for an examination by its physician at 2:30 p.m. the following day and not to report for work otherwise. Upon reporting for work at 2:00 p.m. on November 19, accompanied by MSHA's special investigator, Mr. Hennessee was again terminated from his employment. As a result of this termination, MSHA's special investigator issued two section 104(a) citations and a section 104(b) order on November 19, 1986.

MSHA argues that no legitimate reason exists for requiring an examination of Mr. Hennessee by the respondent's physician, and that if the respondent had any basis for concern as to the safety or well being of Mr. Hennessee prior to November 10, it should have investigated the matter and presented it for consideration during the reinstatement hearing. Were there any basis for concern after November 10, MSHA asserts that it must have been eliminated on November 18, when the respondent received the certification of Mr. Hennessee's physician, the same physician upon whose certification the respondent relied in February 1985 when he returned to work after his injury. MSHA points out that the respondent does not suggest that its physician is capable or appropriate to the task of meaningfully examining Mr. Hennessee's knee or foot.

MSHA states that the respondent has long known of Mr. Hennessee's injury because he received it on the job and it is the subject of continuing litigation between them. MSHA points out that despite his injury, Mr. Hennessee has fully and capably performed his work duties until his discharge in April, 1986. Moreover, during the 3 days in which Mr. Hennessee worked after his reinstatement, he fully performed his duties, and prior to returning to work in 1985, he received his orthopedic surgeon's clearance, and was again examined and cleared for work by his doctor on November 17, 1986.

MSHA concludes that there is no basis to require Mr. Hennessee to undergo a physical examination by the respondent's physician as a condition to his reinstatement. MSHA maintains that Mr. Hennessee's knee remains in as good or better condition that it did on the day of his discharge in April, 1986, and that the respondent previously accepted him back to work after the 1984 injury.

MSHA concludes further that having lost at the temporary reinstatement hearing, the respondent now seeks to find refuge from that order by interposing, solely on Mr. Hennessee,

special demands which create hardships for him. MSHA maintains that it would not knowingly seeking reinstatement of a individual incapable of performing the functions for which his reinstatement is sought, and that this has not occurred in this case. MSHA contends that both Mr. Hennessee and MSHA have been reasonable and accomodating and have addressed the concerns expressed by the respondent.

Findings and Conclusions

The respondent does not contend that it had no prior knowledge of Mr. Hennessee's prior injury. I believe it has raised the issue, albeit belatedly, because of Mr. Hennessee's admission that his prior injury continues to cause him difficulty, and his admission that he wears a shoe pad to keep his toes from curling up, that his leg swells up when he works long hours, and that his knee is tender at all times, particularly when twisted.

The fact that the respondent was aware of Mr. Hennessee's prior injury, and that some of his fellow workers refer to him as "Hopalong" because he limps at times, does not establish that the respondent was aware of Mr. Hennessee's asserted present difficulties with his leg and knee. Given the fact that there is no evidence that the respondent knew that Mr. Hennessee wears a shoe pad, or that his leg is subject to swelling and his knee is always tender when twisted, and his admission that he did not mention his prior injury to company management when he discussed the incident of April 17 with them, and did not contend at that time that his injury played a role in his work refusal, I cannot conclude that the respondent's belated raising of this issue is other than bona fide.

As correctly argued by MSHA, the respondent did not make an issue of Mr. Hennessee's prior knee and leg condition during the hearing, and in fact interposed a continuing objection to any testimony in this regard and took the position that it was irrelevant.

Mr. Hennessee testified that the condition of his knee at the time of the April 17, 1986, incident which gave use to his discharge was basically the same as it was when he returned to work after his injury in 1984. Although he was off the job for 10 weeks because of his injury, and was assigned to light duty shop work for 2 months after his return, he stated that sometime in 1985, he returned to his normal duties as an electrician, and there is no evidence that his physical condition has interferred with his work.

Although Mr. Hennesse admitted that he wears a pad in his right shoe to keep his toes from curling up, that his leg swells when he works long hours, and that his knee becomes tender when it is twisted, there is no evidence or testimony to establish that his prior injury has in any way interferred with the performance of his electrician's duties, or that he is unable to perform those duties safely. Further, there is no evidence that Mr. Hennessee has ever complained about his knee or foot condition, that he has ever refused any job assignment because of his condition, or that the respondent was required to make any special accomodation to him because of his condition, other than to assign him light duties until he could fully perform his normal electrician's duties. Indeed, once he was returned to his normal duties, there is no evidence that his prior injuries interferred with his ability to do his job. Further, there is no indication that he was unable to perform his duties during the 3 days that he was reinstated in compliance with my temporary reinstatement order.

With regard to Mr. Hennessee's general competency to do his job, MSHA Special Investigator Paul Belanger testified that his investigation of Mr. Hennessee's discrimination complaint disclosed no adverse information concerning his work performance. Mr. Belanger testified that there was no evidence of any prior adverse personnel actions against Mr. Hennessee, or any unfavorable comments concerning his workmanship, conduct, or his ability to get along with others. Mr. Belanger concluded that Mr. Hennessee was a good employee (Tr. 137-138). Plant manager Ed Pierce confirmed that Mr. Hennessee was a good employee (Tr. 204).

Mr. Hennessee testified that the respondent went to some expense to send him to a GE factory training school in January, 1986, to learn about an automated computer system for a new section of the plant. He also confirmed that he often responded to calls by the respondent for his services in the evenings when the job required it, and that he never refused to work overtime or to do his work (Tr. 54-56).

In a prior temporary reinstatement case which I decided on March 18, 1986, I denied MSHA's request for temporary reinstatement of a miner pending a hearing of the merits of his complaint, Secretary of Labor, MSHA ex rel Johnnie Lee Jackson v. Turner Brothers, Inc., Docket No. CENT 86-36-D, 8 FMSHRC 368 (March 1986).

In the Jackson case, the facts disclosed that he was discharged from his job as a bulldozer operator after he

suffered injuries when a high wall fell on his machine while he was operating it. He was discharged for allegedly causing the accident, which not only resulted in injuries to his back and neck, but also damaged the machine. Although the doctor who treated Mr. Jackson for his injuries submitted a statement that he was able to return to work after the accident with no restrictions, he also noted that as a result of his injuries, Mr. Jackson was temporarily and totally disabled and that his injuries predisposed him to reoccurring exacerbation of symptoms and reinjury related to the accident. In a second statement, the same doctor was of the opinion that Mr. Jackson would require periodic care for the rest of his life and would probably experience chronic reoccurring symptoms as a result of his injuries.

In addition to the medical information concerning Mr. Jackson's injuries, the evidence adduced during the reinstatment hearing reflected that he suffered from "tennitis or ringing of the ears," and possible hearing loss as a result of loud equipment noise, and that this information was not made available to the doctors who cleared him for return to work. Further, the evidence established that Mr. Jackson had in the past voluntarily exposed himself to unsafe work conditions and had been admonished by the mine operator for failure to use his seat belt or to wear a hard hat while operating his equipment.

My decision denying temporary reinstatement in the Jackson case was based on the totality of all of the evidence adduced during the reinstatement hearing which reflected his then present physical condition, including his doctor's contradictory medical statements, the fact that he was suffering possible hearing loss, a condition not known prior to the hearing, and the fact that his prior work record reflected his own lack of care and disregard for the requirement that he wear a hard hat and use his seat belt while operating his equipment. I also considered the fact that to reinstate Mr. Jackson to his prior job operating a piece of equipment which had to be maneuvered back and forth while not always on level ground presented "a clear and present danger" or potential for further injuries.

In my view, the facts presented in the instant case are distinguishable from those presented in the Jackson case. There is no evidence that Mr. Hennessee has had any past difficulty in doing any job assigned to him. The evidence establishes that he has been a good employee and has never been disciplined or charged with any safety violations. Further, his prior injuries were not recent, and he was welcomed back

after a period of recuperation and assigned light duties before being permitted to perform his normal job as an electrician. In all candor, I believe that the question of Mr. Hennessee's prior injuries were brought out by MSHA in an attempt to support a possible later claim that they somehow impacted on his refusal to perform the job task for which he was fired. However, this is an issue which is yet to be determined on the merits of the discrimination complaint.

On the facts of Mr. Hennessee's case in its present posture, and after careful review and consideration of all of the testimony and evidence of record, including an unrebutted statement from his orthopedic surgeon that he is able to perform his normal electrician's duties without physical restrictions, I cannot conclude that his temporary reinstatement pending the adjudication of the merits of his complaint will adversely affect his safety or the safety of his fellow workers, or that his temporary reinstatmeent should be conditioned on his passing a physical by a company doctor.

As indicated earlier, Mr. Hennessee's physical condition was raised by MSHA as part of its complaint, and by its counsel during the course of the hearing. In my view, aside from the respondent's liability concern, the only possible concern with Mr. Hennessee's physical ability to his job as an electrician may be presented in connection with any "non-electrician" duties which may be assigned to him. During the reinstatement hearing, Plant Manager Ed Pierce confirmed that the plant is non-union and that everyone, including electricians, are expected to do cleanup work (Tr. 216). Although Mr. Hennessee stated that he was never expected to do any work other than "technical work" during the period of his employment with the respondent, he conceded that management had never specifically told him that, and he further conceded that he never refused to do any job assignment, and that company rules required that anyone working on equipment clean up and remove any debris (Tr. 74-75). Further, although Mr. Hennessee confirmed that his prior accident is something that he thinks about when he is at work or away from work, and that he is careful when he walks around, he candidly admitted that he would "take a risk" in order to get the job done" (Tr. 60-61).

Mr. Pierce's statement of November 1, 1986, reflects that as a non-union employee, Mr. Hennessee would at times be expected and required to perform non-electrical work such as painting, sweeping, shoveling, etc. Under these circumstances, I believe it is reasonable to conclude that these additional duties are likely to include physical labor which may or may not further aggravate Mr. Hennessee's existing knee and foot

condition. However, I am not convinced that the respondent's policy of assigning other work to its employees is something new. The record here supports a conclusion that Mr. Hennessee has always been expected to perform duties not specifically related to those of an electrician and that he has done so willingly and without incident or complaint. Under the circumstances, I am not convinced that the performance of these additional duties will expose Mr. Hennessee to further injury, nor am I convinced that the respondent has established by any credible evidence that as a condition of reinstatement, Mr. Hennessee should be forced to undergo a physical by a company doctor. I express no view as to whether or not the respondent's existing personnel policies or rules require its employees to be examined by a company doctor in the event the respondent, as an employer, has reasonable or legitimate grounds to believe that an employee cannot physically perform his job. My jurisdiction is limited to the facts presented in the context of a temporary reinstatement proceeding under the Act.

ORDER

In view of the foregoing findings and conclusions, the respondent's request for modification of my temporary reinstatement order to require Mr. Hennessee to undergo a physical by a company doctor as a condition precedent to his temporary reinstatement pending an adjudication of his discrimination complaint on the merits IS DENIED. My previous Decision and Order of November 6, 1986, is therefore REAFFIRMED, and the respondent IS ORDERED to immediately reinstate Mr. Hennessee temporarily to his electrician's position in compliance with that Order.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 86-37-M A.C. No. 41-03036-05504
v.	:	Olmos Portable Crusher No. 1 M
COLORADO MATERIALS CO., INC., Respondent	:	

DECISION

Appearances: Eva Chesbro, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Petitioner;
William M. Knolle, Esq., Hearne, Knolle Lewallen, Livingston & Holcomb, Austin, TX, for Respondent.

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor for a civil penalty for an alleged violation of a safety standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

Based on the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Respondent, Colorado Materials Co., Inc., at all pertinent times operated the Olmos Portable Crusher No. 2, which is a limestone (crushed and broken) plant, in Austin, Texas, engaged in interstate commerce.

2. On August 6, 1985, between 7:00 and 7:30 a.m., Respondent's crusher operator, Galdino Robledo (Decedent), was fatally injured while attempting to remove a rock or rocks from a portable rock crusher.

3. When Decedent was killed, the engine of the rock crusher was running and the machinery was not blocked against motion. Decedent apparently put the engine in neutral, climbed down to the drum and mouth of the crusher in order to dislodge a rock or rocks from the crusher drum and attempted to dislodge the obstruction by pushing the drum with his foot. In this movement, he apparently slipped and fell into the mouth of the rock crusher. His hard hat and a boot came out of the crusher and traveled on a conveyor belt a distance of about 25 feet. This distance reasonably shows that Decedent's initial contact with the drum caused the clutch to engage accidentally and thus to add engine power to drive the drum that crushed him to death.

4. On August 7, 1985, after a careful investigation of the accident, MSHA's inspector issued a citation charging Resondent with a violation of 30 C.F.R. § 56.14029, which provides:

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

5. Decedent began working for Respondent in 1984 as a laborer, and worked his way up to the job of crusher operator by January, 1985. He was known to be a productive, careful and dependable worker.

6. Respondent produces about 600,000 tons of crushed rock a year. It is as a small to medium sized operator.

7. In the 24 months before the accident, Respondent paid penalties for five violations, which were found during six inspection days.

8. It was stipulated that payment of the proposed civil penalty of $6,000 would not impair Respondent's ability to continue in business.

9. Respondent abated the cited condition in a timely manner, by conducting a safety meeting at which all employees were instructed to shut off the power on the crusher engine and to install a blocking pin in the crusher axle before any employee entered the crusher area for removal of obstructions.

10. Many of Respondent's employees, including Decedent, were Spanish speaking rather than English speaking.

Respondent did not post safety signs or write safety notices in Spanish for the benefit of such employees. Decedent's immediate supervisor did not speak Spanish and only assumed that Decedent, although Spanish speaking, could understand enough English to follow his instructions to Decedent, but no proof was offered to show that Decedent actually had a reasonable grasp or understanding of English. His supervisor testified that Decedent could understand vocal instructions in English because Decedent would do what he was instructed. However, the supervisor did not know how much of Decedent's understanding was due to gestures and other nonverbal communications, and there was no evidence that he could read English or follow it without gestures.

DISCUSSION WITH FURTHER FINDINGS

Respondent contends that it had a policy requiring the crusher operator to shut off the power of the diesel engine driving the crusher before attempting to remove obstructions from the crusher. Additionally, Respondent asserts that the removal of obstructions fits within the exception of § 56.14092, in that the materials could not be removed unless there was machinery motion. It therefore contends that it did not need to block the machinery against motion.

It is at best arguable whether Respondent had a policy requiring that the engine be shut off. Although Respondent's managerial staff testified to such a policy, they have failed to provide the records which they contend they have kept as documention of safety meetings and instructions. Moreover, testimony indicates that even if such a policy existed in theory, it was not enforced in practice, e.g. during winter months due to the difficulty of restarting machine operations.

The failure to enforce such a policy, if Respondent had one, through effective communication, training, or supervision, is tantamount to an absence of such policy.

The standard cited also requires the blocking of machinery against motion, "except where machinery motion is necessary to make adjustments." At times, obstructing rocks were removed by turning the drum shaft from the outside of the machine. At those times, the blocking safety standard would not apply. However, there were times when obstructing rocks were too big to be dislodged this way, and at those times it was necessary to pull or pick the rock or rocks away from the drum while standing inside the crusher area and over the drum and mouth of the crusher itself. At those times, Respondent has acknowledged that the machinery had to be

blocked for safety of the employee, but it contends that it had a policy in such cases: (1) that the employee had to get permission from his supervisor to enter the crusher area, (2) the power would be shut off, and (3) the drum would be blocked by employees out side holding a Stilson wrench on the shaft. Also, Respondent states that when the welder worked on the drum he would first block it with wooden wedges on both sides or weld the drum to the frame.

The requirement for blocking the machinery is specifically directed at the prevention of a safety hazard that is obvious and severe. The simple step of shutting off the engine power of a crusher mitigates the chance of motion which could otherwise occur, due to either the slippage of the clutch because of vibration of the machine, or due to an employee's accidental or intentional exertion of force on part of the machinery. Notwithstanding the required step of shutting off power, the rotating drum, conveyor, and other parts of the crusher are still capable of motion, and thus, hazardous to employees exposed to the crusher. The crusher drum weighs about 13 tons and is "freewheeling."

This residual motion and hazard is addressed by the blocking requirement of the standard. Blocking ensures that these potentially hazardous parts cannot be put into motion by either a slippage of a clutch or an employee's pressure, be it the force of a kick to start the drum rotating or the body weight of an employee who slips or falls. The evidence shows that the § 56.14029 exception does not apply to the task of removing rocks by approaching the drum from above while standing in the crusher area.

Respondent's asserted blocking policy was not shown to be in writing or otherwise effectively communicated to the Decedent. Despite repeated requests by MSHA for such records, Respondent was unable to produce the records it contended it kept as documentation of safety meetings and instructions to employees. Respondent has failed to show effective communication and enforcement of its asserted blocking policy.

As in the case of Respondent's asserted policy of shutting off the engine for dislodging procedures, Respondent's failure to communicate and enforce its asserted policy of blocking the crusher--through effective communication, training and supervision of Decendent and other Spanish-speaking employees--is tantamount to an absence of such a policy.

The duty of enforcement of an employer's safety rules rests on the employer. Since the safety standards under the Act are mandatory and are not "fault" standards, a penalty proceeding is barred by a defense of employee misconduct. As the United States Court of Appeals for the Fifth Circuit noted, since the employer is in a better position to make and enforce rules than are his workers, the Act "impose[s] a kind of strict liability on the employer as an incentive for him to take all practicable measures to ensure the workers' safety" Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-894 (1982). See also Atlantic Cement Co., Inc., 2 FMSHRC 1499 (1981) (employee's failure to wear safety belt and line in direct contravention of the company's regularly enforced safety rules does not relieve employer from liability for violation of standard of no-fault statute).

I find that Respondent was negligent in failing to establish and enforce through effective communication, training, or supervision a clear safety rule implementing the standard in 30 C.F.R. § 56.14029. Decedent's negligence (entering the crusher area without shutting off the engine and having the machinery blocked against motion) is imputed to Respondent. This was a most serious violation, because the risk of death or serious injury was very high.

Considering all of the criteria for assessing a civil penalty under section 110(i) of the Act, I find that a civil penalty of $6,000 is appropriate.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 56.14029 as charged in Citation No. 2241745.

3. Respondent is ASSESSED a civil penalty of $6,000 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalty of $6,000 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Eve Chesbro, Esq., U.S. Department of Labor, Office of the Solicitor, 555 Griffin Square #501, Dallas, TX 75202 (Certified Mail)

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kg/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT B. CORBIN and JAMES CORBIN, Complainants	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. KENT 86-131-D
	:	BARB 86-27
	:	Docket No. KENT 86-132-D
v.	:	
	:	BARB 86-42
TERCO, INC., RANDAL LAWSON, TERRY MCCREARY, and MATTHEW LOGAN, Respondents	:	

ORDER OF DISMISSAL

Appearances: W.F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Complainants;
Carlos Morris, Esq., Barbourville, Kentucky, for Respondents.

Before: Judge Melick

The Complainant, Secretary of Labor, with the consent of the individual Complainants, James Corbin and Robert Corbin, requests approval to withdraw his complaints in the captioned cases on the grounds that the parties have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The cases are therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Frederick Moncrief, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-385 A.C. No. 46-01455-03628
v.	:	
	:	Osage No. 3
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Terry Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant.

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. A reduction in penalty from $1,055 to $355 is proposed. 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 $355 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 8 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BARRY MYLAN, LESTER POORMAN, Complainants	:	DISCRIMINATION PROCEEDING Docket No. PENN 86-125-D MSHA Case No. PITT CD-8 Benjamin Strip No. 1
v.	:	
BENJAMIN COAL COMPANY, Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor	:	

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by MSHA on behalf of the complainants pursuant to section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). The complainants state that they are employed by the United Mine Workers of America as Health and Safety Representatives, and they allege that on or about October 31, 1985, when acting as miners' representatives, the respondent denied them the right to travel with an MSHA inspector during a spot inspection of the mine. The complaint seeks the following relief:

> 1. A finding that the complainants were unlawfully discriminated against by the respondent for engaging in actions protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.

2. A cease and desist order and an order directing the respondent to post a notice that it will not violate section 105(c) of the Act.

3. An order assessing a civil penalty against the respondent for its violation of section 105(c) of the Act. Pursuant to 29 C.F.R. § 2700.42, MSHA has submitted a statement proposing a civil penalty assessment in the range of $500 to $600 based upon the criteria for penalty assessments set forth in section 110(i) of the Act.

The parties agreed to submit this matter to me for summary decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, and they have filed a joint stipulation of facts, and briefs in support of their respective positions. The UMWA has been permitted to intervene pursuant to Commission Rule 4(b), 29 C.F.R. § 2700.4(b)(1) and (2), and it has filed briefs in support of its position.

Issues

The principal issue presented in this case is whether or not the respondent discriminated against the complainants by its refusal to permit them to accompany an MSHA inspector in their alleged capacity as miner's representatives. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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. Sections 103(f), 105(c), and 110(i) of the Act, 30 U.S.C. § 813(f), 815(c), and 820(i).

3. 30 C.F.R. § 40.1 and 40.2.

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

Stipulations

MSHA and the respondent have stipulated to the following:

1. On November 4, 1985, Barry Mylan and Lester Poorman filed a section 105(c) complaint

with the Mine Safety and Health Administration, Johnson Field Office, against the Benjamin Coal Company.

2. Both Messrs. Mylan and Poorman are employed by the United Mine Workers of America as Health and Safety Representatives. Neither is employed at the Benjamin Coal Company in any capacity.

3. The Benjamin No. 1 Strip Mine, I.D. No. 36-02667, is one of eight surface mining operations which are owned and operated by Benjamin Coal Company and is located in the vicinity of Waukeska, near Westover, Clearfield County, Pennsylvania.

4. The No. 6 Preparation Plant, associated with the Benjamin No. 1 Strip Mine, processes coal from various strip mines operated by Benjamin Coal Company. The plant employs approximately 35 non-union miners on two production shifts and one maintenance shift to process a daily average of 2,200 tons of coal.

5. Employment at the Benjamin Coal Company is currently 335 employees and the No. 1 Strip Mine including the No. 6 Preparation Plant employs approximately 262 miners.

6. The president of the Benjamin Coal Company is David J. Benjamin.

7. On March 14, 1984, a secret ballot election was held at the Benjamin Coal Company by the National Labor Relations Board.

8. The employees (miners) of the Benjamin Coal Company by a vote of 261 to 209 voted against having the United Mine Workers of America become their representatives. (See Exhibit A).

9. On October 21, 1985, four miners who worked at the No. 6 Preparation Plant designated the United Mine Workers of America to act as the miners' representatives at the No. 6 Preparation Plant. (See Exhibit B).

10. The United Mine Workers of America designated Barry Mylan as its representative and Lester Poorman as its alternate representative. (See Exhibit B).

11. On October 21, 1985, the aforementioned designation was placed upon an authorization form in accordance with 30 C.F.R. § 40.3 and forwarded to Donald Huntley, District Manager of the Mine Safety and Health Administration's District 2. A copy was also sent to the Benjamin Coal Company. (See Exhibit B).

12. On October 24, 1985, Barry Mylan forwarded to John DeMichiei, Subdistrict Manager-MSHA, a written section 103(g)(1) request for an inspection of the No. 6 Preparation Plant. (See Exhibit C).

13. On October 31, 1985, as a result of the October 24, 1985 request, MSHA Inspector Nicholas J. Kohart visited the No. 6 Preparation Plant for the purpose of conducting a section 103(g)(1) spot inspection.

14. Upon Inspector Kohart's arrival he was met by Messrs. Mylan and Poorman who informed him that they were the authorized mine representatives.

15. Inspector Kohart and Messrs. Mylan and Poorman appeared at the mine office that morning for the purpose of conducting the section 103(g)(1) spot inspection.

16. Said inspection was commenced, however, during the course of the inspection, Messrs. Mylan and Poorman were ordered off of the mine property by David J. Benjamin, President of Benjamin Coal Company.

17. Mr. Benjamin refused to recognize the UMWA as a miners' representative because a majority of the employees of Benjamin Coal Company had voted against the UMWA as their representative in the election of March 14, 1984.

18. Employees, i.e., miners, had in the past been allowed by Benjamin Coal Company to accompany federal inspectors on inspections at the No. 6 Preparation Plant.

19. On April 15, 1986, the Secretary of Labor filed the complaint before the Federal Mine Safety and Health Review Commission, which is the subject of this action.

20. The No. 1 Strip Mine's annual production tonnage is approximately 438,496. The Benjamin Coal Company's annual production tonnage is between 1,100,000 tons and 1,500,000 tons.

21. The history of previous violations during the 24-month period preceding the filing of this complaint was 103 over 68 inspection days. The respondent has no previous history of a section 105(c) violation.

An unopposed motion by the UMWA to amend the stipulations was granted, and paragraph 8 above was amended as follows:

8(a). In a decision issued on July 31, 1985, an administrative law judge of the National Labor Relations Board determined that unfair labor practices committed by Benjamin Coal Company had precluded the conducting of a fair election and he therefore ordered the election of March 14, 1984, set aside (decision attached as Exhibit D). The judge concluded further that said unfair labor practices were so egregious as to preclude the holding of a fair election in the future and that a previous election, conducted on November 17, 1983, in which the UMWA obtained a majority vote, constituted a more reliable indicia of employee desires. The judge therefore concluded, as a matter of law, that the UMWA was, and had been since November 1983, the designated representative of a majority of employees at the Benjamin mine.

8(b). The Administrative Law Judge Decision, attached as Exhibit "D," has been appealed to the National Labor Relations Board, where said appeal is still pending.

Discussion

The facts in this case are not in dispute. The respondent's No. 1 Strip Mine employs approximately 262 miners. The No. 6 Preparation Plant is part of the mine, and approximately 35 miners are employed at the plant.

On October 21, 1985, four miners who worked at the preparation plant designated the UMWA as their representative. This written designation was filed with MSHA's District 2 Manager and a copy was sent to the respondent in accordance with 30 C.F.R. §§ 40.2(a) and 40.3(b). The designation listed Barry Mylan and Lester Poorman as the UMWA officials serving as representatives. Mr. Mylan and Mr. Poorman both are employed by the UMWA as Health and Safety Representatives, and neither is employed by Benjamin Coal Company.

On October 24, 1985, Mr. Mylan filed a request with MSHA for a section 103(g)(1) spot inspection of the preparation plant. In response to that request, MSHA Inspector Nicholas J. Kohart visited the preparation plant on October 31, 1985, for the purpose of conducting the spot inspection. Upon his arrival, Inspector Kohart was met by Mr. Mylan and Mr. Poorman who informed him that they were the authorized representatives of the miners at the plant. Mr. Mylan and Mr. Poorman intended to accompany Inspector Kohart on his inspection as the miners' representative pursuant to section 103(f) of the Act.

Inspector Kohart commenced his inspection, accompanied by Mr. Mylan and Mr. Poorman. Upon learning of the presence of Mr. Mylan and Mr. Poorman, respondent's President, David Benjamin, went to the plant and ordered them off the mine property. Mr. Benjamin's action was prompted by his refusal to recognize the UMWA as the miners' representative because a majority of his employees had voted against the UMWA as the collective bargaining representative of miners in an NLRB directed election held on March 14, 1984. Respondent's miners had in the past been permitted to accompany MSHA inspectors on inspections at the plant.

Thereafter, on November 4, 1985, Mr. Mylan and Mr. Poorman filed a complaint with MSHA alleging that the respondent's refusal to allow them to accompany Inspector Kohart as the miners' representatives pursuant to section 103(f) of the Act violated their rights under section 105(c) of the Act. MSHA conducted an investigation of the complaint, and upon its completion filed the instant complaint on behalf of Mr. Mylan and Mr. Poorman on April 15, 1986.

Respondent's Arguments

The respondent contends that the designation of the UMWA as the representative of the miners by only four (4) miners is not effective to confer representative status on the UMWA over many times that number of miners. Consequently, respondent contends that the allegation that it violated section 105(c) of the Act by its actions cannot be sustained. Respondent asserts that its actions were not motivated because of the exercise of any rights under the Act by Mr. Mylan and Mr. Poorman, and that it is clear that it has always permitted miners' representatives to take part in MSHA inspections. In this instance, however, the respondent maintains that it refused to recognize the UMWA as the representative of its miners because a majority of its miners had declined to have the UMWA act as their representative.

The respondent also contends that the complaint should be dismissed because it was not filed until well after the statutory and regulatory time limits set forth for the filing of a complaint of discrimination, discharge or interference with the Commission.

In support of its principal argument, the respondent points out that the Act contains no definition of a representative of miners. It recognizes that 30 C.F.R. § 40.1 defines a representative of miners as "any person or organization which represents two or more miners at a coal or other mine for the purpose of the Act . . .," and states that the Secretary of Labor, in support of this definition has stated that:

> The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice . . . . 43 Fed. Reg. 29508 (July 7, 1978).

Respondent argues that if all miners have the "right to select the representative of their choice" the claimed violation of section 105(c) cannot, in this case, be sustained. If miners have the right to select a representative of their own choice, respondent asserts that the designation of the UMWA as representative for all of its miners or for all miners at the preparation plant by only four miners must be ineffective since neither the 31 other miners employed at the

plant nor the 258 other miners employed at the mine can be forced to accept the UMWA as their representative under the Act by the action of four individuals. Because this is not a proper designation from the persons the UMWA purports to represent, respondent concludes that it cannot be penalized for refusing to recognize the UMWA as the representative of its miners during the inspection of October 31, 1985.

Respondent maintains that MSHA and the UMWA do not claim that the UMWA is the representative of the four miners that designated the UMWA as their representative, but interpret the designation of four miners as being the effective designation of all miners at the mine. In support of this conclusion, the respondent states that MSHA's consideration of the designation by the four miners to be of wide application is evidenced by the fact that the respondent was cited on June 25, 1986, for refusing to allow the UMWA to take part in an inspection on June 19, 1986, at the site of an accident many miles away from the plant and where none of the miners that signed the designation work.

Respondent argues that if the designation by four miners is effective for other miners at the mine, then this is contrary to MSHA's expressed interpretation of the Act's intent "that all miners have the opportunity to exercise their right to select the representative of their choice . . . ." Therefore, the UMWA cannot, as it purported to be, be the representative of all miners at the Company or of all miners at the plant since the miners presumably have the right to remain unrepresented or choose their own representative.

Respondent cites section 103(f) of the Act which states: "Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine." (Emphasis added.)

Citing the legislative history of this provision, the respondent points out that the Joint House and Senate Conference Committee stated: "The Senate required the Secretary to consult with a reasonable number of miners if there was no authorized representative of miners. The House amendment did not contain this protection for unorganized miners."

Respondent maintains that MSHA is required to consult with a "reasonable number of miners" when there is no authorized representative, and that the designation of a representative by four of several hundred miners cannot relieve it of

this responsibility and deprive other miners of the right to be consulted. Respondent concludes that if a reasonable number of miners must be consulted when there is no authorized representative, the authorized representative of a group of miners must be selected by a reasonable number of miners, and that four miners is hardly a reasonable number in determining the representative for over 250 miners.

Respondent asserts that it is clear that Congress had in mind that the term "authorized representative of the miners" applied to organized mines where MSHA would consult with the representative that had been selected by a majority of the employees, and the reason that MSHA is required to consult with a "reasonable number of miners" where there is no authorized representative, is because in an organized mine by definition, the authorized representative would have been selected by a majority, i.e., reasonable number of miners.

Respondent maintains that if four miners may effectively designate a representative for all other miners, then the remaining miners would also lose valuable rights and protections under section 103(g) of the Act which states:

> (1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative, has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger . . . ."

Citing the legislative history of this provision, respondent points out that the Joint House and Senate Conference Committee stated: "The conference substitute conforms to the Senate Bill, except that such inspections can be requested only by a representative of miners, or by a miner where there is no representative of miners at the time."

Respondent argues that if the UMWA is the representative of the miners at the mine and plant by virtue of the designation of four miners, then by statutory mandate all other miners lose their rights under section 103(g) of the Act. The statute and the legislative history make it entirely clear that if there is a representative of miners at a mine, then the miners are to be represented by that representative

for purposes of the Act, and they lose the right to act individually because of the presence of a representative of miners. Similarly, if there is a representative of the miners at the mine, miners apparently lose the right under the Act to be consulted at the time of an inspection pursuant to section 103(f).

Respondent concludes that if miners are going to lose valuable rights under the Act to act individually because they must deal through a representative, then they must be involved in the selection of that representative. Respondent suggests that to allow four miners to designate the representative for all other miners deprives them of their freedom of choice and requires them to be represented by an entity they have in this instance previously rejected, and is contrary to the purpose of the Act as set forth by MSHA which is allegedly best served by allowing all miners "the opportunity to exercise their right to select the representative of their choice." [43 Fed. Reg. 29508 (July 7, 1978)].

Respondent maintains that by refusing to recognize the UMWA as the representative for all of its miners, or as the representative of the miners at the preparation plant, it did not violate section 105(c) of the Act. It concludes that the UMWA cannot, consistent with the regulations nor the spirit of the Act, be the representative for miners that have not authorized it to represent them.

Respondent argues further that allowing four miners to designate a representative for other miners also conflicts with the miners' rights under the National Labor Relations Act (NLRA). In support of this argument, respondent asserts that section 7 of this statute permits employees (miners are included in the definition of employees) to engage in concerted activity for purposes of collective bargaining or other mutual aid or protection. Section 7 also states that employees may refrain from engaging in such concerted activities. Concerted activities for purposes of other mutual aid or protection includes matters of safety and health in the workplace. NLRB v. Washington Aluminum Co., 370 U.S. 9, 8 L.Ed.2d 298 (1962); Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009 (3d Cir. 1980); Wray Electric Contracting, Inc., 210 NLRB 757, 86 LRRM 1589 (1974).

Respondent points out that under the NLRA a representative of the employees selected by a majority of the employees becomes the exclusive representative of the employees. [NLRA § 9(a), 29 U.S.C. § 159(a)]. In 1984 an election was held in which the UMWA sought to become the exclusive representative

of the respondent's employees (miners), and that the employees (miners), by a vote of 261 to 209, voted against having the UMWA as their representative. Since that time, the employees (miners) have not indicated any desire to have the UMWA represent them for any purposes other than the purported designation by four individuals of the UMWA as the representative of miners under the Act.

The respondent suggests that because employees (miners) have the right to refrain from being represented under the NLRA, a determination allowing four individuals to select the representative for many other miners would abrogate their right to refrain from engaging in collective activity, and that any recognition by an employer of a union as a representative of employees that have not selected the union as their representative can be an unfair labor practice under section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2). Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476 (3d. Cir. 1980). Moreover, if the UMWA is their representative, the miners lose their rights to act individually pursuant to sections 103(f) and (g) of the Mine Act.

The respondent points to the fact that MSHA has stated that the purpose of the Mine Act are better served by having all miners "exercise their rights to select the representative of their choice . . . ." If this is the case, respondent further suggests that miners also have the right to refrain from selecting a representative and are free to pursue their rights under the Act individually. Further, if miners are free under the Act to refrain from having the UMWA represent them, respondent concludes that the designation of the UMWA as their representative by others must be invalid. Respondent further concludes that allowing the UMWA to gain representative status over other miners based on the actions of four miners would directly conflict with the comprehensive scheme for the selection of a union established under the NLRA as well as the apparent intent of the Mine Act.

The respondent maintains that if the UMWA had won the election and had been certified as the exclusive representative of the employees at the company, it would, as contemplated by Congress, be the authorized representative of the miners under the Mine Act. Since the UMWA, a labor organization, did not win the election and has not been certified as the representative of respondent's employees, it cannot now achieve the status of a representative for hundreds of miners based on the actions of four miners, and that as a labor organization, it must follow the procedures of the NLRA to gain the status of representative for hundreds of miners.

Respondent concludes that to interpret the Mine Act to allow a union to gain a status as representative for employees without their consent, would fly in the face of the long established scheme of the NLRA, and that Congress could not have intended a result whereby an employer could refuse to recognize a union that has been rejected by a majority of his employees but the same employer would have to recognize the same union as the representative of the same employees because a few of those employees had designated the union as representative for the employees.

Summarizing its position on the merits, the respondent concludes that the designation of the UMWA as the representative of miners at its mine by four miners is inconsistent with both the Mine Act and the National Labor Relations Act, because there is no authority allowing two or more miners to select a representative for many times that number of miners. This is particularly true if the Acts' purposes are better served by allowing miners to select representatives of their choice.

Respondent concludes that the designation that purported to designate the UMWA as the representative of miners that did not indicate a willingness to waive their individual rights under the Act in favor of having the UMWA act as their representative is clearly defective, and consequently, its refusal to recognize the UMWA under these circumstances is not violative of section 105(c)(1) of the Mine Act. Moreover, the respondent maintains that its actions were clearly not motivated because of the exercise of rights protected under the Act by the UMWA, but instead, were based on the act of its employees that had previously rejected the UMWA as their representative.

In addition to its arguments on the merits of its asserted defense in this case, the respondent asserts that MSHA's complaint should be dismissed as untimely. Citing the time requirements of section 105(c)(3) of the Act, and Commission Rules 40 and 41, 29 C.F.R. § 2700.40 and 2700.41, respondent states that MSHA is required to make a written determination of a violation within 90 days of receipt of a complaint and to immediately file its complaint with the Commission if it believes that a violation of section 105(c)(1) has occurred. Respondent points out that 29 C.F.R. § 2700.41(a) further delineates that MSHA shall file its complaint with the Commission within 30 days of any determination that a violation has occurred.

Since the complaint by Mr. Mylan and Mr. Poorman was filed with MSHA on November 4, 1985, the respondent maintains that MSHA should have filed its complaint by March 5, 1986. Respondent calculates that 90 days from November 4, 1985 is February 3, 1986; and 30 days from February 3, 1986, falls on March 5, 1986. Instead, respondent points out that MSHA failed to file its complaint with the Commission until April 15, 1986.

The respondent asserts that MSHA had ample opportunity to file a complaint within the mandated time limits. Moreover, respondent asserts that the instant case is not one where an unsophisticated party not knowing their rights under the Act failed out of ignorance to take advantage of his right to file a complaint, and that the alleged discriminatees are representatives of the UMWA, a large, sophisticated labor organization that is fully capable of filing a complaint within the required time limits and has historically been involved in such litigation under the Act.

MSHA's Arguments

In support of its position in this case, MSHA initially points out that under the analytical guidelines established by the Commission in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d. Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence that (1) he engaged in protected activity, and (2) the adverse action taken against him was motivated in any part by that protected activity. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-818. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.

MSHA submits that a prima facie case of a violation of section 105(c) of the Act has been proven in this case, and that section 103(f) of the Act provides the statutory right which gives rise to the protected activity at issue. MSHA points out that section 103(f) provides rights to miners and their representatives in connection with their participation in MSHA inspections, and that in fulfilling his statutory rulemaking mandate, the Secretary of Labor issued an Interpretative Bulletin at 43 Fed. Reg. 17546 (April 25, 1978) setting forth the scope of section 103(f). MSHA maintains that this

interpretative bulletin is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act, and that the courts have often held that considerable respect is due the interpretation given a statute by the officers or agency charged with its administration. Whirlpool Corporation v. Marshall, 445 U.S. 1 (1980); Ford Motor Credit Company v. Milhollin, 444 U.S. 555 (1980); Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973); Skidmore v. Swift & Company, 323 U.S. 134 (1944).

MSHA asserts that as set forth within the preamble of the interpretative bulletin, the Department of Labor is responsible for interpreting and applying the statutes which it administers, and that publication of all interpretative positions by the Department is useful in informing the general public and interested segments of the public of positions on particular provisions of certain statutes. The deference to be afforded interpretative bulletins has been specifically addressed in matters arising under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.). The regulatory provisions of the Fair Labor Standards Act specifically sets forth that "such interpretations of the Act provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 29 C.F.R. § 779.9.

MSHA cites the introductory statement contained in the interpretative bulletin, at 43 Fed. Reg. 17546, and maintains that the bulletin explicity provides that a representative authorized by the miners shall be given an opportunity to accompany the inspector, and that an operator's refusal to allow participation by a representative of miners is a violation of the Act which subjects the operator to a citation and penalty under sections 104 and 105. MSHA points out that the bulletin also cites the Congressional mandate that the scope of the protected activities be broadly interpreted by the Secretary to include participation in mine inspections, and specifically states that "[a] refusal by an operator to comply with the requirements of section 103(f) is an act which 'interferes' with the exercise of statutory rights." Accordingly, MSHA concludes that the provisions of section 105(c) apply to discrimination or interference with the inspection participation right. 43 Fed. Reg. 17547.

MSHA argues that on the facts of this case, the respondent interferred with Mr. Mylan's and Mr. Poorman's statutory rights to act as representatives of the miners at its No. 6

Preparation Plant, and that this interference constitutes an adverse action against them because of their attempt to participate in protected activity.

MSHA maintains that the respondent's contention that Mr. Mylan and Mr. Poorman engaged in no protected activity because they were UMWA representatives and the UMWA had lost a representation election is without merit. MSHA states that the fact that the UMWA did or did not represent the respondent's miners pursuant to NLRB law does not foreclose representation pursuant to the Mine Act. In support of its argument, MSHA maintains that in 1978 the Secretary promulgated regulations at Part 40 which inter alia defined a representative of miners, and that the language of Part 40.1(b) clearly sets forth that "any person or organization representing two or more miners at a coal mine is a representative of miners for purposes of the Federal Mine Safety and Health Act of 1977." Moreover, MSHA points out that the preamble to Part 40 specifically addresses the term "representative" as it is applicable to NLRB law and the Mine Act, and states that the Secretary, in addressing the comments filed during MSHA's rulemaking, stated that a broad definition would be preferable to a narrow one and that "any attempt to limit the manner in which representatives are selected would be intrusive into labor-management relations at the mine and not in keeping with the spirit if miner participation," 43 Fed. Reg. 29508.

MSHA maintains that the selection of the UMWA as representative of miners in the instant proceeding meets the Secretarial guarantees outlined above, and that the selection of the UMWA as "miner representatives" on October 21, 1984, by four miners who worked at the respondent's No. 6 Preparation Plant was in accordance with the Act and its implementing regulations at Part 40.

MSHA also maintains that the argument that the UMWA representatives were not employees of the respondent, and thus not able to represent the miners at the preparation plant is without merit. In support of this conclusion, MSHA cites Judge Broderick's decision in Consolidation Coal Company v. United Mine Workers of America, 2 FMSHRC 1403 (June 12, 1980), affirmed by the Commission at 3 FMSHRC 617 (March 21, 1981), holding that non-employees may be representatives of miners within the meaning of the Act even though they failed to formally file as representatives pursuant to the Part 40 regulations.

MSHA also relies on Judge Morris' decision in Emery Mining Corporation v. MSHA and the UMWA, Intervenor, 8 FMSHRC 1182 (August 7, 1986), upholding a citation for a violation of section 103(f) of the Act because of Emery's refusal to permit an international representative of the UMWA to accompany an MSHA inspector on an inspection of its mine without first executing a waiver of liability. In that case, Judge Morris specifically held that Congress contemplated that non-employees may be representatives of miners, and that the UMWA representative was within the "person or organization" concept defined at Part 40.1(b). Further, Judge Morris rejected Emery's argument that a distinction existed betweeen employee and non-employee miners' representative, citing footnote 18 of Council of Southern Mountains, Inc. v. Federal Mine Safety and Health Review Commission, 751 F.2d 1418, 1419 (D.C. Cir. 1985), where the Court stated that the Mine Act "merely refers to 'representatives' and does not articulate any distinction between the rights of employees and non-employee representatives." Judge Morris concluded that both the individual international representative and the UMWA met the definition of "miners' representative."

MSHA concludes that it is without question that the UMWA and its representatives are proper representatives of miners at the respondent's No. 6 Preparation Plant within the meaning of the Mine Act, and that the respondent's failure to recognize this representative status because of an asserted lost NLRB representation election is violative of the UMWA's and its individual representatives' statutory rights under section 103(f) of the Act. MSHA maintains that the Congressional purposes in enacting the Mine Act and the NLRB Act are clearly distinct and separate. It points out that the former is a remedial statute designed to promote the safety and health of the miner, and that Congress promulgated specific individual statutory rights to miners as individual workers not as members of any union, while the latter was designed to minimize industrial strife and improve working conditions by encouraging employees to promote their interests collectively. Accordingly, MSHA further concludes that NLRB law and the results of any NLRB election are not controlling in this proceeding.

MSHA's Proposed Civil Penalty Assessment

In support of its proposal for a civil penalty assessment for the respondent's violation of section 105(c) of the Act, MSHA has submitted information with respect to the civil penalty criteria found in section 110(i) of the Act. MSHA

asserts that the respondent was negligent in refusing to recognize the statutorily guaranteed rights of miner representatives, and that its conduct in this regard displays a lack of due diligence for the rights of miners and presents a "chilling effect" on those rights. MSHA considers the violation to be serious, and concludes that the respondent displayed no good faith in attempting to abate the violation in that it has remained adamant in its refusal to recognize the UMWA as the miners' representative in this case.

MSHA's brief does not address the issue of the timeliness of its complaint, and the respondent's request for a dismissal on the ground that the complaint was not timely filed.

The UMWA's Arguments

The UMWA states that the respondent has admitted that it received the designation of the UMWA pursuant to 30 C.F.R. § 40.3, as a representative of miners at the No. 6 Preparation Plant, which listed the complainants Mylan and Poorman as the UMWA officials serving as representatives, and that it also admits that it refused to permit Mr. Mylan and Mr. Poorman to accompany an MSHA inspector on a spot inspection on October 31, 1985. The UMWA rejects the respondent's argument that the UMWA cannot be a representative of miners at the plant because it did not receive a majority of the votes in a March 14, 1984, election conducted under the National Labor Relations Act (NLRA) for selection of an exclusive collective bargaining agent, and because non-employees may not serve as miners' representatives under the Mine Act as totally groundless.

The UMWA asserts that its status as exclusive collective bargaining agent under the NLRA is completely irrelevant to its status as a representative of miners under the Mine Act. In support of its position, the UMWA points out that the Act makes numerous references to miners' representatives for a variety of purposes, and that one of the major functions of a miners' representative is the walkaround right found in section 103(f). Although the Act does not define the term "representative of miners" and the similar terms used throughout the sections of the Act footnoted at page 5 of its initial brief, the UMWA points out that by rulemaking culminating on July 7, 1978, the Secretary of Labor issued regulations which at 30 C.F.R. § 40.1(b), defines the term as follows:

"Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for purposes of the Act, and

(2) "Representatives authorized by the miners," "miners or their representative," "authorized miner representative," and other similar terms as they appear in the Act.

The UMWA maintains that since it has been designated by four miners as their representative at the preparation plant, it is clearly an "organization which represents two or more miners" at the plant and meets the facial definition of "representative of miners" under 30 C.F.R. Part 40, and nothing in that definition indicates that a "representative of miners" must either have been selected by a majority of all miners or have been certified as the exclusive collective bargaining agent under the NLRA. In addition to the clear language of section 40.1(b), the UMWA cites the preamble to Part 40, 43 Fed. Reg. 29508 (July 7, 1978), which states in pertinent part as follows:

> [Some] commenters suggested that the National Labor Relations Board (NLRB) definition of representatives be applied while others suggested that the representatives should be elected by a majority . . . . [T]he NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representative in the context of collective bargaining. The meaning of the word representative under this Act is completely different. Additionally the rights of nonunion miners would be severely limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of

a representative of miners under the Act and within the framework of each provision.

The UMWA argues that nothing in the Mine Act or its legislative history indicates any Congressional intent to limit a representative of miners under the Act to an organization or individual selected by a majority of the miners or to an organization certified as the exclusive bargaining agent under the NLRA. The UMWA points out that the Secretary of Labor, who is charged with enforcing the Mine Act and promulgating regulations thereunder, has determined precisely the opposite through careful rulemaking proceedings, in which the respondent's precise argument was raised, considered fully, and rejected.

Citing United Mine Workers v. FMSHRC, 671 F.2d 615, 626 (D.C. Cir. 1982) and Magma Copper Co. v. Secretary of Labor, 645 F.2d 694, 696 (9th Cir. 1981), the UMWA further points out that the Courts have held that safety legislation is to be liberally construed to effectuate the congressional purpose and that deference is to be given to the Secretary's reasoned and reasonable statutory construction as enunciated in his promulgated regulations. The UMWA concludes that the Secretary's regulatory definition of "representative of miners" is "a reasoned and supportable interpretation of the Act," and that the UMWA, designated by four miners at the No. 6 Preparation Plant, is not precluded from being a "representative of miners" within the meaning of 30 C.F.R. § 40.1(b) and the Mine Act merely because it lacks certification as the exclusive collective bargaining agent under the NLRA.

The UMWA finds no merit in the respondent's contention that the UMWA and its safety and health representative cannot be representatives of miners under the Mine Act because they are not employed by the respondent. In support of its argument, the UMWA maintains that one of the most important functions of a miners' representative under the Act is the inspection walkaround right under section 103(f). Quoting the pertinent provision of that section which provides that "such representative if miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection," the UMWA suggests that if all miners' representatives were required to be employees of the operator, the emphasized language would be meaningless surplusage. The UMWA concludes that Congress obviously contemplated and intended that non-employees, as well as employees, could be designated as representatives of miners, and that Commission Judges Broderick and Morris reached precisely this conclusion in

Consolidation Coal Co. v. UMWA, 2 FMSHRC 1403, 1408 (1980), and Emery Mining Corp. v. Secretary of Labor, 8 FMSHRC 1182, 1202 (1986) (review pending).

In addition, the UMWA ponts out that its safety and health representatives receive much the same training as MSHA gives to its inspectors, and that permitting non-employees to serve as miners' representatives furthers the purposes of the Act by allowing participation by representatives specially trained in safety and health matters.

In further response to the respondent's arguments, the UMWA asserts that the purpose of a walkaround representative under section 103(f) is not to represent all of the miners for purposes of collective bargaining, but rather, to assist MSHA and the miners who have selected him in enforcing the statutory and regulatory safety and health standards. The UMWA concludes that nothing in the Act or 30 C.F.R. Part 40 requires that a miners' representative be the exclusive representative for purposes under the Act, or represent all miners, or be selected by a majority of miners. Quite the contrary, as stated by the Secretary in the preamble to Part 40, "the rights of nonunion miners would be severely limited by a definition of 'Representative of Miners' based on the collective bargaining concept. Furthermore, . . . [t]he purposes of the Mine Act are better served by allowing multiple representatives to be designated." 43 Fed. Reg. 29508 (July 7, 1978).

The UMWA further concludes that its designation as a representative of miners under the Act does not mean that the other miners employed at the respondent's No. 1 Strip Mine have been forced to accept the UMWA as their representative under the Act by the action of four individuals because no exclusive representative "for the purposes of collective bargaining" under section 9(a) of the NLRA has been selected by the Part 40 designation involved in this case, nor have the rights of any or all other respondent's miners to select one or more other representatives under the Act been interferred with in any manner. Those miners are free to designate any representative(s) they choose, or to continue not to designate other representatives under Part 40.

Finally, the UMWA concludes that the respondent's refusal to permit the complainants to accompany an MSHA inspector during the inspection on October 31, 1985, interferred with the exercise of their statutory rights under section 103(f) of the Act, and therefore was a violation of section 105(c)(1) of the Act. Under the circumstances, the UMWA asserts that the

respondent was properly cited for a violation and that a civil penalty for that violation must be assessed.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, the complainants bear the burden of production and proof to establish (1) they engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the complainants' unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ____, 76 L.Ed.2d 667 (1983).

The respondent in this case is charged with a violation of section 105(c)(1) of the Act for allegedly interferring with the asserted statutory right of the complainants to accompany an MSHA inspector during his inspection rounds in their capacity as the designated miners' walkaround representatives pursuant to section 103(f) of the Act. The undisputed facts establish that on October 21, 1985, four miners working at the respondent's No 6 Preparation Plant designated the UMWA as their representative in the exercise of their rights under the Act, and that the UMWA in turn designated complainant Barry Mylan as its representative, and complainant Lester Poorman as its alternate representative. Mr. Mylan and Mr. Poorman are employed by the UMWA as health and safety representatives and are not employed by the respondent. The designation of Mr. Mylan and Mr. Poorman as the representative of the miners was filed with MSHA's District Office pursuant to 30 C.F.R. § 40.3, and a copy was served on the respondent.

It is also undisputed that on October 31, 1985, an MSHA inspector visited the mine for the purpose of conducting a section 103(g)(1) spot inspection, and when Mr. Mylan and Mr. Poorman attempted to accompany the inspector on his inspection rounds in their capacity as the miners' designated walkaround representative, the respondent ordered them off the property and would not permit them to accompany the inspector.

Section 105(c)(1) of the Act provides in pertinent part as follows:

> No person shall discharge or in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners * * * in any coal or other mine subject to this Act * * * because of the exercise by such miner, representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act. (Emphasis added).

Section 103(f) of the Act, commonly referred to as "the walkaround right," provides as follows:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representative of miners

> who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. (Emphasis added).

The critical issue in this case is the interpretation to be placed on the term "miner representative" or "authorized representative" of miners. The respondent's principal contention is the assertion that the UMWA could not be the "miner representative" or "authorized representative" of miners at its preparation plant because the UMWA lost a representation election conducted by the NLRB, and that the designation by four miners of the UMWA as their representative is inconsistent with both the Mine Act and the National Labor Relations Act because there is no authority allowing two or more miners to select a representative for many times that number of miners at the mine. Respondent suggests that the purpose of the Mine Act is better served by allowing a majority of the miners to select their own representative, and that to permit four miners to designate the UMWA as their representative impedes the "freedom of choice" available to the other miners, and flies in the face of the statutory scheme of the National Labor Relations Act and the Mine Act.

As correctly stated by the parties, the Mine Act does not specifically define the term "representative of miners," nor does it set out all of the parameters of the statutory right of a miner's representative to serve as a walkaround in a representative capacity. However, in the exercise of his rulemaking authority pursuant to the Act, the Secretary of Labor on April 25, 1978, issued an Interpretative Bulletin at 43 Fed. Reg. 17546, setting forth the scope of the walkaround provisions of section 103(f). The bulletin in pertinent part provides as follows:

> The Federal Mine Safety and Health Act of 1977 (Pub. L. 91-173, as amended by Pub. L. 95-164, November 9, 1977) (hereinafter referred to as the Act) is a Federal statute designed to achieve safer and more healthful conditions in the nation's mines. Effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of miners at every

level of safety and health activity. Therefore, under the Act, miners and representatives of miners are afforded a wide range of substantive and procedural rights.

Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of a mine, for the purpose of aiding such inspection, and to participate in pre- or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, 'If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.' S.Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977).

In recognition of the fact that the Act does not contain a definition of the term "representatives of miners," the Secretary of Labor, on July 7, 1978, acting under his authority found in section 101 of the Act to promulgate and revise mandatory standards, promulgated 30 C.F.R. Part 40, governing the identification of representatives of miners and setting forth the filing requirements for such representatives, 43 Fed. Reg. 29508, July 7, 1978.

30 C.F.R. § 40.1 - Definitions, in pertinent part provides:

(b) "Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) "Representatives authorized by the miners," "miners or their representatives," "authorized miner representative," and other similar terms as they appear in the Act.

30 C.F.R. § 40.2 - Requirements, in pertinent part provides:

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by § 40.3 of this part. Concurrently,

> a copy of this information shall be provided to the operator of the mine by the representative of miners.

In my view, the term "representatives of miners" for purposes of the Mine Act was clearly defined by the Secretary when the aforementioned regulations were promulgated. During the rulemaking process, several commenters expressed concern that the regulatory definition found in section 40.1 was overly broad and would cause confusion among miners selecting a representative. Some commenters suggested that the NLRB definition of representative be applied while others suggested that miner representatives should be elected by a majority of the miners. In addressing these comments, the Secretary stated that a broad definition would be preferable to a narrow one and that "any attempt to limit the manner in which representatives are selected would be intrusive into labor-management relations at the mine and not in keeping with the spirit of miner participation," 43 Fed. Reg. 29508, July 7, 1978. Additionally, the Secretary stated that:

> [M]ore specifically, the NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representation in the context of collective bargaining, the meaning of the word representative under this Act is completely different. Additionally, the rights of nonunion miners would be severly limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of a representative of miners under the Act and within the framework of each provision. (Emphasis added).

In view of the foregoing, it seems clear to me that in addressing the very concerns raised by the respondent with respect to the application of the collective bargaining provisions of the National Labor Relations Act with respect to the definition of the term "representative," the Secretary, in

promulgating Part 40 clearly distinguished the NLRB law and the Mine Act purposes and rejected any notion that a representative of miners can only be based on any "majority rule." Under the circumstances, I conclude and find that the respondent's arguments with respect to the application of NLRB law in this case are without merit, and they are rejected. I agree with the arguments advanced by MSHA and the UMWA on this issue, and conclude that the fact that the UMWA may not represent the respondent's miners for purposes of NLRB or NLRA collective bargaining purposes does not foreclose its representation of the miners who designated it to act as their representative in the exercise of their rights under the Mine Act.

The regulatory definition of the term "representative of miners" as found in 30 C.F.R. § 40.1 includes any person or organization which represents two or more miners. Section 40.2(b) provides that miners or their representatives may appoint or designate different persons to represent them under various sections of the Act relating to representatives of miners. On the facts of this case, there is no question that the four miners working at the preparation plant designated the UMWA as their representatives, and that the UMWA designated Mr. Mylan and Poorman to serve in their representative capacity on behalf of the four miners.

The respondent's suggestion that the designation of the UMWA by the four miners in question is binding on all miners at the mine and has resulted in the loss of individual rights for all remaining miners is not well taken. The issue is not whether the UMWA represents all miners for all purposes under the Mine Act. The issue is whether or not the respondent interferred with Mr. Mylan's and Mr. Poorman's right to accompany the inspector as the walkaround representative of the four miners who designated the UMWA as their representative. As far as the other miners are concerned, under the regulations found in Part 40, they are free to designate any individual or organization to act as their representative for purposes of MSHA inspection walkarounds. If they choose not to select the UMWA, that is their business.

The respondent's contention that Mr. Mylan and Mr. Poorman may not serve as miners' representatives because they are employed by the respondent is rejected. As pointed out by MSHA and the UMWA in their briefs, this issue has previously been raised in Commission cases decided by Judge Morris and Judge Broderick, in Consolidation Coal Company v. United Mine Workers of America, 2 FMSHRC 1403 (1980), and Emery Mining Corp. v. Secretary of Labor, 8 FMSHRC 1182

(1986). I agree with those decisions, and find nothing in the Act or MSHA's Part 40 regulations which makes distinctions between the rights of employees and non-employee miners' representatives.

I conclude and find that the complainants in this case were the duly designated walkaround representatives of the four miners who so designated them, and they had a statutory right pursuant to section 103(f) accompany the inspector during his inspection on October 31, 1985. In a recently decided walkaround discrimination case, Secretary ex rel. Richard Truex v. Consolidation Coal Company, 8 FMSHRC 1293, September 25, 1986, the Commission stated that "[t]he language of section 103(f), providing that 'a representative authorized by his miners shall be given an opportunity to accompany the Secretary,' unambiguously provides that miners possess the right to choose their representative for section 103(f) inspections * * *," 8 FMSHRC 1298. Further, the legislative history of section 103(f) clearly shows that Congress recognized the important function served by such a right. The Senate Report stated, "It is the Committee's view that [participation in inspections and pre- and post-inspection conferences] will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-17 (1978) ("Legis. Hist."). See also Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979), aff'd, Magma Copper Co. v. FMSHRC, 645 F2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981).

I further conclude and find that the respondent's refusal to allow Mr. Mylan and Mr. Poorman to accompany the inspector during his inspection on October 31, 1985, violated their protected statutory rights under section 103(f) to serve as the representative of the miners who so designated them, and constituted an unlawful interference with their protected rights under section 105(c)(1) of the Act. Accordingly, the complaint filed in this case IS AFFIRMED.

Respondent's Request for Dismissal of the Complaint as Untimely

After due consideration of the respondent's arguments concerning the late-filing of the complaint, they are rejected, and the respondent's request for a dismissal of the complaint on this ground IS DENIED. It has been held that the filing deadlines found in section 105(c) of the Act are

not jurisdictional in nature, Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (1981). Further, as remedial legislation, the Act should be liberally construed so as not to unduly prejudice miners for MSHA's delay in filing its complaint. In this case, I find no protracted delay on MSHA's part, nor can I conclude that the delay has prejudiced the respondent in its ability to present its defense.

Civil Penalty Assessment

On the facts of this case, I do not consider the violation to be egregious. MSHA's suggestion that the respondent displayed a lack of good faith by adamantly refusing to recognize the UMWA as the miner representative in this case is not well taken. Given the protracted and somewhat nasty legal dispute surrounding the contested NLRB collective bargaining election, I find no basis for unduly penalizing the respondent for its legal position taken in this case. Under the circumstances, and after consideration of the civil penalty criteria found in section 110(i) of the Act, I conclude that a civil penalty assessment of $100 is reasonable and appropriate in this case.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. The respondent cease and desist from prohibiting the UMWA or its designated health and safety representatives who have been designated by the four miners at the respondent's No. 6 Preparation Plant as their representatives from accompanying MSHA inspectors as walkaround representatives during their mine inspections.

2. The respondent post a copy of this decision on the mine and preparation plant bulletin boards or at other locations readily available or accessible to miners.

3. The respondent remit to MSHA a civil penalty assessment in the amount of $100 for its violation of section 105(c)(1) of the Act.

Full compliance with this Order is to be made by the respondent 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

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 9 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 85-125-M
	:	A.C. No. 05-04014-05501
v.	:	Docket No. WEST 85-126-M
	:	A.C. No. 05-04014-05502
JEFFERSON COUNTY ROAD & BRIDGE DEPARTMENT, Respondent	:	Docket No. WEST 85-127-M
	:	A.C. No. 05-04014-05503
	:	Harris Pit

DECISION

Appearances: Robert Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Cile Pace, Esq., Jefferson County Road & Bridge Department, Golden, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

A hearing on this matter took place on December 11, 1985 in Denver, Colorado.

The parties filed extensive briefs in support of their positions.

Issues

The issues are whether the Secretary has enforcement authority over respondent and, if so, may the Secretary assess civil penalties.

Stipulation

At the hearing the parties stipulated that if respondent is held to be subject to the Act and not entitled to a CAV inspection then respondent does not challenge the individual citations and penalties in the cases (Tr. 5, 6).

The parties further stipulated that the respondent, in its mining operations, uses equipment manufactured outside of the State of Colorado (Tr. 21).

Summary of the Evidence

The threshold issues require a review of the evidence. Bud Smead, Sam Nankervis and Louis Gabos testified for respondent. Jake DeHerrera and Arnold Kerber testified for the Secretary.

Bud Smead has been the Director of Public Works for Jefferson County, Colorado since 1978. The county operates five gravel pits called Harris, Dog Pound, Green Valley, Golden Gate and Pine Junction (Tr. 8-10). Smead is in charge of the County's Road and Bridge Department which is within the Public Works Division (Tr. 9).

Jefferson County does not sell any of its gravel. It is used exclusively for the surfacing of Jefferson County roads. Some of those roads connect to state and federal highways (Tr. 9, 14).

The operation of a Jefferson County gravel mine is approved by the County Commissioners of Jefferson County and by the State of Colorado Board of Mine, Land and Reclamation (Tr. 9, 10).

Mr. Smead indicated the county requested a CAV inspection. Mr. Gabos made an oral request for such an inspection (Tr. 13).

Sam Nankervis, director of the Jefferson County Road and Bridge Department, is responsible for maintenance and crushing for Jefferson County. The county has sustained one loss time accident (Tr. 15, 16).

The witness was first aware of the events after Lou Gabos called MSHA representative Carmoc Gardner for what the county thought would be a courtesy inspection (Tr. 18). The request for the CAV was after they had moved the crusher to a different pit. MSHA said they would inspect but it would not be a "courtesy" inspection (Tr. 19, 20).

Louis Gabos, a professional engineer and assistant director of the Jefferson County Road and Bridge Department, handles reports for the federal government and for land reclamation (Tr. 22, 26). Witness Gabos filled out the MSHA form and indicated the official business name as "Jefferson County Road and Bridge Department" (Tr. 26).

On March 18 Gabos called Gardner at MSHA. He said they were ready and running but he didn't mean they were crushing anything (Tr. 23). Gardner said there could be no courtesy inspection if the pit was in operation (Tr. 23).

The current practice of the respondent is to call MSHA when they move from one mine to another. Every time they now move they receive a courtesy inspection (Tr. 24).

Gabos filled out the MSHA legal identity form at the direction of his supervisor, Sam Nankervis (Tr. 26; Ex. 1). The form was dated July 12, 1985 (Tr. 27). All of the county gravel pits are titled in the same fashion (Tr. 28).

Gabos indicated the county complies with safe mining practices but they are not required to do so (Tr. 28, 29).

Jake DeHerrera, an MSHA inspector experienced in mining, inspected the Jefferson County pits (Tr. 30, 31).

At one point in time there was a lack of funds to inspect such pits. But he visited the site when he was advised they had been funded to inspect such property (Tr. 32, 33).

A CAV inspection is to assist the operator in complying with the Act prior to a mine reopening after it has been shut down for a time. For such a CAV inspection MSHA requires two weeks notice in writing. Further, MSHA requires that pit not be in operation (Tr. 33). Penalties are not issued under a CAV inspection (Tr. 34).

In January 1985 the Dog Pound pit was in operation and in the process of stock piling material. The inspector observed four to six workers in the area (Tr. 34).

Arnold Kerber, an MSHA inspector since 1974, visited the Dog Pound pit in January 1985. He also visited the Harris Pit on March 21, 1985 and issued 20 or 21 citations (Tr. 38-41).

The parties stipulated that the pit was in operation at the time of the inspection (Tr. 42).

Discussion

The County argues that the Secretary lacks authority to enforce the federal Mine Act against respondent for a number of reasons.

Initially, it is asserted that Congress in passing the Act did not intend to regulate states or political subdivisions thereof. This is so because neither the statutory definition of "operator" or "person" speak to the regulation of state or local governments. Cognizant of federalism concerns, Congress explicitly brings state and local governments within the purview of the statutory scheme if it intends to regulate their activity. For example, Congress so acted in amending the Fair Labor Standards Act, 29 U.S.C. § 203(d), (x), See also Garcia v. San Antonio Mass Transit Authority _____ U.S. _____, 105 S. Ct. 1005 (1985).

This issue is a matter of statutory construction and legislative intent.

The federal Mine Act defines an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine ..." (emphasis added) 30 U.S.C. § 802. In the preamble of the Act Congress explicitly stated that it recognized "the existence of unsafe and unhealthful conditions and practices in the Nation's ... mines (emphasis added). Accordingly, the Act was promulgated to meet the "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's mines in order to prevent death and serious bodily harm ..." (emphasis added). It is apparent here that a mine operated by a county is one of the Nation's mines. The Act was designed and Congress declared that "the first priority of all in the coal or other mining industry must be the health and safety of its most precious resource - the miner", 30 U.S.C. § 801.

A casual reading of the legislative history establishes the clear intent of Congress. Senate Report No. 95-181 shows the congressional views:

> The Committee believes that it is essential that there be a common regulatory program for all operators and equal protection under the law for all miners. Thus, a principal feature of the bill is the establishment of a single mine safety and health law applicable to the entire mining industry.
>
> Further, the Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. (Emphasis added).

Sen. Report, 95th Congress, 1st Session (1977) reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session, 601, 602.

Sand, gravel and crushed stone operations, whether privately operated or operated by a local government unit have been covered by the federal mine safety law since 1966 when the Federal Metal and Nonmetallic Mine Safety Act (Metal Act) was enacted. Historically there has never been any serious question that sand and gravel are minerals and that their extraction is mining, Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir., 1979); Marshall v. Nolichucky Sand Co. Inc., 606 F.2d 693 (6th Cir., 1979). Sand and gravel operations are classical

mining operations. The methods and equipment used in sand and gravel mining are similar, if not identical to, the methods and equipment used in the mining of many other minerals. The hazards faced by workers engaged in extracting sand, gravel, and crushed stone are similar and in many cases they are identical to the hazards faced in other mining operations.

The Metal Act was repealed in 1977 and all mining operations were placed under the present statute. However, the safety and health standards applicable to sand, gravel, and crushed stone operations issued under the Metal Act continue in effect under the 1977 Act.

Because sand, gravel, and crushed stone operations are "mines" as defined in section 3(h)(1) of the Act, they are subject to the provisions of the Act and the regulations issued thereunder. The fact that a pit is operated by a governmental unit rather than a private party is immaterial. When a state or local government engages in an activity subject to Congressional regulation, such as in operating a railway or a mine, the state or local government is subject to regulation in the same manner as a private citizen or corporation. Parden v. Terminal Ry. of Ala. State Docks Dept, 377 U.S. 184, 84 S. Ct. 1207 (1964).

Respondent further argues that Congress explicitly brings state and local governments within the purview of the statutory scheme if it intends to regulate their activity citing such legislative action in amending the Fair Labor Standards Act, 29 U.S.C. § 203(d)(1) and relying on Garcia v. San Antonio Mass Transit Authority, supra.

I agree that Congress certainly may legislate by particularly naming those entities that are subject to the legislation. In fact, Congress did so in extending minimum wage coverage over a period of time and gradually expanding the coverage.

When FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees, the subject of the Garcia case, §§ 3(d), 13(a)(9), 52 Stat, 1060, 1067. In 1961 Congress extended minimum wage coverage to employees of any mass-transit carrier whose annual gross revenue was not less than one-million. Fair Labor Standards Amendments of 1961, §§ 2(c)9, 75 Stat. 65. 71. In 1966 Congress extended FLSA coverage to state and local government employees for the first time. Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 831. In 1974 Congress provided for the progressive repeal of the surviving overtime exemption for mass transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 68. At the same time Congress simultaneously brought the states and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local government employees, §§ 6(a)(1) and (6), 88 Stat 58.60, 29 U.S.C. § 203(d) and (1).

As noted above Congress gradually expanded FLSA coverage and finally specifically included states and local governments. Congress could have specifically named the states and counties in the Mine Act but it is not obliged to legislate in that fashion. In addition, the gradual extension of the FLSA coverage indicates a piece-meal approach to coverage under that Act. A similar legislative approach did not occur in the enactment of the federal Mine Act. The broad statutory definition supported by the legislative history establish that Congress intended to include all mines and miners within the ambit of the federal Mine Act.

Respondent further contends that its gravel pits are not subject to the Act's coverage because its products neither enter commerce nor affect it.

The evidence is uncontroverted that the gravel from the respondent's mines is not sold. It is, in fact, used exclusively to surface the county roads. In addition, Jefferson County's roads do not extend beyond the boundaries of the State of Colorado. The Act encompasses within its coverage the following:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner shall be subject to the provisions of this chapter. 30 U.S.C.A. § 803.

Further, commerce is defined as follows:

> (b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof. 30 U.S.C.A. § 802 (b).

The issue to be addressed is whether the county's gravel operations "affect commerce." As a threshold matter the term "affecting commerce" has been given a broad judicial interpretation. Garcia v. San Antonio Mass Transit Authority, supra; Marshall v. Kraynack, 604 F.2d 231 (3rd Cir. 1979); Godwin v. OSHRC, 540 F.2d 1013 (1976) (9th Cir); United States v. Dye Construction Co., 510 F.2d 78 (1978) (10th Cir.); Brennan v. OSHRC, 492 F.2d 1027 (2d Cir. 1974); Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82.

In the instant cases the parties stipulated that the county uses equipment in its mines manufactured outside of the state. Such activity clearly "affects commerce" as stated in the above cited case law.

Morton v. Bloom, 373 F. Supp. 797 (D.C. Pa. 1973), relied on by respondent, presents a unique factual situation of a mine operated by one man. In that circumstance, the Court ruled that

the local nature of the mine did not affect commerce. The case has not been followed as precedent for later decisions. In short, it appears to have a very narrow application not applicable here.

The Commission has yet to consider the jurisdictional issues raised here but decisions by judges of the Commission have held that a governmental gravel operation is subject to the federal Act. New York State Dept of Transportation, 2 FMSHRC 1749 (1980), Laurenson, J.; Island County Highway Department, 2 FMSHRC 3227 (1980), Morris, J; Salt Lake County Road Dept, 2 FMSHRC 3409 (1980), Vail, J.

Respondent further contends that the Jefferson County Road and Bridge Department is not a legal entity. It is, therefore, not subject to suit under Colorado law. Further, it is not subject to service within the federal system, citing Rule 4(d)(6), F.R. Civ.P.

The respondent here is "Jefferson County Road and Bridge Department". The evidence at the hearing shows that Louis Gabos, assistant director of the department, filled out the MSHA legal identity form at the direction of his supervisor. Only one legal identity form appears in the record but witness Gabos indicated they were all titled in the same fashion. The form contains the federal identification number as well as the mine name and its address. In Government Exhibit 1 the mine name is identified as "Public Works Quarry #5 (formerly called Harris Pit)" and under address there appears "Jefferson County Road and Bridge Dept/-Division of Public Works."

The Secretary's regulations as set for at 20 C.F.R. § 41.10 et seq. require the operator of a mine to file with the Secretary of Labor the legal identity of the operator of a mine and the regulation further requires the reporting of all changes in the legal identity as they occur. The regulations further state that "[t]he submission of a properly completed Legal Identity Report Form No. 2000-7 ... will constitute adequate notification of legal identity to the Mine Safety and Health Administration".

Since respondent identified itself as the "Jefferson County Road and Bridge Department" it is hardly in a position to disavow its own representations. In any event this is not a proceeding under the Colorado statutes but it is an adjudicatory proceedings provided for in 30 U.S.C. § 113(a) and its Rules of Procedure, 29 C.F.R. § 2700 et seq.

Respondent's reliance on Rule 4(d)(6), F.R Civ. P. meets the same infirmity. To like effect on the issue of incorrectly naming a respondent in notices of violation and petition for assessment see the case decided by the Interior Board of Mine Operations in Harlan No. 4 Coal Company, 4 IBMA 241 (1975).

The final issue concerns the assessment of civil penalties. Respondent argues that the Act is replete with provisions demonstrating congressional intent to cooperate with states. Secondly, the federal government is cognizant of the need for fiscal independence of states and their political subdivisions. Thirdly, the imposition of fines will not foster mine safety and respondent immediately abated the violative conditions.

I agree with respondent that the federal Act is replete with legislative assertions of cooperation. Further, the federal government is cognizant of the financial status of the states. However, I believe the imposition of penalties will foster mine safety. Such penalties, as well as further sanctions carefully structured under the Act, as in Section 104(d), can provide a strong incentive for a gravel operator to comply with safety regulations. Further, the text and legislative history of Section 110 of the Act require the Secretary to propose a penalty assessment for each violation and the Commission and its judges to assess some penalty for each violation found. Tazco Inc., 3 FMSHRC 1895 (1981). Nominal penalties have been assessed in extenuing circumstances as in Potochar and Potochar Coal Company, 4 IBMA 252, 1 MSHC 1300 (1975). However, the primary reasons for assessing civil penalties is to deter future violations. Eddie Higgs, d/b/a Higgs Trucking Co., 6 FMSHRC 1215 (1984). Respondent here continues to operate its quarries and civil penalties are therefore appropriate.

Respondent further asserts that no penalties should be assessed because respondent was entitled to a CAV inspection. If respondent was entitled to such an inspection then no penalties should have been proposed.

The parties presented evidence concerning the nature of the alleged CAV inspection but neither parties offered any evidence concerning any regulation or other authority for such an inspection. Accordingly, the judge issued a post-trial order directing each party to submit any relevant regulation or other authority for such an inspection.

Respondent did not reply. The Secretary, although denying its applicability, filed a copy of an internal MSHA memorandum from Robert B. LeGather, assistant Secretary for Mine Safety and Health.

The broad thrust of the memorandum focuses on the proposition that under Section 502 of the Mine Act the MSHA inspectors are authorized to visit mine sites to point out potential violations where such calls involve (1) new mines not yet producing, (2) seasonal, closed or abandoned mines prior to opening and (3) new installations in mines prior to their becoming operational. Generally, the directive provides that if the inspector observes a violative condition he will issue a notice but no penalty will be assessed or proposed.

The evidence here shows that respondent was not entitled to a CAV inspection since its pits were in operation at the time of the inspection. The evidence shows that Lou Gabos, according to witnesses Smead and Nankervis, called MSHA's Gardner and requested a courtesy inspection (Tr. 18).

The testimony of witnesses Smead and Nankervis is not persuasive particularly when it was contradicted by witness Gabos himself who stated that the mine was in operation when MSHA first appeared to inspect it (Tr. 22).

I accordingly reject respondent's evidence and credit MSHA's evidence that in January 1985, at the Dog Pound pit the inspector observed four to six workers in the area. The pit was then in operation and they were stock piling material.

Concerning the Harris pit, the parties stipulated that it was in operation when inspector Kerber conducted his inspection (Tr. 40-42).

Respondent currently relies on the CAV inspection process when moving to new sites (Tr. 23-24). However, respondent was not entitled to a CAV inspection on the date the citations were issued in the cases at bar.

For the foregoing reasons the threshold contentions raised by respondent are rejected.

Briefs

The parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the stipulation of the parties, the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. An order should be entered affirming the citations and the proposed penalties.

ORDER

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

1. In WEST 85-125-M the following citations and proposed penalties are affirmed:

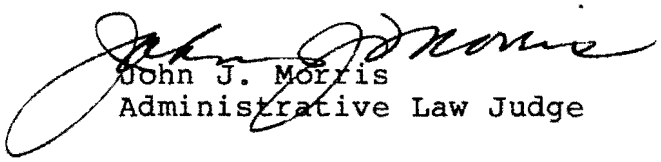
Citation No.	30 C.F.R. § Violated	Penalty
2355924	56.14-1	$54.00
2355925	56.14-1	54.00
2355926	56.14-1	54.00
2355928	56.14-1	36.00
2355929	56.14-1	20.00
2355930	56.14-1	54.00
2355931	56.14-3	36.00
2355932	56.14-1	54.00
2355933	56.11-2	54.00
2355936	56.9-87	20.00
2355937	56.12-28	20.00
2355938	56.12-25	20.00
2355939	56.4-2	20.00
2355940	56.12-25	20.00
2357724	56.11-27	36.00
2358543	56.9-54	63.00

2. In WEST 85-126-M the following citation and penalty therefor are affirmed:

Citation No.	30 C.F.R. § Violated	Penalty
2355927	56.14-1	$54.00

3. In WEST 85-127-M the following citations and proposed penalties are affirmed:

Citation No.	30 C.F.R. § Violated	Penalty
2355922	56.14-1	$54.00
2355923	56.14-1	54.00
2355934	56.11-12	79.00
2355935	56.9-87	20.00
2358542	56.9-87	20.00



John J. Morris
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

JAN 9 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOSEPH E. TIMKO, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 85-132-DM MD 85-12 Dee Gold Mine
v.	:	
DEE GOLD MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT AND DISMISSING PROCEEDING

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Complainant;
Jay W. Luther, Esq., Chickering & Gregory, San Francisco, California, for Respondent.

Before: Judge Lasher

The parties reached an amicable resolution of this matter on the first day of a hearing in two matters involving the Dee Gold Mining Company. The terms of the agreement reached between the Secretary on behalf of Joseph P. Timko and the Respondent are that, in return for the payment of $925.00, less customary and appropriate withholding deductions to be determined by Respondent, Complainant agrees to accept such amount in full satisfaction of all claims made in connection with his proceeding and remedies claimed by him under the Federal Mine Safety and Health Act of 1977, including back pay, reinstatement, and all other remedies contemplated by the Act and legal precedent. The figure, $925.00, is an approximation of damages sustained by Complainant as a result of the alleged violation.

Complainant has executed a written release of the Respondent Dee Gold Mining Company which is attached to this decision and order approving settlement and made a part hereof.

Respondent's actions executing the settlement and its agreements in connection therewith shall not be construed as an admission of violation of the Federal Mine Safety and Health Act of 1977.

It was the intent and understanding of both parties hereto that Respondent would, within seven days or as soon thereafter as possible, tender payment of the $925.00 less appropriate deductions, to counsel for the Secretary, Mr. Marshall Salzman, at this office address. Counsel for the Secretary has now notified me in writing of such payment and acknowledges that I may consider the complaint in this matter to be withdrawn with prejudice to the Complainant to thereafter file any action under Section 105(c), individually, or otherwise.

It is understood that the attached release signed by Joseph P. Timko, relating more generally to the employment relationship between Mr. Timko and Respondent, is broader in scope than the specific jurisdiction afforded under the Act and should not be construed to be limited by any of the specific terms of this order approving settlement. Such release speaks for itself.

The parties are now in compliance with the settlement reached and approved at hearing. Accordingly, this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

Attachment: Release

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Bldg., Box 36017, 450 Golden Gate Avenue, San Francisco, CA 94102

Jay W. Luther, Esq., Chickering & Gregory, Three Embarcadero Center, 23rd Floor, San Francisco, CA 94111

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF

JOSEPH E. TIMKO,

Complainant,

vs.

DEE GOLD MINING COMPANY,

Respondent.

_____/

Docket No. WEST 85-132-DM, MD 85-12

RELEASE OF DEE GOLD MINING COMPANY

Joseph E. Timko, complaining party in that certain matter known as Joseph E. Timko, Complainant, v. Dee Gold Mining Company, Respondent, Docket No. WEST 85-132-DM, MD 85-12, does hereby release, remise, and forever discharge Dee Gold Mining Company, a Nevada general partnership, from any and all claims, demands, liability, indebtedness, causes of action, and claims for relief arising from or in any way related to (a) any and all matters alleged in the above-entitled proceeding; (b) any and all matters involving or related to said Joseph E. Timko's employment by the said Dee Gold Mining Company or the termination of said employment.

This release is given fully and voluntarily, after consultation with counsel, and Joseph E. Timko warrants that he has full authority to execute this release and accomplish the objects intended thereby, to wit the complete extinguishment of any of the enumerated obligations of Dee Gold Mining Company to Joseph E. Timko. Neither this release, nor the settlement of which it is a part, shall be regarded as an admission of liability on the part of Dee Gold Mining Company, which expressly denies liability to Joseph E. Timko.

Joseph E. Timko waives any and all statutes or case law designed to prevent the enforcement of this release in accordance with its expressed terms.

Joseph P. Timko
JOSEPH E. TIMKO

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 12 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-6-M A.C. No. 47-02575-05502
v.	:	Pit #6
NELSON TRUCKING, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Mr. Kenneth M. Nelson, Nelson Trucking Company, Green Bay, Wisconsin, pro se.

Before: Judge Lasher

The Petitioner initiated this proceeding on October 30, 1985, by the filing of a Proposal for Penalty requesting that a penalty be assessed for Respondent's alleged violation of 30 C.F.R. § 56.5-50 which provides:

> (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, N.Y. 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

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

X X X X X X X X

(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.

Pursuant to notice, this matter came on for hearing in Green Bay, Wisconsin, on August 13, 1986, at which MSHA Inspector Arnie Mattson testified for Petitioner and Kenneth Nelson, a co-owner, testified for Respondent.

In the citation involved, No. 2374054, Inspector Mattson described the violative condition as follows:

> "The eight hour exposure to mixed noise levels of the 120 Hough International front-end loader operator in the pit exceeded unity (100%), by 2.68 times (268%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 97 dBA. Personel [sic] hearing protection was being worn."

Based on stipulations, documents, and testimony, I find or infer from the preponderant reliable and probative evidence as follows:

The Respondent is a very small (four employees) sand and gravel operator doing business in the vicinity of Green Bay, Wisconsin; it has no history of violations prior to that involved in the subject citation which Respondent, in good faith, promptly abated after it received notification thereof. Payment of a penalty in this matter will not adversely affect Respondent's ability to continue in business.

While on a regular inspection of Respondents No. 6 Pit on July 10, 1985, Inspector Mattson observed the crusher and determined that a noise survey should be conducted. On July 11, 1985, Inspector Mattson performed such survey (Ex. S-3) for a period of eight hours, during which time a dosimeter was attached to the short collar of CHRIS NICKLAS, the operator of the 120 Hough International front-end loader.

As a result of the sound level examination and testing of the environment of the crusher operator, it was determined that the operator of the front-end loader was exposed to (a) 97 dBA for a period of eight hours (480 minutes), and to (b) noise 2.68 times the permissible level (T. 16-20). 1/ The loader operator had been wearing ear protection and the Respondent's management erroneously believed that this alone constituted compliance with the requirements of the standard, according to the Inspector (T. 28, 29).

To abate the violation, the Respondent was required to install engineering controls, i.e., a muffler, on the loader which reduced the sound level to approximately 93-94 dBA for the relevant period. Since the mine operator had only four employees, administrative controls, in this case, reducing the number of hours the operator of the loader actually operated the machine each day, were not feasible (T. 25). Since the installation of the muffler did not bring the sound level down to permissible sound limits, the loader operator was also required to also wear personal ear protection to insure compliance with the standard. The Citation was terminated on August 29, 1985, upon Respondent's compliance with the above requirements. The Inspector indicated that the occurrence of the hazard posed by the infraction, injury to the loader operator's hearing, was "not likely" (Ex. S-1), but that had such occurred, such an injury would be "permanently disabling".

Issues

1. Whether the evidence established that Respondent failed to employ feasible engineering controls where its employee's exposure to noise exceeded permissible limits.

2. If so, the amount of an appropriate penalty for the violation.

Ultimate Findings, Conclusions and Discussion

The Respondent made no substantial or persuasive challenge to the existence of the conditions which constitute the violation and raised no legal defense thereto. 2/ By stipulation at the

1/ Exposure of the loader operator to a sound level in excess of 90 dBA for an 8-hour workday constitutes an infraction of the standard.

2/ Respondent's concerns about not being advised about this infraction during a prior MSHA courtesy assistance visit were, inasmuch as such might be construed as an equitable estoppel defense, addressed in my decision in a related matter, Docket No. LAKE 85-102-M, issued September 11, 1986. My decision on this question is incorporated herein by reference.

commencement of the hearing, Respondent conceded that the Commission and this administrative law judge has jurisdiction over it and the subject matter of this proceeding.

In July 11, 1985, Respondent's loader operator was exposed to noise 2.68 times the permissible level; the exposure was equivalent to 97 dBA for eight hours per day.

There were feasible engineering controls available to reduce the exposure, i.e., the installation of a muffler on the subject front-end loader. Respondent thus was in violation of 30 C.F.R. § 56.5-50 because of its failure to utilize such engineering controls (administrative controls not being feasible) to reduce the exposure of its loader operator to excessive noise (T. 28).

Because MSHA had examined the Respondent's operation previously during a courtesy inspection and had not required engineering controls to reduce the noise levels, Respondent's negligence is found to be minimal. Based on the Inspector's characterization of the probability of the hazard ever being realized as "not likely", the violation is not found to be serious. There is no contention-or evidence-that the imposition of a penalty will adversely affect this very small Respondent's ability to continue in business. Considering the above mandatory penalty assessment factors, and the fact that Respondent proceeded in good faith, upon notification of the violation, to promptly abate such, the penalty urged by the Secretary, $20.00 is found appropriate. In view of the very modest amount ($20.00) of the penalty sought by the Secretary to begin with, I find no reason for a reduction thereof based on MSHA's failure to advise the Respondent about it during the prior "courtesy" visit. See Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

ORDER

(1) Citation No. 2374054 is affirmed.

(2) Respondent shall pay the Secretary of Labor within 30 days from the date hereof the sum of $20.00 as and for a civil penalty.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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Nelson Trucking Company, Mr. Kenneth M. Nelson, 2898 Flintville, Green Bay, WI 54303 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 12 1987

CHARLES F. ROSE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 86-379-D
CONSOLIDATION COAL COMPANY, Respondent	:	MORG CD 86-11
	:	Pursglove No. 15 Mine

DECISION

Appearances: William R. Nalitz, Esq., Waynesburg, Pennsylvania, for Complainant;
Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me on the complaint of Charles F. Rose against Consolidation Coal Company filed on April 9, 1986 alleging discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as "Act"). On June 13, 1986, the Secretary advised Complainant that it had determined that a violation of Section 105(c) did not occur. Rose filed his complaint with the Commission on July 14, 1986. Pursuant to notice, the case was scheduled for October 23, 1986, in Washington, Pennsylvania. At the hearing, the Complainant, who was unrepresented, requested that the case to be adjourned so that he might obtain legal represena-tion. This motion was granted and pursuant to notice the case was heard on November 3, 1986, in Washington, Pennsylvania. Paskel Lee Eddy and Charles F. Rose testified on behalf of Complainant, and James A. Simpson testified on behalf of Respondent.

Complainant and Respondent filed posthearing briefs on December 8 and December 5, respectively. Reply briefs were to have been exchanged ten days later but none were filed.

Findings of Fact

1. The Complainant, Charles F. Rose, is an employee of Respondent, Consolidation Coal Company, at the Respondent's Pursglove No. 15 Mine.

2. Complainant's regular job classification is general inside labor.

3. Under the terms of the National Bituminous Coal Wage Agreement of 1984 Complainant is to work an 8 hour day including 30 minutes for lunch.

4. It has been the custom for many years at Respondent's mine that the lunch break has been taken between third and fifth hour of employment (11 a.m to 1 p.m).

5. It has been customary practice for at least 2 years, prior to March 1986, that the union representative (hereinafter called "walk-around") accompanying a Federal Mine Inspector on a inspection of Respondent's subsurface mine, have his half hour lunch at the conclusion of the inspection after the inspector leaves (Tr. 33, 38, 45-46, 65-66).

6. In March 1986, Respondent made a management decision, as a result of a reduction in work force, that the "walk-around" should eat his dinner between the 3rd and 5th hour, and that upon completion of the inspection the "walk-around" was to return to work.

7. On March 19, 1986, Complainant served as a "walk-around" accompanying a Federal Mine Inspector on his regular inspection of Respondent's Pursglove No. 15 Mine. He received pay for 8 hours.

8. At approximately 3:15 p.m. on March 19, 1986, after the Complainant completed his "walk-around" duties and the inspector left, Clyde Owens, Respondent's Safety Director, informed the Complainant that James A. Simpson, Superintendent, told him to tell the Complainant to go right to work without a break for lunch.

9. Simpson testified, in essence, that during an inspection underground there are delays waiting for certain activities to occur or waiting for transportation (Tr. 75, 79). This was confirmed by Complainant (Tr. 87). Simpson also said in essence that company personnel accompaying a federal mine inspection eat during a break in the inspection when they can sit down, or they grab a sandwich "on the run". However, Simpson also said that the delays are not predictable, and do not occur at regular intervals. Both Complainant and Eddy testified as to the difficulties a "walk-around" would encounter if one would start to eat during a transportation delay (Tr. 47, 87). Also Eddy testified that normally during an inspection one would not have a half hour to eat (Tr. 47). Complainant testified that normally, in essence, a delay due to switching or "whatever" was 5 to 10 minutes at the most and not a half hour (Tr. 87). Accordingly, inasmuch as Eddy and Complainant were actually involved as

"walk-arounds" and thus had personal knowledge of the conditions during such inspection, I credit more weight to their testimony. Therefore, I find that it is not possible for a "walk-around" to have a continuous half hour lunch while engaged as a "walk-around" underground.

10. Simpson testified that after the inspector and the "walk-around" finish the inspection and return to the surface they may have a sandwich. However, he said that from the time they exit the mine until the time they start discussing the inspection from 15 minutes to a half hour elaspes. During this time they also have to remove the clothes and equipment they wore in the mine. Accordingly, I find that there is not a continuous half hour period after the inspection for a "walk-around" to eat lunch prior to discussing the inspection.

Issues

The general issue in this case is whether Consolidation Coal Company discriminated against Rose in violation of Section 105(c) of the Act and, if so, what is the appropriate relief to be awarded Rose and what are the appropriate civil penalties to be assessed against Consolidation for such discrimination.

The specific issue is whether Respondent, by denying Complainant half hour for lunch upon completion of his "walk-around" activity beyond the usual time period for lunch, caused the Complainant to suffer a "loss of pay" during the period of his "walk-around".

Laws

Section 105(c)(1) of the Act provides, in essence, in part, that no person shall in any manner discriminate against, or cause discrimination against, or otherwise interfere with the exercise of the statuatory rights of any miner or representative of miners because of the exercise by such miner of any statutory right afforded by the Act. In essence, Section 103(f) of the Act, provides that an authorized representative of miners, such as Rose, is entitled to accompany a MSHA inspector in the course of his inspection and that "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." (Emphasis added.).

Discussion

Respondent in essence argues that the Complainant was not under the control of the mine management during the "walk-around", and thus the latter did not cause the Complainant to suffer a loss of lunch during the "walk-around". Respondent in this

connection presented testimony that it did not tell Complainant he could not eat lunch during a "walk-around". Also, Respondent argues that Complainant was paid his full wages for the day of the "walk-around", and thus suffered no "loss of pay".

Complainant argues that in essence deprivation by Respondent of a "walk-around's" right to eat lunch for a continuous period of half hour after a "walk-around" is violative of Section 103(b) of the Act. For reasons that follow I agree.

There is not any legislative history of the Act containing any discussion of the specific issue presented here. However, it appears that in general Congress intended a broad construction to be placed on the phrase "shall suffer no loss of pay" (Section 103(f), supra.) In this connection, it is noted that the Senate Report accompanying S. 717, (S. Rept No. 181, supra, at 28-29, Leg. Hist. at 616-617), provides with regard to the intent behind Section 103 that "to encourge such miner participation it is the Committees intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with purpose of the Act and would unfairly penalize the miner for assisting the inspector performing his duties". (Emphasis added).

Furthermore, similarly, the courts, based upon the legislative history, have placed a broad interpretation on the rights granted by Section 103(f), supra. Thus, in United Mine Workers of America, etc. v. Federal Mine Safety and Health Commission, 671 F.2d 615 (D.C. Cir. 1982), the Court was faced with the issue as to whether under Section 103(f), supra, a miner has the right to pay when accompanying an inspector on a "spot" inspection. The court held that, pursuant to Section 103(f), supra, a miner shall not suffer any loss of pay while accompanying an inspector on a "spot" inspection as well as a regular inspection. In its decision, the Court reviewed the legislative history of Section 103(f), supra, and noted that it was the express intention of the Senate Committee on Human Resources, as contained in the Report on S.717 (S. Rept No. 181, 95th Cong. 1st Sess 28-29 (1977), as reprinted in Legislative History of the Federal Mine Safety and Health Act at 616-617) "that a Miner participating in a "walk-around" inspection receive "full compensation." (671 F.2d, supra at 625). The Court further opined that both miner participation and full compensation were considered by the committee to constitute important tools in the effort to increase miners' awareness of the hazards they face and the measures they can take to achieve a safe and healthy working environment. (671 F.2d, supra, at 625).

Further, the Court in United Mine Workers, supra, at 625 related that Senator Helms had introduced an amendment to S.717,

the Senate version of the Act, that would have stricken any reference to a miner being paid while accompanying an inspector on an inspection. (See Leg. Hist., supra). The Court, (671 F.2d, supra at 625), noted however that Sentor Javits successfully opposed the amendment, giving, among others, the following reasons:

> First, greater miner participation in health and safety matters, we believe is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner who is not in business for himself, should do this if his activities remain uncompensated.
>
> * * * * * * *
>
> But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.
>
> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper.

Essentially, the same legislative history was cited with approval in Monterery Coal Company v. Federal Mine Safety and Health Review Commission 743 F.2d 589 (7th Cir. 1984), in which the court also held that Section 103(f) of the Act requires that a miner should be paid by an operator where the former participates in a "spot" inspection. (See also Consolidated Coal Company v. Federal Mine Safety and Health Review Commission, 740 F.2d 271 (3rd Cir 1984).

Similarly, in Magma Copper Company v. Secretary of Labor (645 F.2d 694 (9th Cir 1981, cert. denied 454 U.S. 94), the Court held that where several inspectors are present, it is within purview of Section 103(f), supra that one respresentative of the miners may accompany each inspector without loss of pay. In reaching this conclusion, the Court, at 698, cited with approval the legislative history of the Act, as set forth, in the Senate Report 95-81, (reprinted in Legislative History at 623,) to the effect that if the Mine Safety and Health Program is to be truely effective miners will have to play an active part in the enforcement of the Act.

Also, the Commission's Judges, have, on occassion, provided a broad interpretation to Section 103(f), supra, so as not to discourage participation in "walk-around" inspections which would be contrary to the clear intent of Congress. Thus, in Secretary of Labor, Mine Safety and Health Administration, on behalf of Timithy P. Scott v. Consolidation Coal Company, 2 FMSHRC 1056, the miner was paid on the basis of a grade three rate scraper operator for the time spent in "walk-around" activities. On the day of the inspection, the miner was told that he was to perform removal work, at higher level of pay, (grade five). However the miner began his "walk-around" prior to the actual commencement of such work. Judge Melick found that the miner must be compensated in a amount equivalent to grade five rate pay so as not to be unfairly penalized in performing his "walk-around" duties as a representative of miners. In Secretary of Labor, Mine Safety and Health Administration v. Virginia Pocahontas, 3 FMSHRC 1493 (1981), former Commission Judge Steffey, held, in essence that the language of Section 103(f) supra requires that a miner, who accompanies an inspector on a shift other than his own regular shift, must be provided with work on that shift after the inspection is completed.

Thus from all the above it can be seen that Congress, in enacting Section 103(f), supra, clearly intended it to encourage "walk-arounds" and prohibit acts that would tend to discourage miners from participating in "walk-arounds". It is thus manifest that the broad intent behind Section 103(f), supra, would be thwarted by allowing any act which might have a tendency to discourage miners' participation in "walk-arounds". As such, it is concluded that Respondent's action herein violates Section 103(f), supra.

At the hearing and in a posthearing brief Complainant has requested that relief be extended to all occasions subject to March 19, 1986, when Complainant served as a "walk-around" and was denied by Respondent the opportunity to have lunch upon conclusion of the inspection. This relief has been opposed by Respondent. Inasmuch as Complainant has established that Respondent violated Section 103(f), supra on March 19, 1986, in the interest of justice, Complainant shall be allowed to establish if additional similar actions by Respondent have subsequently occurred. This will achieve the purpose of granting Complainant's full relief, (see Section 105(c)(3) of the Act). This should not unduly burden Respondent, as at the hearing on November 3, 1986, Respondent had the opportunity and did present its case, i.e., that its actions in not providing Complainant a lunch after a "walk-around" did not violate Section 103(f), supra. It would appear that the facts adduced by Respondent at the hearing would apply equally to all subsequent similar actions.

Conclusions of Law

Complainant and Respondent are subject to Section 105 of the Act, the latter as miner and the former as mine operator. I have jurisdiction to hear and decide this case. Respondent has violated Section 103(f) of the Act by not providing the Complainant with a continuous half hour for lunch upon the completion of his duties as a "walk-around."

Relief

It is ORDERED that:

(1) Respondent pay Complainant $10.32 within 10 days of this decision.

(2) Respondent shall desist from not providing Complainant a continuous half hour for lunch upon completion of his "walk-around" duties.

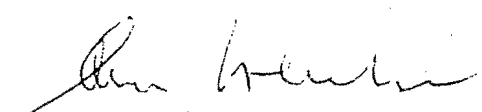
(3) Respondent shall pay costs and expenses including attorneys fees reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding.

(4) For each instance subject to March 19, 1986 until the date of this decision, Respondent shall pay Complainant, his usual rate of pay for each half hour of lunch time Respondent failed to provide Complainant upon completion of his duties as "walk-around".

(5) Counsel are directed to confer and attempt to agree on the amounts due under paragraphs 3 and 4 above, and if they can agree to submit a statement to me within 20 days of this decision. If they can not agree, Complainant shall within 30 days of this decision file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 30 days thereafter. If there are significant and substantial issues of fact raised in these statements, a supplemental hearing might be held.

This decision shall not be final until I have issued a supplemental decision on the amounts due under paragraphs 3 and 4.

(6) Respondent shall post a copy of this decision on a bulletin board at the surface mine which is available to all employees and it shall remain there for a period of at least 60 days.



Avram Weisberger
Administrative Law Judge

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dcp/rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 12 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOHNNY S. VANCE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 86-424-D
	:	HOPE CD 86-11
v.	:	Lightfoot No. 2 Mine
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	

ORDER OF DISMISSAL

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Complainant;
Steven p. McGowan, Esq., Steptoe & Johnson, Charleston, West Virginia, for Respondent.

Before: Judge Melick

The Secretary with the consent of the individual Complainant requests in effect to withdraw his complaint of discrimination in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 13 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 86-93-M
Petitioner	:	A.C. No. 41-03327-05501
v.	:	
	:	Crusher No. 2 Mine
AMARILLO ROAD COMPANY,	:	
Respondent	:	

DECISION

Appearances: Rebecca A. Siegel, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
E. E. Clark, Secretary-Treasurer, Amarillo Road Company, Amarillo, Texas, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $30 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.16009. The respondent filed an answer denying the violation, and a hearing was held in Amarillo, Texas, on December 11, 1986. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed

for the violation based on the criteria found in section 110(i) of the Act.

2. Additional issues raised by the parties are identified and discussed in the course of this decision.

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 to the following (Tr. 5-12):

1. The respondent's mining activities involve products which affect interstate commerce, and the respondent is subject to the jurisdiction of the Act.

2. The respondent's annual mining production of limestone is 31,615 tons. The respondent is a highway contractor, and its limestone mining and crushing operations employ from 16 to 18 miners.

3. The cited condition or practice which resulted in the issuance of the violation was not the result of any negligence by the respondent.

4. For purposes of this case, the respondent has no prior history of violations.

5. The inspector's gravity findings, as reflected on the face of the citation, are accurate and correct.

6. The respondent exhibited good faith compliance in abating the cited condition or practice.

Discussion

Section 104(a) "S&S" Citation No. 2660902, issued on January 9, 1986, cites a violation of 30 C.F.R. § 56.16009, and the cited condition or practice is described as follows:

A serious non-fatal accident occurred on January 2, 1986, resulting in two broken legs

and a broken back when an employee for some unknown reason walked under an unsecured 47 foot section of belt conveyor framework which had just been raised into place but not secured. Moments prior to the accident, all employees involved in setting the structure were advised by the foreman to stand clear until more jacks and supports could be installed to secure the section of conveyor and related load out bin.

The citation was terminated on Februray 5, 1986, and the termination notice states as follows: "When suspended loads are required at the crusher plant the employees has (sic) again been informed of the hazards involved at a safety meeting held on 1-13-86. Employees that violate the foreman's dissuade safety orders will face dismissal of employment."

MSHA's Testimony and Evidence

MSHA Inspector Michael C. Sanders, testified as to his training and experience, and he confirmed that he issued the citation in question on January 9, 1986, after conducting an investigation of the accident which occurred on January 2, 1986.

Mr. Sanders identified photographic exhibits P-1 through P-4 as the conveyor and portable load out bin, and confirmed that he took the pictures on January 9, 1986. Photograph P-1 shows the conveyor which fell on the accident victim resting against the lip of the load out bin; P-2 is a rear view of the bin with wooden support blocks under the axle; P-3 is similar to P-1; and P-4 shows a part of the load out bin supported by jacks and wooden blocks.

Mr. Sanders sketched a diagram showing the final flow of the limestone material along the bin feed out conveyor through to the load out bin, and to the truck load out conveyor (exhibit P-5), and he explained the processing sequence. He confirmed that the crusher "plant" consists of portable conveyors and bins which are moved from location to location as required.

Mr. Sanders stated that his investigation of the accident disclosed that at the time of the accident the plant was in the process of being moved and was in the final stages of assembly. One end of the conveyor which fell on the employee was elevated and resting against the lip of the bin as shown

in photographs P-1, P-3, and R-1, but the safety chain normally used to secure the conveyor to the bin to prevent movement once the assembly is completed was not attached to the bin. The other end of the conveyor was resting on the ground.

Mr. Sanders stated that the end of the conveyor which was resting on the bin was lifted in place to that position by a front-end loader. Once in place, the loader pulled away and left the area. The supervisor on the scene, Vicente Loe, noticed that the three employees who were assembling the plant had not secured the conveyor chain to the bin as they had been instructed. He also observed that the weight of the conveyor, as it rested against the bin, resulted in some movement of the support blocks under the bin axle. Recognizing these hazards, Mr. Loe left the scene to bring back the front-end loader to stablize the conveyor and to secure it to the bin. However, before leaving, Mr. Loe informed the work crew of the hazard of the unsecured conveyor and specifically instructed them to stay clear of the conveyor until he returned with the loader. For some unexplained reason, the accident victim disregarded Mr. Loe's directives and went under the conveyor. When he did, movement of the bin blocks caused the end of the conveyor resting on the bin to fall on the victim breaking his legs, and his back.

On cross-examination, Mr. Sanders stated that during his accident investigation he did not speak with the injured employee or the other two employees. He confirmed that he had no reason to question Mr. Loe's version of the accident, and he concluded that the respondent was not negligent, and that it resulted solely from the negligence of the injured employee who disregarded Mr. Loe's instructions to stay clear of the conveyor until it could be supported by the loader and secured by the chain.

Mr. Sanders confirmed that the conveyor which fell and struck the employee was not "suspended in the air," and that one end was on the ground, and the other end which fell was elevated at an angle resting against the bin and the chain was not secured to the bin. He stated that in the assembly and disassembly of the conveyor and bin, the conveyor is normally lifted off the ground by means of an end-loader and placed against the bin until it can be secured to the bin by a safety chain. According to his interpretation of section 56.16009, if the safety chain is not secured to the bin, he considers the conveyor to be "suspended" within the meaning of that standard, and that is why he cited this standard. If the conveyor were secured to the bin by the safety chain, he

would not consider the conveyor to be "suspended" and he would not have issued the citation.

Respondent's Arguments

The respondent agreed that there is no dispute as to the facts of this case, and that the inspector's testimony regarding the circumstances of the accident in question is accurate. Although Mr. Loe was present in the courtroom, respondent's representative E. E. Clark stated that he saw no need to call him as a witness, and that the respondent's position is as stated in its answer and exhibits filed in this proceeding.

Mr. Clark took the position that the respondent has not violated section 56.16009, because the conveyor in question was not in fact a "suspended load," in that it had been placed at rest on the bin similar to an inclined plane, or a ladder resting against a wall. Mr. Clark pointed out that the conveyor was not free on all sides, or "suspended" or hoisted in the air as the phrase "suspended load" normally implies. He also argued that since section 56.16009, is included as part of MSHA's "Materials Storage and Handling" standards under Subpart O, Part 56, Code of Federal Regulations, it does not apply in this case because the conveyor cannot be considered "materials" as that term is used in the standards appearing in Subpart O.

Mr. Clark asserted that the respondent's safety rules (exhibit R-2) require each employee to follow instructions and not to take chances, and that the hoisting or lifting of objects over workmen is prohibited.

Mr. Clark maintained that the accident was not caused by the respondent's or Mr. Loe's failure to recognize a hazard and react accordingly in a safe and prudent manner, but was caused by the negligence of the injured employee who disregarded Mr. Loe's cautionary instruction to stand clear of the conveyor. Since MSHA agrees that the respondent was not negligent, Mr. Clark believes that the respondent should not be held accountable for any violation. Mr. Clark concludes that since the injured employee violated his supervisor's order to stand clear, and since the load was not suspended in the first place, no violation of section 56.16009 has been established.

I take note of the fact that as part of its answer to MSHA's proposal for assessment of civil penalty, the respondent included a copy of a company accident report filled out and signed by Mr. Loe on the day of the accident. Mr. Loe

stated that when he asked the two employees who were at the scene for an explanation as to why they did not attach the conveyor chain or wait until he returned, they responded that "they didn't know" and "just thought that they could block the bin and took a chance."

Petitioner's Arguments

Petitioner asserts that section 56.16009 is a broad standard which should be liberally construed, and that the inspector's interpretation and application of the phrase "suspended loads" was correctly applied and should be affirmed. In response to the respondent's assertion that since the cited standard appears under Subpart O, Part 56, dealing with storage and handling of materials, it is not intended to apply to equipment such as a conveyor, petitioner cites my prior decision of October 8, 1979, in Pennsylvania Glass Sand Corporation, 1 FMSHRC 1191 (August 1979). In that case, I concluded that the cited standard applied in the case of a motor suspended above a work area.

In response to the respondent's argument that it should not be liable for any violation when it is clear that it was not negligent, and that the accident was caused by the employee's negligence in failing to follow the safety instructions of his supervisor, petitioner states that the law is otherwise, and that the courts and the Commission have consistently ruled that a mine operator is liable for a violation without regard to fault.

Findings and Conclusions

The respondent in this case is charged with a violation of mandatory safety standard 30 C.F.R. § 56.16009, which states that "Persons shall stay clear of suspended loads." MSHA concedes that the respondent was not negligent and that the foreman who was supervising the construction work at the scene of the accident warned his crew and the injured miner to stand clear of the conveyor in question until it could be further secured from any movement.

Two issues are presented in this case. The first question is whether or not the respondent can be held liable and accountable for a violation which resulted from the negligence of one of its employees who for some unknown reason clearly disregarded his foreman's instructions to stay clear of the conveyor which fell and struck him. The second issue is whether or not the cited mandatory standard section is

applicable to the alleged violative condition which prompted the issuance of the citation.

The respondent's contention that it cannot be held liable for a violation of any mandatory safety standard because it was not negligent is rejected. As correctly stated by the petitioner, the law is otherwise, and the Commission has consistently held that under the Mine Act, an operator is liable, without regard to fault, for violations committed by its employees. Asarco, Incorporated-Northwestern Mining Department, 8 FMSHRC 1632 (November 1986), and the cases cited therein.

The term "load" is defined in A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968 Edition, in pertinent part as follows at page 650:

> f. The weight borne by a structure caused by gravity alone (dead load) or by gravity increased by the stress of moving weight (live load), as in the case of hoisting a string of drill rods.

The term "suspend" is defined in Webster's New Collegiate Dictionary, in pertinent part as follows: "[T]o hang so as to be free on all sides except at the point of support."

In the Pennsylvania Sand Glass case, supra, the inspector issued a citation based on his belief that someone had performed work under a scrubber motor which had been lifted up in the air by a chain hoist and tied off with a safety chain. The inspector believed that maintenance work was required to be performed in the area under the motor while it was in that suspended position. In addressing the question as to whether the standard applied to the motor, even though it appeared under a "materials storage and handling" general regulatory section, I concluded that "it may be applied to a situation where it is established that men are working under any suspended loads, whether it be 'materials', as that term is commonly understood, or motors or other equipment," 1 FMSHRC 1208. Although I concluded that the cited section was applicable, I vacated the citation on the ground that the inspector failed to describe the alleged violative condition with any particularity, and that he personally did not observe anyone working under any suspended load.

The facts presented in the Pennsylvania Sand Glass case are clearly distinguishable from the facts presented in the instant case. In Pennsylvania Sand Glass, the inspector's

rationale for issuing the citation was based on his belief that someone was working under a motor while it was suspended in the air and held in that position by a chain lifting apparatus. In the case at hand, there is no evidence that the conveyor belt structure which fell was tied to any crane or other lifting apparatus, or was otherwise suspended at the time of the accident. The evidence established that one end of the conveyor piece in question had been lifted up by means of a front-end loader and placed against the side of the bin, while the other end remained on the ground at an angle. Further, once placed in that position by the end loader, the loader left the area and was not holding the end which had been laid to rest against the bin. Under these circumstances, I cannot conclude that the conveyor section which fell was a suspended load within the meaning or intent of section 56.16009, nor can I conclude that the cited section is applicable on the facts here presented.

I take note of the fact that the "condition or practice" cited by the inspector on the face of his citation makes no reference to any "suspended loads." However, the abatement and termination notice indicated that abatement was achieved by informing all employees of the hazards concerning "suspended loads." The testimony established that the end of the conveyor which fell was not secured to the end of the bin by a safety chain which is normally used for this purpose. While it may be true that the accident could have been prevented by securing the safety chain, the respondent here is not charged with any safety infraction for failure to secure the end of the conveyor to the bin. The respondent is charged with a violation that requires men to stay clear of a suspended load, and MSHA's theory is that the conveyor piece which fell was suspended. On the facts of this case, I cannot conclude that the petitioner has established a violation of section 56.16009.

ORDER

In view of the foregoing findings and conclusions, section 104(a) Citation No. 2660902, January 9, 1986, 30 C.F.R. § 56.16009, IS VACATED, and the petitioner's civil penalty proposal IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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E. E. Clark, Secretary-Treasurer, Amarillo Road Company, P.O. Box 32075, Amarillo, TX 79120 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 13 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 85-73-D
ON BEHALF OF	:	
RONNIE D. BEAVERS,	:	MORG CD 84-1
DONALD L. BROWNING,	:	
ROBERT L. CARPENTER,	:	Kitt No. 1 Mine
EVERETT D. CURTIS,	:	
LARRY L. EFAW,	:	
ROGER LEON ERWIN,	:	
CHARLES W. FOX,	:	
LESTER D. FREEMAN,	:	
LARRY F. HUFFMAN,	:	
HARRY EDWIN HURST,	:	
ROBERT HURST,	:	
GARY C. KNIGHT,	:	
LARRY LANTZ,	:	
MICHAEL L. MARRA,	:	
WILFORD MARSH, JR.,	:	
DAVID R. MARTIN,	:	
DANNIE M. MAYLE,	:	
CHARLES W. McGEE,	:	
CHARLES F. MURRAY,	:	
WALTER F. MURRAY,	:	
LARRY NORRIS,	:	
CLARA Y. PHILLIPS,	:	
KENNETH D. SHOCKEY,	:	
RICHARD D. SNIDER,	:	
JESSE L. WARD,	:	
BEDFORD WILFONG, JR.,	:	
Complainants	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	
	:	
v.	:	
	:	
KITT ENERGY CORPORATION,	:	
Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Intervenor;
B. K. Taoras, Esq., Kitt Energy Corporation, Cleveland, Ohio, for Respondent.

Before: Judge Maurer

I issued a decision on the merits in this case on September 10, 1986. In that decision, I found that the complainants had established that they had been discriminated against by respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At that time, I ordered the parties, by counsel, to communicate for the purpose of stipulating to the extent possible the amounts of monetary relief due each of the named complainants, as well as the amount of attorney fees that may be awarded to counsel for the intervenor, United Mine Workers of America, who had intervened on the side of the complainants.

The parties were able to stipulate the amounts due the individual complainants if I did not allow any award based on the overtime claim pressed by the UMWA, and for the reasons that follow I will not.

The basis for the UMWA's claim that the complainants are due some overtime pay is that the operator employed part of his workforce on the two weekends which were included within the back pay period in issue. Therefore, UMWA's position is that the operator should reimburse complainants in an amount which reflects the fact that arguably some unspecified portion of the 26 of them would have worked the two weekends in question, or some part thereof. They propose that each complainant be awarded a percentage of his or her Saturday and Sunday pay that exactly matches the percentage of the operator's workforce that worked on that day.

The Secretary of Labor parts company with the UMWA on this issue. While agreeing that reimbursement for lost overtime is generally recoverable, he states that this is an atypical case. The more typical case being one which involves long periods of unemployment where the loss of overtime earnings is clearly demonstrable. Here, he asserts, and I concur, that it is speculative at best whether any overtime opportunities were lost to these complainants.

The operator correctly points out that the burden of proof on damages in this case is on the complainants. They must establish by a preponderance of the evidence that they

in fact lost wages for overtime during the time they were laid off. There is no evidence in this record of which complainants, if any of them, would have worked overtime on any particular Saturday or Sunday during the layoff, and therefore I find the UMWA's claim that all are entitled to some portion of overtime pay during the two weekends herein involved too speculative. The Secretary of Labor, appearing on behalf of the complainants, does not support this claim for overtime. The UMWA, appearing as an intervenor and a representative of the miners, has failed to carry the burden of proof on this issue. I therefore will award no back pay for overtime.

A second issue the parties were unable to resolve amongst themselves was appropriate attorney fees, if any be appropriate, to be awarded the UMWA, or it's staff attorney, for its appearance and participation in this case as an intervenor.

Section 105(c)(3) of the Act provides that "[w]henever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

Contrary to the operator's position, attorney fees may be assessed in proceedings under any part of subsection (c) of section 105 of the Act. See, e.g., Secretary on behalf of Ribel v. Eastern Associated Coal Corp., 7 FMSHRC 2015, 2023 (1985), where the Commission held that "private attorneys' fees may be awarded to a prevailing miner in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel's efforts are non-duplicative of the Secretary's efforts and further, that private counsel contributes substantially to the success of the litigation."

In Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983), which in turn relied on Nat'l Treasury Employees Union v. Dept. of the Treasury, 656 F.2d 848 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia held that unions and union attorneys are entitled to costs and attorney fees for representation of union members. The Court also held that if the fees are awarded to the attorney personally (not the union), the attorney is entitled to receive the market value of her services. The fact that the attorney is a salaried employee of the union does not affect the size of the fee to which she is otherwise entitled.

In this case, the UMWA as intervenor was a representative of miners and Mary Lu Jordan, Esq., was the UMWA staff attorney representing the complainants along with counsel for the Secretary, who instituted these proceedings. Ms. Jordan has submitted a petition for attorney fees detailing 36.81 hours of time spent on the case at a requested hourly fee of $110.00, for a total requested attorney fee of $4,049.10. The operator, while objecting to the fee in toto and in general has failed to cite with sufficient specificity any portion of it that relates to duplicative or insubstantial efforts on the part of Ms. Jordan. My review of her fee petition and her work product in this case leads me to the conclusion that she did indeed significantly participate in the case and contributed in a substantial way to the success of the litigation. I also find that the hours and market rate claimed by her are reasonable. Accordingly, I am going to award the requested attorney fee of $4,049.10.

ASSESSMENT OF CIVIL PENALTIES

The Secretary of Labor, by counsel, filed his complaint of discrimination in this case seeking inter alia, "an order assessing appropriate civil penalties against Respondent for its violations of section 105(c)." Since this case was submitted on stipulated facts, I have evaluated evidence concerning the statutory criteria set forth in section 110(i) of the Act only insofar as evidence was available in the record to do so. Where no evidence of certain criteria was included in the stipulated record, such as the operator's history of previous violations, the size of the operator's business and the effect on the operator's ability to continue in business, I have considered these criteria in the light most favorable to the operator. Having done so, I consider a civil penalty of $1,000 for a violation of section 105(c) of the Act involving 26 individuals a de minimus assessment under the totality of circumstances contained in the stipulated record.

ORDER

1. It is ORDERED that within 30 days of the date of this Supplemental Decision the operator pay:

a. Complainant R. Beavers the amount of $974.11.

b. Complainant D. Browning the amount of $924.53.

c. Complainant R. Carpenter the amount of $856.59.

d. Complainant E. Curtis the amount of $924.53.

e. Complainant L. Efaw the amount of $851.64.

f. Complainant R. Erwin the amount of $851.64.

g. Complainant C. Fox the amount of $851.64.

h. Complainant L. Freeman the amount of $1,136.09.

i. Complainant L. Huffman the amount of $856.59.

j. Complainant H. Hurst the amount of $918.21.

k. Complainant R. Hurst the amount of $918.21.

l. Complainant G. Knight the amount of $924.53.

m. Complainant L. Lantz the amount of $828.97.

n. Complainant M. Marra the amount of $924.53.

o. Complainant W. Marsh the amount of $871.78.

p. Complainant D. Martin the amount of $871.78.

q. Complainant D. Mayle the amount of $851.64.

r. Complainant C. McGee the amount of $1,698.84.

s. Complainant C. Murray the amount of $851.64.

t. Complainant W. Murray the amount of $851.64.

u. Complainant L. Norris the amount of $850.10.

v. Complainant C. Phillips the amount of $851.64.

w. Complainant K. Shockey the amount of $851.64.

x. Complainant R. Snider the amount of $871.78.

y. Complainant J. Ward the amount of $1,698.84.

z. Complainant B. Wilfong the amount of $924.53.

2. It is FURTHER ORDERED that the operator pay attorney fees of $4,049.10 to Mary Lu Jordan, Esq., within 30 days of the date of this Supplemental Decision.

3. It is FURTHER ORDERED that the operator pay a civil penalty of $1,000 to the Secretary within 30 days of the date of this Supplemental Decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1987

DAIRL EDDINGTON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-164-D
v.	:	
	:	BARB CD 86-24
FALCON COAL COMPANY, Respondent	:	

DECISION

Before: Judge Maurer

On January 30, 1986, the complainant, Dairl Eddington, filed a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., "the Act," with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against the Falcon Coal Company. That complaint was denied by MSHA and Mr. Eddington thereafter filed a complaint of discrimination with this Commission on his own behalf under section 105(c)(3) of the Act. Mr. Eddington alleges that he was discriminated against in violation of section 105(c) of the Act because he was disqualified for a position in the mine that was subsequently filled by a relative of the superintendent. More specifically he alleges as follows:

> Robert Spencer, inside boss, told Henry Coots and I on the outside to do on that day the same as we had done on Friday 13th.
>
> Inside, Robert then told me to build brattish. The material sent in was not enough. The materials sent were plaster or sealer was froze, and I could only use half of it. Then I had to take the scoop outside to get mandor, asking Robert where it was he didn't know, so I had to go find Kash Mullins, Supertindent, he then told me where the mandor was. Then when I found the mandor I had to move other materials to find it. Then running out of material again we had to send Ronnie Whitaker and another worker outside to get the rest of the material. They brought sack cloth and cap boards. They also didn't bring any 4 inch block or 2 inch header block because they were out.

At 2:30 Robert Spencer told me, I was wanted on the outside by Kash Mullins. Before leaving the job I asked was the brattish he was working on alright. Roberts' reply to the question was "Yes, Dairl it's ok."

On arriving outside it was about 2:45, Kash Mullins started to talk, then he said wait a minute, he then came back with Robert Spencer. They then told me why they were disqualifing me. Kash said because of being out of the mines as long as I had been I was no longer an experienced miner. They evaluated me on the scoop for the length of time, I had operated the scoop in their presence, and in their opinion I should have been faster. Robert Spencer, said I was a good worker, and so did Kash. But that I wasn't putting out enough production and that they would be glad to have me work as an inexperienced miner. They also said you had to be able to operate something other than a scoop.

I operated a front end loader and built brattish. Brattish person and scoop operator are different classification.

The Falcon Coal Company thereafter responded, inter alia, that the complaint fails to state a claim upon which relief can be granted under section 105(c). That contention may be taken as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the purposes of such a motion, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice, ¶ 12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act,

> including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the complainant must prove that he engaged in an activity protected by that section and that the alleged discrimination was motivated in any part by that protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). In this case Mr. Eddington asserts that he was discriminated against because he was wrongfully disqualified for a position in the mine which subsequently was filled by a relative of the superintendent. Assuming that this allegation is true, it is clearly not sufficient to create a claim under section 105(c)(1) of the Act. That section does not provide redress for a wrongful disqualification for a particular job that may have been unfair if that disqualification was not caused in any part by an activity protected by the Act. Accordingly, the complaint herein must be denied and the case dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

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George S. Brooks II, Esq., 1200 First Security Plaza, Lexington, KY 40507 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 15 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 87-29-R
	:	Citation No. 2810754; 12/9/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Bessie Mine

DECISION

Appearances: R. Stanley Morrow, Esq. and Harold D. Rice, Esq., Birmingham, Alabama, for Contestant; William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama for Respondent.

Before: Judge Weisberger

Statement of the Case

Docket Number SE 87-29-R is a notice of contest filed by Jim Walter Resources, Incorporated on December 12, 1986 to review a Citation, issued December 9, 1986, and a underlying safeguard notice issued December 5, 1986 by an inspector of the Mine Safety and Health Administration under Section 104(a) of the Act.

In this citation December 19, 1986 was provided as the date that termination was due. Subsequently, this date was extended until January 19, 1987.

On December 12, 1986 Contestant filed a Motion For Expedited Proceedings. On December 12, 1986, this case was assigned to me by Chief Judge Paul Merlin. On December 12, 1986 in a conference call between Contestant, Respondent, and the undersigned it was agreed that trial for this matter be scheduled for January 5, 1987. By Notice of Hearing dated December 19, 1986 Contestant's Motion For Expedited Proceedings was granted and the matter was set for hearing in Birmingham, Alabama on January 5, 1987. The hearing was held as scheduled. Bill Pitts, Gerald Tuggle, James A. Jones, Stephen W. Vaughn, and Edward Scott testified for Respondent. Bobby Taylor testified for Contestant.

Applicable Statute and Regulations

Section 314(b) of the Act which also appears in 30 C.F.R. § 75.1403 provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Notice to Provide Safeguards and Citation

The subject notice to provide safeguards dated December 5, 1986 provides as follows:

> Present means of controlling the underground rail traffic is inadequate in that a person designated by the operator to give clearance was not provided nor blocked signals being used.
>
> This is a notice to provide safeguard requiring all underground rail traffic to require clearance from a person so designated by the operator or block signals to be installed and maintained in an operative condition to provide clearance.

The subject citation, dated December 9, 1986, provides as follows:

> The mine operator failed to comply with a notice to provide safeguard number 2810752 issued December 5, 1986 that required all underground rail traffic to require clearance from a person so designated by the operator or block signals to be installed and maintained in an operative condition to provide clearance. No plan nor work was presented to comply with the safeguard on the termination date due December 9, 1986 at 8 o'clock a.m.

Stipulations with Reguard to Jurisdiction

The parties stipulated as follows:

1. The operator is the owner and operator of the subject mine.

2. The operator and the mine are subject to jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this case.

4. The MSHA Inspector who issued the subject citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

Findings of Fact and Discussion

In Contestant's Bessie Mine, aside from walking, the only way of transporting men and material from the entry to the various work area is by way of tranportation vehicles such as jeeps, locomotives, or trip motors, all of which must travel along a single track. This track is used for transportation of vehicles going into and out of the mine. These transporation vehicles use the track during every shift. In order to prevent head-on collisions Contestant has furnished each transportation vehicle with a two-way telephone-radio which gets its power from a trolley line which is also used to power the vehicle. In general, according to the uncontradicted testimony of Inspector Gerald Tuggle, and Contestant's motorman James A. Jones who testified for Respondent, an operator when leaving a certain area, such as Header Number 3, would call to say that he is leaving Header Number 3 and going to Header Number 4. These calls are done in transit and the operator does not wait for any response.

According to the uncontradicted testimony of Inspector Tuggle and motorman Jones, the track in the Bessie Mine contains steep upgrades followed by steep downgrades especially throughout the Palos Shaft between Header Number 3 and Header Number 7. Indeed, the uncontradicted testimony of Tuggle and Jones establishes that the slope of the upgrades and downgrades are so steep, as to create numerous blind spots where vision is so limited that an operator of a vehicle at that point is unable to see a vehicle coming at him from the opposite direction and that in essence these conditions are "unique" to Bessie Mine (Tr. 106). Blind spots are also present in areas where the track leaves the belt and enters a S curve. Mr. Tuggle's uncontradicted testimony established that other mines may have upgrades and downgrades, but they are not as bad as in the Bessie Mine. Also, there are areas of the track that have rock dust, debris or sand which prevent a vehicle's wheels from fully touching the rail, thus eliminating a ground for the telephone-radio and causing static or interference. According to the uncontradicted testimony of Tuggle, sand is used "a lot" due to the hills and hollows of the track at Bessie Mine.

Contestant's only witness, Safety Inspector Bobby Taylor, stated that in his opinion the present telephone-radio system of preventing head-on collisions or collisions in blind spots is "not inadequate." In essence he said that in general in approaching blind spots one should slow down and operate at a speed which is consistent with track conditions. Although excessive speed might be a contributing factor to collisions, the

issue here is whether Contestant's telephone-radio system, when used while traveling at proper speed, resulted in any increased risk of collision.

Taylor testified that when approaching a blind spot it is possible to be warned by the lights of an oncoming vehicle. He testified that when the vehicle lights are not functioning one can see cap lights of the miners riding in the vehicle. On cross-examination Jones admitted that it is possible to see the light of a oncoming jeep before a collision. However, it can not be found that the risk inherent in approaching a blind spot, i.e., not knowing for certainty that there is not any vehicle beyond the blind spot, is minimized to any great degree by being able to see the light on the oncoming vehicle. There is no clear convincing evidence as to the distance which one can see and be warned by a light of the oncoming vehicle especialy approaching the end of a blind area or going around an S curve at normal speed.

The balance of the evidence indicates that the present system of controlling traffic creates a risk of injury due to the specific conditions of the contour of the track of the Bessie Mine. Indeed, even Taylor indicated that the present system could work "with certain improvements" (Tr. 229). Considerable weight was accorded the testimony of Jones and Scott due to the extensive nature of their experience operating and riding vehicles along the track of Bessie Mine. In this connection it is noted that Jones has been a motorman for 6 years, and Scott worked as a motorman for 20 years and as a fire boss for 12 years. In essence, their testimony corroborates the opinion of Tuggle that under the present system whenever transportation enters a blind spot there is uncertainty in not knowing whether another vehicle is coming in the opposite direction or is stuck beyond the blind spot. Due to the fact that the responsibility of the operator of a vehicle along the track is only to indicate on the telephone-radio that he is leaving a point to go to another point, he can only be warned of a oncoming vehicle or a vehicle disabled in a blind spot if the second vehicle has communicated it is leaving a certain area and the first vehicle heard the transmission. The oncoming vehicle, similarly, will avoid risk of collision only if its telephone-radio received communication from the first vehicle as to its destination. However, the uncontradicted testimony of Tuggle was that material on the track, a condition peculiar to Bessie Mine, prevents a good ground for the telephone-radio and thus prevents adequate reception and transmission. Further, due to the numerous blind spots, caused by steep upgrades and downgrades of the track, and the fact that there is only a single track that carries traffic every shift, the risk of collision is quite high. Indeed, Contestant's witness Taylor testified that about once a week while traveling in a vehicle underground he has unexpectantly met a vehicle coming in the opposite direction and that the vehicle operator did not hear communications from Taylor's vehicle. Tuggle, Scott and Jones also testified to similar occurrences.

It is thus found that the present system, which allows a vehicle operator to proceed into a blind area without receiving positive clearance, increased the risk of collision. Section 304(b) of the Act which also appears at 30 C.F.R. § 75.1403, in essence authorizes a Federal Mine Inspector to issue safeguards which in his judgment will "minimize hazards" with respect to transportation of men and materials. It is clear that the safeguard issued by Tuggle on December 5, 1986 falls within the purview of the above section. This safeguard requires underground rail traffic to require clearance from a person designated by the operator or in the alternative block signals are required. According to the uncontradicted testimony of Tuggle, under a dispatch system a vehicle operator must call the dispatcher before proceeding into a certain area. The operator can proceed into the area only after the dispatcher tells him the area is clear. In a Block System, according to the uncontradicted testimony of Scott and Tuggle, an operator of a vehicle upon entering an area turns on a traffic light. This light remains on until the operator clears the area and turns the light off.

Taylor testified that the present system is better than a dispatcher and as good or better than a Block System. He testified that in the 9 months that he worked at Bessie Mine, which has neither a Block System nor a dispatcher, there were no wrecks. In contrast, he said that at the Number 3 Mine which has a Block System and a dispatcher, in any 9 month period since 1973 there have been more wrecks. However, there were no records produced to provide evidence that the accidents at Number 3 Mine were caused solely by a malfunction of a dispatcher or Block System. They could have resulted from negligence or other causes. What is clear is that the present system creates a risk of injury and that the safeguard in the judgment of Tuggle will minimize the risk. This opinion in essence was corroborated by the testimony of Scott and Taylor. Considerable weight was placed on their testimony due to their extensive experience operating and riding on underground transportation vehicles especially at the Bessie Mine.

The traffic control systems required in the safeguard are clearly not fool proof. On cross-exmination Tuggle indicated that there could be people who would not call a dispatcher as required, and Taylor indicated that a dispatcher might erroneously give clearance to two vehicles to enter the same area at the same time. It is clear that any system will not decrease the risk of injury if there is human error. There is no way to insure 100 per cent against human error. However, a dispatcher system used properly, will insure that a vehicle will not enter a blind spot unless it has positive clearance from a dispatcher. This will minimize the hazard of collision inherent in the present system.

Taylor indicated that with the Block System there is a continuous problem of lights going out. More weight was placed on the testimony of Scott due to his 20 years experience operating and traveling underground vehicles in mines with a Block System in his job as fire boss. It was his testimony that although block lights could go out, these are one of the first items a fire boss inspects. It is concluded that a Block System, which is maintained, will thus minimize risk of collision in blind spots, as under that system a vehicle would not enter an area containing a blind spot if the light is lit. Accordingly, the hazards of the present system will be minimized.

At the hearing no evidence was presented to rebut statements in the December 9, 1986 Citation and testimony of Tuggle that safeguard 2810752 has not been complied with.

Based on all of the above, it is concluded that the safeguard of December 5, 1986 was properly issued. The Contestant has failed to comply with the safeguard issued on December 5, 1986. As such, the citation (2810054) of December 9, 1986 was properly issued.

At the hearing counsel for both parties presented opening arguments. At the conclusion of the hearing counsel for both parties presented proposed findings of facts and posthearing arguments. In reaching my decision I have considered all these.

At the hearing the parties additional stipulations were offered as follows:

1. The history of the company with reguard to violations is average.

2. Imposition of a penalty will have no effect on the ability of the operator to continue in business.

3. The size of the operator is medium.

4. The negligence of the operator, in the violation referred to in citation 2810054 is low.

5. The gravity of the violation contain in citation 2810054 with reguard to the likelihood of an accident or injury was as testified to by Tuggle.

6. The violation referred to in citation 2810054 was not abated on the respresentation of counsel. This is not considered to be a lack of good faith.

ORDER

It is ORDERED that the Contest, filed on December 12, 1986, contesting citation 2810054, be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 21 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-83 A.C. No. 01-01401-03628
v.	:	No. 7 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; Harold Rice, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks civil penalties for two alleged violations of the mandatory standard contained in 30 C.F.R. § 75.316. In one, Respondent is charged with violating its approved ventilation, methane and dust control plan by failing to maintain line curtain to within ten feet of all faces in all working places inby the last open crosscut at all times except while roof bolting. With respect to this violation, the parties submitted the case for decision on stipulated facts and an agreed-upon issue. The other citation involves an alleged failure to comply with the approved ventilation plan in that methane in excess of 2.0 percent (modified by agreement at the hearing to 1.0 percent) was detected in the Southeast and South bleeder entries of the subject mine. Evidence was taken on this violation at the hearing in Birmingham, Alabama, on October 22, 1986. Ronald James Soneff, II, William Jerry Vann, and Kenneth Ealey testified on behalf of the Secretary. Ted Sartain testified on behalf of Respondent. Both parties have submitted post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

PRELIMINARY FINDINGS OF FACT

Respondent at all times pertinent hereto was the owner and operator of an underground coal mine in Tuscaloosa County, Alabama, known as the No. 7 Mine. Respondent is medium sized and its history of prior violations is average. The imposition of penalties herein will not affect Respondent's ability to continue in business. The violations charged were abated in good faith.

ORDER NO. 2605979

On March 13, 1986, Federal Mine Inspector Gerald N. Tuggle issued a withdrawal order under section 104(d)(2) of the Act alleging a violation of 30 C.F.R. § 75.200. It was modified on March 24, 1986, to charge a violation of 30 C.F.R. § 75.316 rather than § 75.200. The parties have stipulated that the following condition was present in the No. 8 section of the subject mine: the continuous mining machine had mined the crosscut to the left on the curtain (brattice line) side and the end of the curtain terminated in excess of 10 feet from the deepest point of penetration of the face to the straight of the entry. The parties have agreed that the approved ventilation, methane and dust control plan in effect at the subject mine when the order was issued required that the line brattice be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting.

The parties have agreed that the issue before me is whether Respondent was required to maintain line curtain to within 10 feet of all faces, or only the working faces from which coal is being extracted or was most recently extracted. The same issue was decided by me in a case between the same parties in September 1985. Secretary v. Jim Walter Resources, Inc., 7 FMSHRC 1471 (1985). I decided that Respondent was required to maintain the line curtain to within 10 feet of all faces. Respondent did not seek Commission review, and the decision became a final decision of the Commission. 30 U.S.C. § 823(d)(1). Ordinarily, the doctrine of res judicata or collateral estoppel would preclude the relitigation of an issue between the same parties which was previously litigated. 46 Am. Jur. Judgments § 397 (1969); 1B Moore's Federal Practice § 0.405 (1982); RESTATEMENT (SECOND) OF JUDGMENTS, §§ 27, 83 (1982); KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE, § 21:1-21:9 (2d Ed. 1983); Commissioner v. Sunnen, 333 U.S. 591 (1948); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966); Montana v. United States, 440 U.S. 147 (1979). However, the same issue between the same parties was relitigated in the case of Jim Walter v. Secretary, 8 FMSHRC 568 (1986), review pending. In that case Judge Koutras held that the plan requirement that line brattice be maintained to within 10 feet of all faces means all working faces. The question of issue preclusion was apparently

not raised by the Secretary in that case. Because the issue has been decided in conflicting ALJ decisions, and is presently before the Review Commission, I will address the merits of the case.

30 C.F.R. § 75.316 provides in part as follows:

> A ventilation system and methane and dust control plan . . . suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator . . . The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require * * * [Emphasis added].

The ventilation plan in this case, as in the other cases, was changed in 1972 to include the following language:

> Line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting and servicing as stated in the plan.

This provision was imposed upon Respondent in 1972 because of the high methane liberation in its mines. For this reason, the Secretary required "additional or improved equipment," beyond that required by 30 C.F.R. § 75.302-1(a), which mandated that line brattice be maintained to within 10 feet of active working faces. I conclude that the requirement imposed by the Secretary is within his authority, and that the term "all faces" includes idle faces. The citation was properly issued. The parties have stipulated that the proposed penalty of $750 is appropriate for the violation.

CITATION NO. 2605452

FINDINGS OF FACT

On February 20, 1986, MSHA ventilation specialist William Vann inspected the subject mine, after being informed by MSHA safety inspector Jerry Tuggle that the mine was having problems with high methane concentrations in the area of the No. 1 longwall section. Inspector Vann was accompanied by Ted Sartain, ventilation engineer for Jim Walter, and by a union representative. He took methane readings with three separate mechanical instruments, three in the Southeast bleeder entries,

and four in the South bleeder entries. The former varied from 2.1 percent methane to 2.5 percent. Two bottle samples were taken and were later analyzed at the MSHA laboratory. The samples showed 2.13 percent and 2.21 percent methane. The readings in the South bleeder entries varied from 1.4 percent to 3.06 percent and included readings of 2.4 percent, 2.6 percent, 2.7 percent and 3.0 percent methane. Three bottle samples were taken and analyzed at 2.32 percent, 2.33 percent and 3.05 percent methane. Mr. Sartain also took methane readings which esentially agreed with those of Inspector Vann. The area covered by the Inspector totalled approximately 6600 feet. Because of these findings, the Inspector issued an imminent danger withdrawal order under section 107(a) of the Act requiring Respondent to withdraw from the No. 1 longwall section and the Southeast main and South entries behind the longwall. He also issued a 104(a) citation charging a violation of the ventilation, methane and dust control plan. At the time the order and citation were issued, the longwall was energized and in operation.

Ronald Soneff, a fireboss at Jim Walter, made an inspection of the No. 1 longwall section in the latter part of 1984. He found and recorded the finding of 4 percent methane in the South bleeder entries. The following day he was told not to inspect the area thereafter. After a management change, he returned to firebossing the area in mid-1986.

The subject mine is a gassy mine. It liberates in excess of 19 million cubic feet of methane in a 24 hour period. For this reason it is subject to spot inspections under section 103(i) of the Act every 5 working days. The subject mine has experienced 52 methane ignitions from 1977 to 1985, six of them between October 22, 1985 and September 24, 1986. The last one (September 24, 1986) occurred on the headgate side of the No. 1 longwall section.

The roof in the South bleeder entries is very poor and has been deteriorating since at least 1984. Rock falls have affected the ventilation in the South and Southeast bleeder entries. In December 1985, Inspector Vann told Ted Sartain that the roof was beginning to deteriorate in the bleeder entries. Sartain replied that Respondent was beginning to install cribs in the area.

The ventilation System and Methane and Dust Control plan in effect for the subject mine on February 20, 1986 contained the following provision:

> All provisions of published regulations and criteria pertaining to ventilation and methane and dust control must be followed except as noted below:

> 75.316-2(d)--When methane content in a main return exceeds 1.0 volume percentum, mine management shall submit a plan detailing additional evaluation procedures and safeguards which will be utilized to insure safety.

On August 1, 1985, Respondent requested a change in the ventilation plan as follows:

> Jim Walter Resources, No. 7 Mine requests that the methane content in the main return air courses be in excess of 1.0 volume percentum, but shall not exceed 2.0 volume percentum. The following provisions will be complied with in this area:
>
> 1. Fireboss examinations . . . at intervals not to exceed twenty four hours.
>
> 2. Electrical equipment will not be operated in an area where the methane content . . . is 1.0 percentum or more.
>
> 3. The main return air splits shall be examined immediately prior to entering a return shaft or fan. The methane content of the air passing through the fan shall be less than 1.0 volume percentum.

The request was approved February 21, 1986 by the MSHA District Manager in a letter reading:

> The request that the methane content in the bleeder entry and the Number One South East Main return air courses after the bleeder splits from the longwall panels enter these air courses be in excess of 1 percent but not to exceed 2 percent methane has been reviewed and is approved for the area serving the Number One Longwall.

After the order and citation were issued on February 20, 1986, and the No. 1 Longwall was shut down, Respondent closed No. 11 section (a continuous miner section) and took the air from that section and put it on the longwall to increase the ventilation and reduce the methane. On February 23, 1986, Inspector Vann found that the volume of air was increased in the South and Southeast bleeder entries, and the methane content had been reduced to less than 1.5 percent. The order was terminated. The citation was terminated on February 26, 1986, when it was learned that the District Manager had approved the supplement to the ventilation plan.

ISSUE

Whether Respondent's failure to maintain the methane content in the South and Southeast bleeder entries of the No. 1 longwall section at or below 1.0 percent was a violation of the approved ventilation plan.

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the No. 7 Mine, and I have jurisdiction over the parties and subject matter of this proceeding. 30 C.F.R. § 75.316 requires Respondent to adopt a ventilation system and methane and dust control plan. When such a plan is adopted and approved by the Secretary, Respondent is required to comply with its provisions. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). The provisions in the plan in effect at the subject mine relating to maximum permissible methane content are not, as counsel for the Secretary admits, a model of clarity. However, I believe that a fair reading of the letter of July 17, 1985 approving the plan shows that it requires adherence to the criteria in 30 C.F.R. § 75.316-2 (§ 75.316-2(d) provides that methane in a return air course should not exceed 2.0 percent, and that air in any active workings shall contain less than 1.0 percent methane) except that where methane in a main return exceeds 1.0 percent, a plan shall be submitted with detailed evaluation procedures and safeguards to insure safety. The "exception" thus imposes a more stringent requirement than the criteria in § 75.316-2(d). I read the plan to require Respondent when circumstances indicate that methane may exceed 1.0 percent to take the steps necessary to reduce it below 1.0 percent. The evidence here shows a history of excessive methane in the area in question. It also shows that Respondent was aware of this fact. It further shows a seriously deteriorating roof condition which could be expected to disrupt ventilation. It shows on the date of the inspection methane readings far in excess of the maximum percentages, and approaching dangerous levels. These facts in combination show a violation of the ventilation plan. The request of August 1, 1985 to increase the maximum permissible level to 2.0 percent does not constitute "a plan detailing additional evaluation procedures and safeguards which shall be utilized to insure safety."

The steps taken after the order and citation were issued should have been taken earlier and would have prevented the excessive methane buildup. Cf. Secretary v. Youghiogheny & Ohio Coal Company, 5 FMSHRC 1581 (1983), vacated on motion, 7 FMSHRC 200 (1985).

The excessive methane content in the area of the mine in question posed a serious hazard to miners--from an ignition or mine fire, or even an explosion if the methane concentration increased. The conditions causing the excessive methane were known to Respondent, which should have taken steps to reduce it. The violation was very serious, and resulted from Respondent's negligence. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $1000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent shall, within 30 days from the date of this decision, pay the following civil penalties for violations found herein:

Order 2605979	$ 750
Citation 2605452	1000
Total	$1750

James A. Broderick
Administrative Law Judge

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JAN 21 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF SAM BALL, Complainant	:	DISCRIMINATION PROCEEDING Docket No. VA 86-23-D NORT CD 85-9
v.	:	
WESTMORELAND COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On November 4, 1986, the Secretary filed a motion to withdraw the complaint, based on a settlement agreement between the parties. Respondent supported the motion. By the settlement agreement, Respondent agreed not to discriminate against any miner or representative of miners in violation of the Act, and, in particular agreed not to discriminate against Sam Ball or any other miner in making job assignments because of their status as miners' walkaround representatives. Respondent agreed to post a copy of the settlement agreement for a period of 60 days.

On January 8, 1987, counsel for Respondent certified that the settlement agreement had been posted by Respondent for a period of 60 days.

Accordingly, the motion to withdraw the complaint pursuant to the settlement agreement is GRANTED, and this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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JAN 21 1987

WEST ELK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 86-28-R
	:	Citation No. 2336427; 10/23/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 86-29-R
	:	Citation No. 2336428; 10/23/85
	:	Docket No. WEST 86-30-R
	:	Citation No. 2336430; 10/24/85
	:	Docket No. WEST 86-31-R
	:	Citation No. 2833301; 10/30/85
	:	Docket No. WEST 86-32-R
	:	Citation No. 2833302; 10/30/85
	:	Mt. Gunnison No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-73
	:	A.C. No. 05-03672-03542
v.	:	
	:	Mt. Gunnison No. 1 Mine
WEST ELK COAL COMPANY, INC., Respondent	:	

DECISIONS

Appearances: Thomas F. Linn, Esq., Legal Department, Anaconda Minerals Company, Denver, Colorado, for Contestant/Respondent; James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern five Notices of Contest filed by the West Elk Coal Company, Inc., challenging the validity of five section 104(a) "non-S&S" citations issued pursuant to the Federal Mine Safety and Health Act of 1977, and civil penalty proposals filed by MSHA seeking civil penalty assessments for the citations.

The cases were heard by Commission Judge John A. Carlson, and the parties filed posthearing briefs. However, due to the untimely death of Judge Carlson, the cases were reassigned to me, and the parties agreed to my adjudication of the cases on the basis of the record made before Judge Carlson without any additional hearings. I have considered all of the arguments made by the parties in their respective briefs in the adjudication of these proceedings.

Issues

The issues presented in these proceedings are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalties to be assessed for those violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector who issued the citations followed the appropriate test procedures in support of the alleged violations, and whether or not those procedures were proper and valid.

3. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

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. Mandatory safety and health standard 30 C.F.R. § 75.316.

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

Discussion

These cases arise out of five citations issued by MSHA Inspector Matthew Biondich in connection with his permissibility inspection of the low water shutdown systems on five diesel operated shuttle cars used underground in West Elk's Mt. Gunnison No. 1 Mine. The citations were issued between October 23 and 30, 1985, and each allege a violation of the approved mine ventilation system and methane and dust-control plan requirements found in 30 C.F.R. § 75.316. Each citation alleges that a violation of the ventilation plan occurred in that the cited equipment was not in compliance with the "manufacturer's operating specifications and maintenance manual in the care of use of diesel equipment * * * in that the low water shutdown * * * would not shut the engine off when the water was completely drained from the scrubber."

During the course of a regular inspection of the mine, Inspector Biondich tested 12 diesel shuttle cars to determine their compliance with the applicable permissibility standards. The ram cars are used to carry coal from the mine face area to a dump point. Since the cars work in the face area and passed the last open crosscut, they are required to be in compliance with the permissibility standards. These standards require that the hot exhaust from the car diesel engines be routed through a device known as a scrubber. The purpose of the scrubber is to cool the exhaust with water so that exhaust and any expelled carbon particles will not act as a source of dust or methane ignition. The water used in the system is contained in the scrubber tank, and the scrubber operates by routing the exhaust through a perforated pipe which is under water. As water is depleted from the scrubber tank, a float valve assembly attached to the side of the scrubber tank senses any depletion of water and allows water to enter the scrubber tank from another 90 gallon tank called variously the makeup, reserve, or supply tank. The scrubber is equipped with a device known as the low-level water shutoff device, and the purpose of that device is to shut off the car engine in the event the scrubber tank no longer has water in it to cool the exhaust. On 5 out of the 12 cars inspected by the inspector, the low-level water shutoff device, when tested, did not act to shut down the car engines, and they were cited. The citations in issue are as follows:

Citation No. 2336427 was issued at 9:40 a.m., on October 23, 1985, and it cites a violation of mandatory

safety standard 30 C.F.R. § 75.316. The cited condition or practice is as follows:

> The approved ventilation plan was not being complied with according to manufacturer's operating specifications and maintenance manual in the care and use of diesel equipment in 1 South panel working section (005-C) in that the low water shut down on the R6 Jeffrey Ram-car serial No. 38272 would not shut the engine off when the water was completely drained from the scrubber.

The violation was abated at 12:40 p.m., the same day by installing a new float valve assembly.

The condition or practice cited in the four remaining citations are identical to Citation No. 2336427, and simply cite four additional ram cars. They are as follows:

Citation No. 2336428 was issued on October 23, 1985, at 10:50 a.m. for a violation on Jeffrey Ram Car No. R-11. The citation was abated at 11:30 on that same day by repairing the needle valve on the float valve assembly.

Citation No. 2336430 was issued on October 24, 1985, at 9:30 a.m. for a violation on ram car No. R-12. The violation was abated at 10:40 on that same day by installing a new air float valve on the float compartment.

Citation No. 2833301 was issued on October 30, 1985, at 9:00 a.m. for a violation on ram car No. R-4. The violation was abated at 10:25 on that same day by clearing rust flakes out of the float tank compartment.

Citation No. 2833302 was issued on October 30, 1985, at 11:00 a.m. on ram car No. R-5. The violation was abated at 1:30 on that same day. The abatement noted that the low water shut-down device on the ram car was restored to operating condition in that the engine would shut off before the water was drained from the scrubber.

MSHA's Testimony and Evidence

MSHA Inspector Matthew Biondich testified as to his mining experience and training, including training with respect to diesel equipment permissibility inspections. He confirmed that he conducted the inspections in question beginning on October 23, 1985, and that he inspected the diesel operated

ram cars for permissibility compliance. He identified exhibit S-1 as a copy of the pertinent portion of the mine ventilation plan as it pertains to diesels. He confirmed that paragraph #2, pg. 28, of that plan applies to the cited ram cars, and that the cars were not being operated and maintained in accordance with the referenced manufacturer's manual specifications (Tr. 6-11).

Inspector Biondich stated that he inspected ram car #R-6 on October 23, 1985, for permissibility, and confirmed that it operated from the face areas to the dumping point past the last open crosscut. He stated that he has conducted over 100 permissibility inspections since 1977, and he described the procedures he follows in conducting these inspections. With respect to any required permissibility tests, such as diesel fuel, air, and water shut down systems, he confirmed that these tests are conducted by company personnel and that he simply acts as an observer. Equipment subject to the permissibility standards must be inspected weekly by the operator (Tr. 13-17).

With regard to the low water shut down systems test on the ram cars, Mr. Biondich stated that he requested the personnel conducting the test to shut the main water supply off to save time, and he believed the operator's personnel were familiar with the required test (Tr. 18).

Mr. Biondich explained that the purpose of the car scrubber is to cool the exhaust of the diesel car engine so as to prevent fire and explosion hazards caused by the heat generated by the exhaust system. The scrubber serves to cool the exhaust heat and flames generated by the car engine, and it does this by using water from the machine water supply. If there is no water in the scrubber, the machine will "kick out hot carbon and heat" into the mine atmosphere, and this would create a fire and explosion hazard. The tests were conducted to ascertain whether or not the low water shutoff device on the cars were working properly so as to shut down the engine in the event the available water from the scrubber water supply reached a certain level (Tr. 18-21).

Mr. Biondich identified exhibit S-2 as a schematic drawing of a scrubber and makeup tank and float valve illustrative of the kind used on ram car No. 6, and he explained how the low water shutoff device operates and how it is tested (Tr. 21-23). He explained that in the event the water in the scrubber falls below a certain level, the engine cutoff float valve operates to add water to the scrubber from a water makeup tank. In the event there is insufficient water in the makeup tank,

or if the water falls below 5 or 6 inches in the scrubber and is not replaced, the valve is supposed to shut the car engine down (Tr. 24).

Mr. Biondich confirmed that company personnel tested the engine cutoff valve on the No. 6 car and that he observed the test. The main water supply from the reservoir was shut down so that the water level in the scrubber could be checked without using all of the water in the makeup tank. In addition to a needle valve used to shut off the makeup tank water supply, some of the cars were equipped with a regular water shutoff valve between the scrubber and makeup tank. Once the scrubber tank water supply was cut off, a plug on top of the scrubber was opened, and the individuals conducting the tests explained that this was done to prevent air locks in the scrubber tank. After all of the water drained from the scrubber and stopped running out of the scrubber tank, the engine kept running and the valve would not shut down the engine. Had the engine scrubber cutoff float valve been operating properly, the engine should have shut off. Since it did not, he concluded that the car was not being maintained properly (Tr. 24-28).

Mr. Biondich stated that the citation for the No. R-6 car was abated at 12:40 p.m., 3 hours after the machine was tested, and he confirmed that he was present "a majority of the time" during the abatement. Abatement was achieved by installing another float valve assembly, and a second test was conducted using the same procedure as previously described. Before the water stopped draining out of the scrubber tank, the car engine shut down, and this indicated to him that the shutoff valve was operating properly. The same test was used both during his initial inspection and the abatement of the violation (Tr. 29-31).

Mr. Biondich confirmed that after the No. R-6 car was tested, the same company mechanic tested the No. R-11 car, and the low water shutoff valve was tested in the same manner as the No. R-6 car was tested. He again asked the mechanic to shut down the main water supply to save time in draining the scrubber tank, and to prevent water from the 60-gallon tank spilling on the roadways. After the scrubber tank was completely drained, the engine continued to run with no water in the tank. The condition was abated within 40 minutes by cleaning and repairing the needle valve on the scrubber float valve assembly. After this was done, the car was tested again using the same test, and the engine shut off. This led him to conclude that the needle valve had been defective, and the mechanic told him that this was the case (Tr 32-35).

Mr. Biondich stated that after the tests were completed he spoke with the Jeffrey Manufacturer's representative, a Mr. Murphy, and advised him that the cited conditions had been corrected. Mr. Biondich stated that he explained the test procedures which were used to Mr. Murphy, and Mr. Murphy did not criticize the test procedures (Tr. 38).

Mr. Biondich stated that he returned to the mine on October 24, 1985, and observed the test conducted on the No. R-12 ram car low water shutoff device. The test was conducted in the same manner as on the previous day, and the engine would not shut off when the scrubber was completely drained. The citation was abated within 40 minutes by installing a new float valve on the float compartment. The abatement work was conducted by the Jeffrey representative, Mr. Murphy, and Mr. Biondich observed him. After installing the new float valve, Mr. Murphy tested the machine. Mr. Murphy's test differed from the other tests conducted by the company mechanic in that he drained the scrubber tank by means of a 2-inch drain plug on the side of the rear of the scrubber rather than taking off the water supply hose for the float valve assembly. Mr. Biondich stated that he advised Mr. Murphy that the water hose had been removed when the previous tests were conducted, and that Mr. Murphy replied "you don't need to do it" (Tr. 42).

Mr. Biondich confirmed that the mechanics who tested the other cars the day before drained the scrubber tank by means of a front valve which drained all of the water out, while Mr. Murphy drained the tank by means of the other valve which left 5 to 6 inches of water in the scrubber. The first time Mr. Murphy tested it with 5 to 6 inches of water left in the tank, the engine would still not shut down (Tr. 43). In Mr. Biondich's view, Mr. Murphy's use of a different drain valve, and his leaving the float value assembly hose intact, did not significantly effect the results of the prior tests conducted by the company mechanic (Tr. 44-46). After Mr. Murphy corrected the problem, he tested the car twice, and it worked properly. Mr. Biondich then terminated the citation (Tr. 47).

Mr. Biondich confirmed that he again returned to the mine on October 30, 1985, and observed a company mechanic test the No. R-4 ram car scrubber water shut down device. Mr. Murphy ordered the testing of that car, and the mechanic followed the same procedures used on the other cars, except that he did not disconnect the water supply hose from the main reservoir tank. In order to achieve uniformity in the

test procedures, Mr. Biondich stated that he advised the mechanic that the other mechanics who tested the previously cited cars had disconnected the hose in question, but after the mechanic advised him that this was not necessary, Mr. Biondich allowed him to leave it intact. However, in each instance during all of the testing on all of the cars, the main water valve between the scrubber tank and the main water reservoir was shut off (Tr. 49).

Mr. Biondich stated that when the No. R-4 car was tested by the mechanic, the majority of the water had been drained, and when it trickled out, the engine ran for 15 minutes and did not shut down. Mr. Biondich concluded that the low water shutoff device was not functioning properly and he issued the citation. The violation was abated within an hour and a half (Tr. 50). The mechanic disconnected the float tank compartment from the side and the scrubber and removed the water supply hose. Mr. Biondich observed that the hose was filled with "hard water" or "rust flakes," and that the scrubber tank contained these flakes. Mr. Biondich helped to clean out the tank and the mechanic installed another hose. After this was done, the low water shutoff device was again tested, and it operated properly. Before the water was completely drained from the scrubber, the engine would shut down (Tr. 52-53).

Mr. Biondich confirmed that he next inspected the No. 5 ram car on October 30, and observed the test conducted on that car by company personnel. The test procedure for the No. R-4 car was again repeated for the No. 5 car, and when tested, the engine would not shut down when the water was drained from the scrubber tank. Mr. Biondich issued the citation, and returned the next day to abate it. Mr. Biondich confirmed that he was not present during the abatement, and did not know what was done to correct the condition. However, the No. 5 car was again tested using both test procedures, i.e., leaving the float tank hose on, and taking it off, and when tested both ways, the low water shutoff valve device was operable, and it shut down the machine. Mr. Biondich then abated the citation (Tr. 54-55).

Mr. Biondich confirmed that he conducted permissibility inspections on all 12 of the ram cars used in the mine, and observed company personnel test the emergency air shut off, the fuel shutoff, and the low water shutoff on each car. The five cited cars failed to meet the low water shutoff permissibility requirements (Tr. 58).

On cross-examination, Mr. Biondich confirmed that each of the citations were issued because of the operator's failure to maintain the ram car low water shut down devices in accordance with the manufacturer's operating specifications and maintenance manual as required by the mine ventilation plan (Tr. 64-65). He confirmed that while the plan requires the manuals to be available for inspection, he did not request a copy of the manual test procedures. He also confirmed that he came into possession of the manual test procedures for the first time in December after the citations were issued when he attended a training session conducted by MSHA diesel specialist Jerry Lemon (Tr. 65). Mr. Biondich denied that company supervisors George Moore, Gaylon McDaniel, and Dewey Walker, who accompanied him during his inspections, advised him that they did not know how to test the ram cars, and that he (Biondich) stated to them "Don't worry about it. I'll tell you how to do it" (Tr. 66-67).

Mr. Biondich confirmed that diesel equipment used in underground mines is a relatively new phenomenon, and that he has received training on the checking of diesel equipment from Mr. Lemon (Tr. 68). Mr. Biondich identified exhibit O-2 as a copy of the Jeffrey Manufacturer's Permissibility Checklist for the ram cars in question, and confirmed that the instructions are the same ones given to him in December after the citations were issued. He also confirmed that page four, entitled "Low Scrubber Water Shut Down" are the proper manufacturer's manual testing procedures for the testing of the cited ram car (Tr. 68-69).

Mr. Biondich confirmed that the manual test procedures set out in exhibit O-2, were not followed when the cited ram cars were tested (Tr. 69). He identified exhibit O-3, as a photograph of the ram car scrubber tank in question, and he located the drain valve with a handle used to drain the water out of the cars at the time the tests were conducted in the lower right-hand corner of the scrubber (circled on the exhibit). He identified the drain valve used by Mr. Murphy during his tests as the gray cylinder with a hole in it on the side of the scrubber tank in the left of the photograph. When asked whether the "black cylinder" shown in the photograph is the scrubber lower level tank, Mr. Biondich replied "I's say no." When asked what it was, he replied "I don't know" (Tr. 72). He confirmed that most of his permissibility inspections were electrical inspections, and that his experience with diesel inspections consists of approximately 12 regular mine inspections (Tr. 73).

Mr. Biondich confirmed that during all of the tests, he instructed the company testing personnel to shut off the valve between the water supply tank and the scrubber tank. He conceded that this shut-off procedure is not specified in the Jeffrey testing manual, and admitted that the Jeffrey procedures were not followed in this regard (Tr. 73). He explained that all he checked was the low water shut down, and his instructions to shut down the valve between the water supply and scrubber tank were given "so we wouldn't be there a long time and also water running down through your entry where you have 60 gallons running down" (Tr. 74).

Mr. Biondich conceded that the test procedure in paragraph 2(b) concerning the disconnection of "the air supply line at the upper tank valve" was not performed or followed in any of the tests he observed. With regard to the test procedures found in paragraph 2(a), he stated that it was performed on some of the cars which were equipped with valves to relieve the main water tank pressure, but not on others because they were not equipped with such a valve. These cars had another pressure valve installed in the line, and in such cases MSHA's procedures do not require that the main water tank be completely drained, and he simply had the valve shut off. He conceded that this MSHA procedure is not part of Jeffrey's procedures which are in fact approved by MSHA as the procedures for testing the cars (Tr. 75).

Mr. Biondich identified the rear of "the lower level tank" referred to in test procedure 2(c) as the "white painted plug" on photograph O-3. He was not sure of the location of the 6 or 7 inch drain valves, and he confirmed that he never measured the lower water level with a tape during any of the tests because all of the water had been drained from the tank (Tr. 76-79). He conceded that in the event the cars are tested on uneven levels and the drain pipes are above the bottom of the tank, water could be trapped in the scrubber tank and upper float tank (Tr. 80).

Mr. Biondich confirmed that the Jeffrey ram car scrubber is equipped with a backup secondary heat sensor in the exhaust system, and in the event scrubber gases are not cooled because of a lack of water, the heat sensor will shut down the machine (Tr. 80-81).

With regard to the new float valve assembly installed to abate the citation for ram car No. R-6, Mr. Biondich denied that he was ever told that the float valve assembly removed from the machine was not defective. With regard to ram car

No. R-11, he conceded that the machine was checked in different places through "trial and error," and that equipment changes were being made to try to determine the trouble. Mr. Biondich admitted that he met with company maintenance manager Richard Skvarch on October 31, after the citations were issued and that they discussed how the low water devices worked. He denied that Mr. Skvarch explained the proper test procedures to him or that he pointed out that draining the tank through the main drain valve was improper (Tr. 85). Mr. Biondich admitted that Mr. Skvarch informed him that the low water shut off device on the No. R-12 car had been checked by the Jeffrey procedures several times during the maintenance shift before his arrival and that it was functioning properly (Tr. 86).

Mr. Biondich confirmed that on December 12, 1985, MSHA requested permission from the company to conduct a school on low water shut down devices and other permissibility checks on the diesel cars at the mine. Mr. Biondich stated that the school was intended for the benefit of three newer MSHA inspectors, but that he was present. He further confirmed that Mr. Lemon conducted the classes of instruction and that copies of the Jeffrey procedures were passed out to the inspectors, and that Mr. Lemon "walked them through" the permissibility testing procedures (Tr. 90-91). Mr. Biondich conceded that the tests conducted on the cited ram cars did not follow the Jeffrey manual procedure, but he still believed that the tests were valid (Tr. 91). He denied hearing any statements by Mr. Lemon during the instruction classes that "if you don't follow these instructions * * * (Jeffrey Manual) you know what West Elk will do and I don't blame them." He also denied hearing Mr. Lemon state "if you don't follow those instructions, you don't have a leg to stand on" (Tr. 91-92).

Mr. Biondich identified exhibit O-4, as procedures for testing Jeffrey machines which are the "same type" as the one he cited but for different models. He described these procedures as a "general outline," and while he had them in his briefcase, he did not refer to them when he inspected the cited cars "because I'd done it before." He confirmed that he did not use these procedures when the cited cars were tested, and that they were not used by the company personnel performing the tests. His only participation in the actual testing was limited to instructing company personnel to shut off the water valve from the main tank (Tr. 101-105).

In response to further questions, Mr. Biondich confirmed that the tests conducted on the ram cars which were in compliance and not cited were the same tests conducted on the

cited cars, except for the fact that some of the mechanics disconnected the shut off valve, and others did not (Tr. 107-109). He described the location of the float valve device which shuts the car engine down when the water level gets too low as the "smaller white box" attached to the "bigger white box" identified as the scrubber in photographic exhibit O-3 (Tr. 108).

Jerry Lemon, MSHA Diesel Specialist Coordinator, testified as to his mining experience and duties, and he confirmed that he has served as an inspector conducting inspections on diesel equipment. He has a college BS degree in automotive and diesel engineering, and his duties include the training of inspectors in the inspection of diesel equipment, and the testing approval of diesel equipment field changes and modifications. He has also served on MSHA committees concerned with the regulations and guidelines for diesel equipment used in underground mines. He denied making the statements attributed to him by the operator's counsel during a diesel training session he conducted at the mine with respect to what would happen in the event MSHA inspectors did follow the Jeffrey testing manual guidelines (Tr. 110-113).

Mr. Lemon stated that he is familiar with the cited ram cars in question, and he identified the black hose shown in photographic exhibit O-3 as the hose which connects to the scrubber makeup tank. As water is used up through evaporation of the exhaust, water in the scrubber is made up by means of this hose from the makeup tank. He confirmed that several mechanics disconnected that hose during some of the car tests, and in his opinion this was not necessary. He explained that while disconnecting the hose would eliminate any air locks in the float tank, water may still be present in the float tank and the engine will still run and be nonpermissible. The disconnection of the hose will drain the water out of the float system and deactivate it and shut the machine down. In his opinion, the hose should not be disconnected, and he has reviewed no literature indicating that this hose should be disconnected (Tr. 114-116).

Mr. Lemon explained his reasons why the hose in question should not be disconnected. He indicated that should a malfunction occur in the scrubber, the hose would not be disconnected. The removal of the hose would overcome any design problem and would allow the scrubber to function under test conditions but not under actual mine operating conditions. He stated further that the true test would be to drain all of the water from the scrubber at the lowest point, and once drained, if the system does not shut down the engine, it would

indicate that the shut-device is inoperable. The quickest way to isolate the makeup tank is by opening or closing the air pressure valve, thereby forcing all of the water into the scrubber.

Mr. Lemon confirmed that the test method used by the inspector to isolate the main water holding tank was proper and speeds up the test process. If the tank were not isolated in the manner instructed by the inspector, it may take 2 hours to drain all of the water out of the system. The whole purpose of the test is to remove all of the water from the scrubber to see whether it shuts off the machine, and simply turning off the water from the makeup tank will not effect the test of the low water shutoff device to determine whether it shuts down the machine (Tr. 119-120).

Mr. Lemon confirmed that he is familiar with the Jeffrey test procedure outlined in exhibit O-2, and he confirmed that he has not seen it as part of any maintenance manuals. He stated that it was sent out by separate letter by Jeffrey to mine operators using their equipment (Tr. 121).

Mr. Lemon confirmed that the inspector did not follow procedure 2(b), when the tests were conducted on the cited cars. He explained that the procedure in question is directed to mechanics for troubleshooting possible defective scrubber water float valves. Once that check is completed, if the makeup tank has been isolated pursuant to procedure 2(a), the next step would be to go to procedure 2(c). Even if step 2(b) is skipped, as long as all of the water is drained from the scrubber and the makeup tank is isolated, if the engine did not shut down, this would indicate a faulty system and a violation. The basic point of the test is to determine whether or not the scrubber will shut down when it reaches a water level below 7 inches (Tr. 122-123).

Mr. Lemon stated that the principal goal of the test is to determine whether the shutoff system works, and this is achieved by draining all of the water out of the scrubber and following test procedure 2(a) and 2(c). In his opinion, the inspector complied with these test procedures when the cited machines were tested (Tr. 123).

Mr. Lemon identified exhibit S-9 as an MSHA diesel "permissibility checklist" used to train MSHA inspectors. He indicated that this checklist was adopted by MSHA after its submission by Jeffrey, and it is used by MSHA inspectors in the field to check out the Jeffrey equipment. He confirmed that the checklist deals with "the same type of scrubber" at

issue in these proceedings, and while there are two Jeffrey scrubber models, "Jeffrey equipment is basically the same" although one model uses an air system, while another model uses air and oil (Tr. 125). Mr. Lemon confirmed that the checklist (exhibit S-9) applies to a model 4110 scrubber, and stated "I'm almost positive it's the same scrubber" as those involved in the cited cars which are in issue in this case. However, upon further examination of photographic exhibit O-3, he stated "this picture of the scrubber . . . does not look the same. It looks to me there's been some modifications made on this" (Tr. 126).

Mr. Lemon explained the similarities and dissimilarities between the scrubber model shown in the photograph (Model 4114), and the checklist model referred to in exhibit S-9. He claimed ignorance of any modifications shown in the photograph, and speculated that they may not have been made by the Jeffrey Company (Tr. 128). Mr. Lemon confirmed that he was familiar with all ram cars manufactured by Jeffrey, including the scrubber systems on all of its models, but denied that he had ever previously seen a system as shown in the photograph as a system manufactured by the Jeffrey Company (Tr. 128). He confirmed that any diesel ram cars manufactured by Jeffrey must be certified and approved by MSHA, and that the cars manufactured by Jeffrey have been approved by MSHA. Once this is done, any changes or modifications must have MSHA's approval (Tr. 129). He would generally be involved in any such approval process, and only in a "remote instance" such as his being on leave, would he not be informed of any scrubber changes or modifications (Tr. 129-130).

West Elk's counsel asserted that there is no evidence in this case that the scrubber depicted in the photograph in question was used on any of the cited ram cars in question. In response to a question from the bench as to whether or not the scrubbers on the cited ram cars differ in some significant way from the scrubber shown in the photograph, counsel responded as follows (Tr. 131):

> MR. LINN: I'm not altogether certain, frankly, Your Honor. I think some do differ and some may be the same. This is a new issue as far as I'm concerned. My understanding is that these modifications are Jeffrey modifications. They have been approved by MSHA and we'll have testimony to that effect. The point I'm getting at is that what is depicted in O-3 is not a unit that is on any of the ram cars at issue.

MSHA's counsel confirmed that the question of whether any scrubber modifications or changes constitute separate violations of MSHA's standards is not an issue in these proceedings (Tr. 131).

Mr. Lemon stated further that while he could not determine the model number of the scrubber depicted in photographic exhibit O-3 from the photograph, he believed that the Jeffrey checklist, exhibit S-9, would nonetheless apply and that the model number makes no real difference since all scrubbers are basically constructed the same way (Tr. 132-133). He confirmed that the Jeffrey permissibility checklist procedures identified as "Exhaust System-Low Water shutdown test" on the back of the fourth page of exhibit S-9, as used in MSHA's Training School, coincide with the test methods used by Inspector Biondich in support of the citations issued in these proceedings, and basically contain procedures 2(a) and 2(c) of the Jeffrey procedures outlined in exhibit O-2 as followed by the inspector. He confirmed that the exhibit S-9 procedures do not include a procedure for testing the water supply line as stated in test procedure 2(b), exhibit O-2, and stated that step 2(b) is "just an additional test" to help a mechanic isolate any scrubber problem "from that valve on around to the block to the fuel shutoff and the air valve" (Tr. 135). Mr. Lemon concluded that the test procedures found in exhibit S-9 reflects that the inspector conducted the proper test (Tr. 135).

On cross-examination, Mr. Lemon confirmed that he conducted a school at the mine in December, 1985, for the purpose of instructing MSHA inspector's as to how to go about checking the permissibility of diesel ram cars, and that tne instructions included the procedures outlined in exhibit O-2, as well as S-9, because "they coincide with each other" (Tr. 136). He confirmed that mine personnel were present at the school, but he could not recall telling Mr. Skvarch that unless the proper MSHA approved test procedures were used in issuing the citations they would be invalid (Tr. 138).

Mr. Lemon reiterated that the Jeffrey test procedure checklist, exhibit O-2, are not part of any maintenance manuals kept at the West Elk Mine or any other mine he has visited. He was never told that the procedures are from the manual and he assumed they are from Jeffrey because they are on Jeffrey's letterhead. He confirmed that the checklist is very thorough, and more so than the exhibit S-9 checklist (Tr. 140). Mr. Lemon stated that checklists O-2 and S-9 do not indicate whether they have MSHA's approval. However, checklist S-9 will be included with all new Jeffrey equipment

maintenance manuals for use by mine mechanics in making their equipment inspections (Tr. 140).

Mr. Lemon explained test procedures O-2, and he stated that the test is designed to drain the scrubber rather than the whole water supply tank, and the makeup tank has to be isolated (Tr. 144). Referring to photograhic exhibit O-3, he stated that if he were to conduct the test, he would drain the water from the scrubber tank drain valve which is circled in the photograph, rather than from the grey cylinder marked "LL," or lower level tank. In his opinion, the grey cylinder is the water control valve cylinder and not the lower level tank (Tr. 144). If water is drained from that cylinder and there is an air lock in the float, even though the water is drained from the scrubber, water may still be in the float and the system will still run and be nonpermissible (Tr. 145). When asked to again identify the lower level tank, Mr. Lemon stated "I'm not positive because they're not that clear on their instructions (Tr. 145).

Mr. Lemon stated that the "lower level drain valve" does not appear on other specification drawings, and he confirmed that there are two different scrubber systems for the model 4114 scrubber, and different tank sizes. He also confirmed that Inspector Biondich never checked the scrubber water level in any of the tests performed on the ram cars in question (Tr. 146). He stated that the water level should be tested with the machine on level ground because water could be trapped in either the upper float tank or the lower level tank, and that the hose between the scrubber tank and the main water supply tank should not be disconnected (Tr. 147). He confirmed that closing the shutoff valve between the scrubber tank and the main water supply tank, as instructed by Inspector Biondich, could cause an air lock (Tr. 148).

In response to further questions concerning the testing procedures, Mr. Lemon stated as follows (Tr. 149-150):

> Q. All right. If you accept that premise and take a shortcut, do a short version of O-2, and you find the system doesn't work properly, don't you think it's prudent, that is if you do what the inspector did and just drain out the main drain valve and it doesn't shut off, wouldn't you say or wouldn't you agree that it would be more prudent to go back, fill up the system, run through a detailed test procedure in order to determine whether, in fact, it was a failure on the one hand of the system, or

whether, for example, the scrubber might be tipped or -- or it might be air locked or some other malfunction unrelated to the test procedure or related solely to the test procedure, rather? Wouldn't you agree that'd be a prudent thing to do?

A. Yes.

Mr. Lemon stated that he used the permissibility test procedures in exhibit S-9 during the training classes he conducted at the mine after the citations were issued. He had previously seen the procedures detailed in exhibit O-2, and a copy was given to him by the operator during the training classes, and some of those procedures were covered during the classes, including the procedures detailed in paragraph 2(b) (Tr. 153-154). In his opinion, the test procedures in paragraph 2(b) need not be followed to determine whether or not the scrubber is working (Tr. 155). Testing the equipment on inclines makes a difference mechanically, since the shifting of water in the tank may allow the machine to continue working even though the water level was low, or it could shut the machine down prematurely if the water shifted in another direction (Tr. 156). He conceded that testing the machine on an incline "would make some difference but not a whole lot of difference" and that it could effect the test results in that an air lock could be present. If there was an air lock, and the water shifted to the opposite end of the tank away from the drain plug, 8 or 10 inches of water could be in the tank even though the plug were open and no water was coming out (Tr. 157). However, the equipment is required to operate on both level ground and inclines.

Mr. Lemon could not state whether Inspector Biondich instructed the person conducting the test to shut down a water valve which isolated the reserve water tank. He stated that he was not aware of any such water gate valve on the model 4114 scrubber, and the makeup tank on that model is isolated by isolating the air pressure going into the tank by means of a cap which is removed to bleed the air pressure off the makeup tank. However, a small amount of water will continue to gravitate or trickle from the scrubber (Tr. 159). If an impermissible gate valve was installed between the makeup tank and the scrubber, and that valve were closed to isolate the scrubber, the test results could be affected by a resulting air lock (Tr. 159). This may explain the absence of such a gate valve on the equipment as manufactured, but he could not state that this is the case (Tr. 160). Hypothetically, the addition of a nonpermissible gate valve could

defeat the proper testing by creating a potential air lock (Tr. 160).

In response to further questions, Mr. Lemon explained the water level testing procedure stated in exhibit S-9, and confirmed that Inspector Biondich did not at any time measure the water level in the tank. Mr. Lemon stated that he personally always measures the water level as part of a test in order to determine the level at which the lower water device is shutting off. If it shuts off at 3 inches, rather than 7, then there is more risk involved. A determination must be made as to whether there is no water, or that the float mechanism is not adjusted at the proper level (Tr. 173). If the tank is emptied and the engine continues to run, this would be indicative of a bigger problem. The water measurement factor involved in both tests, S-9 and O-2, is designed to confirm whether the float is actually shutting down the machine engine when the water level reaches a certain level above an empty tank to provide a safety margin (Tr. 174).

Mr. Lemon stated that it was his understanding that during the tests conducted in Inspector Biondich's presence, all of the water was removed from the scrubber in two of the cited cars, and in the other cars there some dribble of water. If all of the water were removed, there was no need to measure the water level. However, if the cars were on an incline or unlevel surface, water may have been present in the other end of the tank if it were tipped (Tr. 177). Problems in measuring pursuant to test S-9 could be encountered because of the curled configuration of the scrubber exhaust pipe (Tr. 179). Testing on pitched mine surfaces do present some problems, but in the mine in question he could not recall any steep grades that would present a real serious problem (Tr. 180).

West Elk's Testimony and Evidence

Richard Skvarch, Surface Operation Maintenance Manager, testified as to his mining experience, and confirmed that he holds a BS Degree in Mechanical Engineering from Penn State University. He confirmed that he was at the mine on October 23, 1985, when Mr. Biondich cited ram cars No. 6 and No. 11 for improperly functioning scrubber shut down systems. Mr. Skvarch was concerned that production personnel accompanied Mr. Biondich since maintenance men are usually assigned to accompany inspectors on permissibility inspections. Mr. Skvarch confirmed that he spoke with several mechanics after the citations were abated and found that some parts were changed to place the machines back into service. He did not

believe that the mechanics understood what was really wrong with the machines (Tr. 182-185).

Mr. Skvarch stated that the float and valve assemblies removed from the No. 6 and No. 11, were examined in the shop when they were brought in and he could find nothing wrong with them or any reason for their failure (Tr. 186). He stated that the low water level shutdown devices were normally checked each day, but after the citations were issued they are checked every 8-hour shift (Tr. 187). He confirmed that the low water shutdown device test procedures at page 4, exhibit O-2, were followed at the mine, and after the citations were issued, they are used on each shift (Tr. 187).

Mr. Skvarch stated that he was at the mine on October 24, when the No. R-12 car was cited. The company technician informed him that he had tested that car four times at 7:00 a.m., and that it had shut down in accordance with the test. The car was parked where it was tested, and it was not moved. After Mr. Biondich cited it at 9:00 a.m., Mr. Skvarch was alarmed and concerned because he could not determine what was wrong. It then became apparent to him that the manufacturer's recommended test procedures were not being followed and he spoke with Mr. Biondich on October 30, after the first citations were issued. Mr. Biondich informed him that "the test procedure he was using was doing the same thing or that it would work," and within the next 2 hours he cited two more cars (Tr. 190).

Mr. Skvarch identified exhibit O-1 as a schematic diagram of the water supply system and scrubber tank shutdown system for a Jeffrey ram car, and he confirmed that it was prepared under his direction. He described how the low water shutdown system operates, and he identified the component parts, including the lower level tank and upper float tank and the procedure for measuring the water level. He stated that the lower float tank "is the brains of the system" and it decides when the scrubber needs more water. The upper float tank is the mechanism which senses the absence of water coming from the water supply tank, and when this occurs, it activates an air pressure dump which shuts down the machine (Tr. 191-196).

Mr. Skvarch identified exhibit O-2 as a copy of the Jeffrey manufacturer's authorized test procedures, and referring to the schematic diagram, he explained each step of test procedures using the diagram as a "walk through" (Tr. 196-200). Mr. Skvarch stated that the test procedures detailed in exhibit S-9 are for a different 4110 scrubber system than the one depicted in his diagram. The shut off system is inside of the

float tank and not on the outside, and a dip stick cannot be used to measure the water level because it would hit the exhaust pipe. He confirmed that the two scrubbers which have been described use different systems requiring different test procedures (Tr. 201).

With regard to the gate valve used to shut off the water between the water supply tank and the scrubber tank pursuant to Inspector Biondich's instructions, Mr. Skvarch stated that some of the cited cars were equipped with such a valve, but he was previously unaware of this. The car had been brought in from another mining operation and had only been in service for a couple of days prior to the inspection. He agreed that it takes a long time to drain the water tank, but insisted that the valve in question was not installed for test purposes. It was used as a "quick flush" for the scrubber so that the entire system need not be drained. He explained that while the approved testing requires the draining of the water tank, the "quick flush" is used to keep the scrubbers clean. He described the procedure as "We just come in, shut it off, break the line, flush the scrubber out, check it over, put it back together, fill it up, bring the water level back up and go right back into service" (Tr. 203).

Mr. Skvarch stated that test procedures O-2 are kept in the foreman's office at the mine in the parts books and in the parts books located in the mechanics lunch room, and he confirmed that they are part of the specifications and maintenance procedures for the machine in question (Tr. 203).

Mr. Skvarch confirmed that he took photographic exhibit O-3, and he identified and marked the component parts of the scrubber system depicted in the photograph (Tr. 203-205). He confirmed that there are differences in the test procedures found in O-2 and the test procedures conducted in the inspector's presence. He explained that during the company's tests, the entire water supply tank is drained, but in the inspector's test, the supply or makeup tank was not drained. A line was disconnected between the two tanks and it appeared that this was creating an air lock by shutting off a valve which removed the tank vent pressure. He believed that an air lock or water being trapped in one of the float tanks would not allow the system to work. He was also concerned that water would be trapped if the car were pitched, and any trapped water would hold the float up and it would never shut down the machine (Tr. 206).

Mr. Skvarch stated that Inspector Biondich did not check the water level in any of the cited cars, and that the draining of the scrubber tank from the drain used in the inspector's test was incorrect. He stated that the water must be drained from the lower level drain valve, which is a 6-inch level valve, so that when the car shuts off, one can verify that there is at least 6 inches of water remaining in the scrubber tank. Draining the water from this low level drain also ensures that all of the water is out of the upper float tank (Tr. 207). He also confirmed that step 2(b) of the O-2 procedures were completely ignored in all of the tests of the cited machines (Tr. 208).

Mr. Skvarch stated that after the citations were issued, he was advised by Mr. Misel, Jeffrey's chief engineer for its ram car division, that company test procedure O-2 was the correct procedure and that it had MSHA's approval, and that using shortcuts could cause problems such as air locking and water entrapment (Tr. 210). Mr. Skvarch confirmed that he attended an MSHA conference with Mr. Biondich and his supervisor, Mr. Turner, and they discussed the citations in question. Mr. Skvarch stated that he advised them that he suspected air or water entrapment during the tests supervised by Mr. Biondich, and that during the company's testing of the machines during each shift, using the company's test procedures, the machines shut down. Mr. Skvarch was informed that MSHA's testing could be used because it accomplished the same thing, and that the citations would stand. However, MSHA subsequently removed the "S&S" designations from the citations (Tr. 210-211).

Mr. Skvarch confirmed that Mr. Lemon conducted a class at the mine, and that he (Skvarch) gave everyone a copy of test procedures O-2, and they were reviewed and discussed. Mr. Skvarch stated that during an "off the record" discussion Mr. Lemon stated that unless the O-2 procedures were followed "you don't really have a case." Mr. Lemon held up the O-2 procedures, and stated further "and you know what this man's going to do with these citations if you don't" (Tr. 214). Mr. Skvarch stated that Mr. Turner was present when these statements were made. Mr. Skvarch also stated that Mr. Lemon told him that he had "no involvement" in the issuance of the citations, and was simply there to conduct a class (Tr. 214).

Mr. Skvarch stated that since the issuance of the citations, MSHA has tested the cars using the "proper test procedures," and they are worked properly (Tr. 215). He confirmed that during the abatement of the citations his maintenance personnel changed upper and lower float tanks and "everything

on the system" but never found a defective part. He also confirmed that during the past week or two he tested a car while on a grade similar to the condition when Mr. Biondich's tests were conducted, and using his test procedures, the machine would not shut down. However, when the authorized O-2 test procedures were followed, the machine shut down (Tr. 217). In his opinion, the cited ram cars were operated and maintained in accordance with the manufacturer's applicable specifications and manuals (Tr. 217).

On cross-examination, Mr. Skvarch confirmed that when the parts were changed on ram cars No. R-6 and No. R-11, no defective parts were found, and the mechanic's reports were so noted. He confirmed that he was not present with Mr. Biondich on October 23, 24, or 30 when the cars were cited and the conditions abated. He also confirmed that he did not examine the hose which was removed and replaced on the No. R-4 car, but that he did observe the disassembly of the float valve assembly on the No. 6 car, and could find nothing wrong with it. He believed that the replacement of the parts to render the machine serviceable may have relieved and air locks or water, and while he conceded that Mr. Biondich's test procedures "could work sometimes," but "most of the time it didn't" (Tr. 219-224).

Referring to photographic exhibit O-3, Mr. Skvarch stated that the purpose of the circled white valve is to flush the scrubber system during a maintenance cycle, and that it is a fast way to remove scale and corrosion and replace the water in the scrubber tank. If the valve were opened and there was no water flowing out of the tank while sitting level, and there were no blockage in the valve, he would "tend to agree" that the tank would be empty. He agreed that if the machine continued to operate, it may indicate that the low water cut-off device was not working, but indicated that he "would have to check other things to be sure" (Tr. 230). He confirmed that when he had his conferences with MSHA after the citations were issued, no one from MSHA advised him that the company test procedures O-2 had MSHA's approval (Tr. 233).

Mr. Skvarch stated that when the company tests the low water shutoff devices the water supply tank is isolated by venting it according to the test procedure by shutting the needle valve or disconnecting the hose. By shutting off the air pressure to the water, the water drains through the system by "gravity or atmospheric" (Tr. 235). He personally has tested the system a dozen times, and he conceded that sometimes all of the water is not forced out of the tank, and he explained why this was the case (Tr. 236-237). The estimated

time for draining the tank ranged from 5 to 40 minutes (Tr. 238). Although the air line in step two of the test is disconnected during the test, no other lines are disconnected. However, the air line is reconnected before going to test step (c), and once this is done there is no difference in the two test procedures insofar as that air line is concerned. He believed that two of the cited cars were equipped with a gate valve between the water supply tank and the scrubber unit, and if this were the cause of the air lock, it would be limited to those two cars (Tr. 240-241). However, air locks could also have been present on the other cars, and the gate valves have since been removed from the cars (Tr. 242).

Mr. Skvarch agreed that step 2(b) of the O-2 procedures is a test to determine whether the shutdown system is working if the float valve trips it. He also agreed with Mr. Lemon's view that the test is valid even if step 2(b) were eliminated (Tr. 244).

Michael R. Murphy, Senior Serviceman, Jeffrey Mining and Machinery Company, testified that his duties include the checking of equipment upon delivery to a mine, general troubleshooting, and giving instructions to equipment operators as to how to maintain the equipment. He confirmed that he is familiar with the low water shutdown devices on the cited ram cars in question, and that he was at the mine on October 30, 1985. He was on the section 10 minutes after a car was cited, and Inspector Biondich informed him that he had shut off the little air valve going to the water tank, and after venting it, the big valve at the bottom of the scrubber tank drain was turned on, and after 5 minutes, the car would not shut down. The car in question was parked "kind of jackknifed in an entry and on a very bad angle." In this position, water could be trapped in the tank and the small float on the lower level tank, which holds just over a half-gallon of water, minus the float ball, would still be floating and indicating that the car still had water in the scrubber, when in fact, the scrubber tank may be empty. In this event, the water in the top float assembly would not allow the car to shut down (Tr. 250-251).

Mr. Murphy identified exhibit O-2 as the Jeffrey permissibility checklist submitted to MSHA's Tridelphia's Office, and he stated that Jeffrey has MSHA's approval to distribute these procedures as "an approved drawing" that is included in the equipment parts book. The drawing is distributed to Jeffrey customers utilizing the scrubber system as a means of checking the system to determine whether it is working (Tr. 251). He confirmed that page 4 of test procedures O-2 are

the only proper procedures for testing the low water shutdown devices on the cars in question, but that they will need to be modified for the newer model 4114 cars at the mine (Tr. 252).

Mr. Murphy stated that using the inspector's test procedures, water could become trapped in the lower level tank, thereby giving invalid test results. He also stated that shutting off the gate valve shown on the schematic drawing, exhibit O-2, during the test, could cause an air lock and produce an invalid test result, particularly if the machine were not level (Tr. 255). With regard to the O-2 procedures, he reiterated that MSHA approved them and wanted to distribute them to its inspectors to inform them how to shut down the system properly.

Mr. Murphy stated that during the inspector's tests, test procedure 2(b) was omitted. Further, although the large drain valve at the bottom of the scrubber tank was opened, the failure to use the other drain valve from the lower level tank as required by step (c) of the O-2 procedures, would not have allowed water to completely drain from the small tank which allows the machine to shut down, particularly where the machine is parked at an angle. The draining of the small lower level tank would compensate for any machine angle or tilt (Tr. 256). In his opinion, there was no way the inspector could have checked the scrubber water level in the manner in which the machines were tested. Mr. Murphy stated that he used the proper test procedures the same day the car was cited, and it shut off, and no work had been done on that machine at that time (Tr. 257).

Mr. Murphy stated that test procedures S-9 are absolutely not the proper procedures for the cited ram cars in question. He explained that the S-9 procedures are for machines with a float and shutoff assembly located inside the scrubber tank, while the O-2 procedures relate to cars such as the cited cars which have remote float tanks or sensing devices affixed to the side of the tank. With regard to these remote assemblies, it is necessary to drain the lower level tank affixed to the scrubber tank in order to perform a valid test (Tr. 261).

Mr. Murphy identified exhibit O-4 as the Jeffrey test procedures for the model 410, HR150, and 411H ram cars, and stated that they do not apply to the cited ram cars or the 4114 model in question, and he explained why (Tr. 261-262). (The exhibit was never received in evidence). Mr. Murphy concluded that the O-2 Jeffrey procedure is the only way to

be sure that the low water shutdown device on the cited cars is properly operated and maintained (Tr. 262).

On cross-examination, Mr. Murphy stated that he examined two cited cars on October 30, but was not sure of the numbers, and both were parked "on a pitch" in the drift. He believed that water could have been trapped in the lower level tank, and this would account for the cars continuing to run. He did not perform the O-2 test on car No. 4 and it shut down. The other car was being worked on by the mechanics. He tested for water in the lower level tank, and found water present. He did not check for water in the scrubber tank and the scrubber tank valve was open. This indicated that there was no water coming out of the valve, but water could have been trapped inside. The presence of water in the lower level tank would keep the machine running because the shutdown sensors are located there (Tr. 263-266).

Mr. Murphy confirmed that he personally has never received a letter from MSHA informing him that test procedures O-2 have MSHA's approval. However, since the print of the procedures are stamped as MSHA approved, it is his assumption that they have MSHA's approval (Tr. 270). He knows for a fact that procedures S-9 are not for the cited cars (Tr. 280). He also stated that the "MSHA stamp" cannot be used if it is not approved, and that Jeffrey engineering representative Paul Misel advised him that the O-2 procedures were submitted to MSHA (Tr. 277).

Mr. Murphy agreed that the elimination of step 2(b) of the O-2 procedures would not necessarily invalidate the inspector's test. However, it is necessary to test the water level in the scrubber tank, and the inspector did not do this. It is also necessary to find out whether there is water in the rest of the system because there is nothing on the car when it is at idle that will shut down the car if the scrubber tank is empty and there is water in the float valves. The float valve is the mechanism that determines whether the car will shut down, and not the level of water in the scrubber. In his opinion, the test method followed by the inspector might cause the machine to give false results or "lie to itself" because there may still be water in the lower level tank. Even though the scrubber tank is full, if the lower level float bowl is drained and the machine shuts off, he would consider the low water shutoff device to be operable. He concluded that the test by the inspector was improper because it did not include the draining of water from the lower level bowl, but only from the scrubber (Tr. 271-274; 283-285).

George C. Moore, operations shift foreman, testified as to his experience, and he confirmed that he travelled with Inspector Biondich on October 23, 1985, when he issued the first two citations in these proceedings. Mr. Biondich informed him that he wanted to check the low water shutdown device on a ram car, and asked him to bring in a car so that he could check it. Mr. Moore advised Mr. Biondich that he needed a mechanic because he (Moore) did not know how to perform the test. Mr. Biondich responded "don't worry about it. I can tell you how the procedure can be done" (Tr. 295). Mr. Moore stopped the first available car travelling down the haulage entry, and after checking it for electrical permissibility, it was parked on a downhill grade, and Mr. Biondich instructed him to turn off the valve between the water supply tank and the scrubber system. Mr. Moore identified the car as the No. R-6 car, and referring to the schematic exhibit O-1, he confirmed that "two valves on top were shut off," and the water was drained by removing the bottom scrubber drain valve with a crescent wrench. After that car was cited, it was parked in the crosscut, and Mr. Moore called the maintenance department to begin work to abate the citation.

Mr. Moore stated that ram car No. R-11 was then checked using the same test procedure. The car was pulled into the entry, the scrubber was filled with water, and the valves were shut off and the tank was vented. The car did not have a drain plug similar to the No. R-6 car, and the water was drained by turning the valve at the bottom of the tank.

Mr. Moore stated that two or three valve assemblies were tried on the No. R-6 car, and the float valve assembly was changed. Using the inspector's test procedures, the car would shut down one time, and the next time it would not. When the water was drained from the No. R-11 car, the engine would not shut down and it was cited. A maintenance man then took the air line off the float valve assembly and the machine shut down. He did some work on the needle valve and after putting it back together, the engine shut down, and Mr. Biondich abated the citation. Both cars were parked on an incline when they were initially tested (Tr. 299-300).

Mr. Moore stated that at no time did Mr. Biondich request the manufacturer's test procedures, and he confirmed that Mr. Biondich did not ask to see them, nor did he have a copy with him (Tr. 300). Mr. Moore identified the hose removed from the No. R-11 car as the air dump shutdown hose shown on exhibit O-1, and he was not sure whether or not there is a needle valve in that hose which senses when the upper float

tank is out of water, or whether or not that was the needle valve which was examined (Tr. 302).

Gaylen S. McDaniel, supervisory safety advisor, testified as to his mining experience, and he confirmed that he accompanied Inspector Biondich on October 24, 1985. Mr. Biondich informed him that he was going to check the low water shutdown devices on the remaining ram cars which were not checked the previous day. The No. R-12 car was brought to the service area and it was "parked on an angle" when it was tested. The air was turned off on the main water supply tank, it was then vented, and the valve between the supply tank and upper level float was shut off. The main scrubber drain valve was opened, and after the water was allowed to drain for approximately 10 to 15 minutes, the car would not shut down, and Mr. Biondich cited it. Water was still trickling out of the tank at the time it was cited. Mr. McDaniel informed Mr. Biondich that he did not know how to check the low water shutdown, and "Mr. Biondich told me he had taken the class on it and that he could tell me how to check it" (Tr. 305).

Mr. McDaniel confirmed that he followed Mr. Biondich's instructions when the car was tested, and when he pointed out that water was still coming from the scrubber tank, Mr. Biondich responded "it had drained long enough and most likely the tank was drained as far as it was going to drain" (Tr. 306). Mr. McDaniel confirmed that Mr. Biondich did not refer to any written test instructions while the test was conducted, and asked him for none (Tr. 306). Mr. McDaniel confirmed that he was later shown a copy of test procedures O-2, and that they differed from the tests instructions given by Mr. Biondich in that the air supply line at the upper tank as covered by procedure 2(b) was not disconnected, and that the water was not "slowly drained from the scrubber through the drain in the lower level tank" as provided for in procedure 2(c). In addition, the water level in the lower level tank was not checked after draining the water out of the main scrubber tank, as provided in procedure 2(c) (Tr. 307).

Dewey R. Walker, shift supervisor, testified as to his experience, and he confirmed that he was present on October 30, 1985, when the last two citations were issued by Inspector Biondich. Mr. Walker stated that prior to going underground, Mr. Skvarch held a meeting with Mr. Biondich, and they discussed the problems concerning the previously cited cars, and Mr. Skvarch expressed concern that the proper Jeffrey test procedures were not being followed in the testing of the cars for compliance. Mr. Skvarch believed there were problems with air locks or trapped water in the tanks.

Mr. Biondich stated that he was going to test the remaining cars in the same manner as those previously tested "to keep everything uniform" (Tr. 309).

Mr. Walker stated that after the meeting, he and the inspector went underground and tested car Nos. R-4 and No. R-5, and they were both parked on "slight angles." The caps were removed from the top of the main water supply tank as shown on schematic exhibit O-2, to make sure water was in the tank. The water supply valve shown by the circled mark by a green line on the schematic, between the main tank and upper float tank was then shut off, and the bottom gate valve on the lower scrubber tank was opened to allow water to drain out. After approximately 10 minutes, water was still trickling out of this drain, but the machines failed to shut down, and Mr. Biondich cited them (Tr. 310-312). Mr. Walker stated that Mr. Biondich had no written test procedures with him, and he could not recall Mr. Biondich showing him a copy of his test procedures (Tr. 313). Mr. Walker confirmed that the exact same test procedures were followed on both cars (Tr. 314).

Robert Moschetta, safety manager, testified as to his experience, and he confirmed that he holds a Masters Degree in safety management and a degree in environmental science from the West Virginia University. He confirmed that he attended a meeting at the mine on October 30, 1985, with Inspector Biondich, Mr. Skvarch, and company maintenance personnel to discuss the propriety of the tests conducted on the previously cited cars. Mr. Skvarch reviewed a diagram similar to the schematic, exhibit O-1, and discussed the manufacturer's test procedures with the inspector. During the meeting, Mr. Biondich stated that he was basically checking the machines in the same manner as shown in the Jeffrey procedures discussed by Mr. Skvarch, and that his (Biondich's) methods were the same (Tr. 316).

Mr. Moschetta confirmed that he attended an informal MSHA conference concerning the citations on November 15, 1985, and he identified exhibit O-5 as his notes taken during that conference. He stated that at this meeting, Mr. Biondich stated that he was using the proper test procedures, but that he did not say this during the October 30th meeting (Tr. 317). He identified exhibit O-6, as his notes taken during a subsequent meeting with Mr. Biondich and his supervisor, Bill Turner, on November 21, 1985, when they discussed the five citations and the proper test procedures. Copies of the O-2 procedures were given to Mr. Turner and Mr. Biondich, and Mr. Turner stated that he was sure that Mr. Biondich was

following the proper test procedures. Mr. Turner stated that he would get in touch with Mr. Lemon, and that they would have another meeting to discuss and check the cars (Tr. 320).

Mr. Moschetta identified exhibit O-7, as his notes of a telephone conversation he had with Mr. Turner on November 22, 1985, and that during that conversation Mr. Turner advised him that Mr. Biondich took the position that he did not instruct company personnel as to what to do to check the low water shutdown devices, and that he simply told them that he would like to check the devices and observe the tests to determine whether the machines would shut down. Mr. Moschetta stated that he advised Mr. Turner that this was inconsistent with his past discussions, and he stated that during the October 30 meeting Mr. Biondich did in fact state that he instructed company personnel as to how to go about testing the cars (Tr. 322).

On cross-examination, Mr. Moschetta confirmed that during the meetings in question Mr. Biondich took the position that the tests methods he utilized during the tests performed on the cited machines were correct (Tr. 325). He also confirmed that between the October 30 and November 15, meetings, Mr. Biondich changed his story as to the test procedures he was using. He further confirmed that the test procedures detailed in O-2 were explained to Mr. Biondich by Mr. Skvarch on October 30, before the last two citations were issued, and that they were available at the mine before all of the citations were issued (Tr. 326-327).

MSHA's Rebuttal Testimony

Mr. Lemon was of the view that the inspector's test where the water was drained from the scrubber was more accurate than West Elk's suggested test because there is less room for error "where water is still trapped there because of various reasons," and because "it leaves less error for the machine to lie to itself" (Tr. 336). Based on his experience with the type of scrubber in question, he believed that under normal operating conditions the scrubber could be empty of water, yet the low water tank could still have water in it causing the machine "to lie to itself" (Tr. 337). He disagreed with Mr. Murphy's opinion that any test "quirks" during the testing of the machines would not appear in the normal operation of the cars (Tr 338). He confirmed that the mine has inclines, and he agreed that if tested on an incline, it could cause the machine to lie to itself indicating it had water when it did not (Tr. 339).

Mr. Lemon was of the opinion that Inspector Biondich complied with steps 2(a) and 2(c) as outlined in the Jeffrey O-2 test procedures, and that following those steps, he effectively tested whether or not the machine would shut itself down when there was insufficient water to cover the exhaust (Tr. 343).

On cross-examination, Mr. Lemon stated that the best method for determining whether there is water in the scrubber is by draining the tank. Assuming the machine was not on a level when tested, this is done by opening the lower right-hand valve on the scrubber. He also identified the "seven inch level" plug on the left lower side of schematic O-1, marked "mechanic" on photographic exhibit O-3, and stated that if the machine is on an incline, prudence would dictate that this plug should be pulled to determine whether there was any water in the scrubber tank, and that one could stick his finger "in and around in the tank and see if the water is there at the seven inch level" (Tr. 344). He conceded that this plug was not pulled during the testing of the cited machines (Tr. 345).

Mr. Lemon stated that at the school he conducted on December 5, he covered the S-9 test procedures, and also covered the O-2 procedures "as a courtesy of the company because they handed it to me." He stated that three or four tests were conducted during the school using both test methods (Tr. 346). He agreed that in the event the scrubber tank drain is elevated relative to the rest of the tank, it is possible that water may be trapped in the lower and upper tanks, and water may be in the scrubber tank. He also agreed that if the gate valve between the water supply tank and the scrubber tank is turned off, it could cause an air lock and give invalid test results (Tr. 346-347).

With regard to the test procedures, Mr. Lemon stated as follows (Tr. 347-349):

> Q. Is it your testimony that the O-2 procedure should not be utilized in connection with testing these ram cars?
>
> A. No, because on the 4114's -- well, just like the maintenance book the company gave me themself, a lot of the units we have running out here in the west still have the old system. Then we have the newer system which is similar to the old system on these cars. And then we have basically this system which I've been familarized during this hearing, which is a

little bit new to me. I picked this up. So I'm going to be doing some more checking on this stuff, but we have the same instructions for the 4110 in that 4114 maintenance manual that's right there on the table. That's why we go over there.

Q. You then learned quite a bit about this system with this hearing.

A. I have, yes.

Q. And you do agree, do you not, that the O-2 procedure is for the shut down system shown in O-1?

A. I agree with that, but in my agreement, I also see some problems that need addressing.

* * * * * * *

Q. It's not your view, is it that these O-2 procedures are improper or inapplicable to this machine, is it?

A. No. With the exception of -- I have a problem with the low level tank -- I have a problem with water being in that tank and all the water being out of the scrubber and the system lying and still not shutting the diesel down. That's where I have my problem.

Q. You agree, though, that that can happen if this valve is closed shown in O-1, that can also happen if the machine is not level. Isn't that true?

A. Yes.

In response to further questions from the bench, Mr. Lemon stated as follows (Tr. 363-365):

Q. All right. Witnesses for the operator have maintained that if you don't drain the main tank, you're liable to get a spurious result. May I take it that you don't agree with that?

A. No. After this testimony today, you know, we will change our testing procedure and we'll go along with that because by -- according to the previous instructions, specially with the 4110 scrubber, states to isolate the area. You turn the air off. That that, in fact -- and you open the cab to the reserve tank. That that, in fact, stops the flow of the water. But there seems to be a problem there that the company's come up with and possibly Jeffrey, so we need to drain these completely out and take the full amount of time.

* * * * * * *

Q. And that you indicated, as I understood your testimony, that in actual operation, there's a possibility where these particular ram cars that were cited, that the system could lie in that the scrubber could be emptied and yet there could be enough water in the lower tank not to trigger the shut down system. Is that correct?

A. Yes, sir, that's correct.

Q. Isn't that really just another way of saying that there's a design deficiency in the system?

A. Yes, Your Honor, there is.

Q. But it's your position that the Mine Safety and Health Administration has actually approved this particular design?

A. That could very well be the problem. I could have overlooked something, Your Honor, in Tridelphia that could have missed us, but that's why I say this needs to be brought to the attention of appropriate people and I will do that.

MSHA's Arguments

MSHA argues that Inspector Biondich followed the normal inspection routine by having West Elk's mechanics conduct the test on each of the cited cars. MSHA asserts that the tests

generally were conducted by isolating the scrubber tank so that water would not continue to run into the scrubber tank from the reserve tank and then by draining all of the water from the scrubber tank through a 1 inch valve located on the bottom of the scrubber tank. By removing all of the water from the scrubber tank with the car diesel engine running, MSHA maintains that the inspector was able to determine whether the low-level water shutoff device worked properly. When it did not shut down the engines with the water removed from the scrubber, the device did not shut down the engine, and the citations followed. After repairs were made to the equipment, the low water shutoff device operated correctly.

MSHA asserts that there does not appear to be any factual dispute as to the testing procedure used by the inspector, but there is a dispute as to whether the test procedure in O-2 or S-9 represents the manufacturer's suggested test. MSHA maintains that test procedures S-9 represent the proper testing methods, and that other than draining the scrubber tank rather than the low water tank, there is little difference between the inspector's test and the O-2 test procedures.

MSHA states that the specific areas in which the inspector's test and the O-2 test differed are as follows: (1) The float assembly which senses whether or not the scrubber tank needs additional water is contained in the low-level water tank, an additional water tank which is attached to the scrubber tank and is ported to the scrubber tank so that water can flow between the two tanks. The company procedure recommends that the low-level tank rather than the scrubber tank be drained. The inspector's method involved draining the scrubber tank since that is the tank which cools the exhaust. (2) A second difference between the two procedures is that the company recommends that once the low-level water device has shut off the machine after the float tank has been drained, the water level in the scrubber tank should be measured. However, having drained the scrubber tank the inspector did not take the unnecessary step of measuring the absence of water in that tank. (3) The third distinction between the two test procedures was that the inspector omitted all of the steps set forth in subparagraph 2(b) of the manufacturer's suggested testing procedure. All parties agreed that part of the procedure did not affect the results of the test but is only a diagnostic step to help isolate particular problems in order to facilitate repair.

MSHA suggest that a fourth distinction apparently raised by West Elk is that the reserve tank should not be isolated during the test (Tr. 279), and that the inspector's method

which isolated the reserve tank was faulty. MSHA asserts that the isolation of the reserve tank by the inspector is consistent with the maufacturer's suggested test (See Ex. O-2 where the first step in the test isolates the water tank by closing the needle valve between it and the low pressure air regulator) and the practice used by other operators. MSHA further asserts that while West Elk's evidence is contradictory on this point, if it means to suggest the two tests differ in this respect, MSHA believe the inspector's test was consistent with the manufacturer's test.

MSHA disputes the notion that the manufacturer's suggested O-2 test procedures were somehow "approved by MSHA." It points out that the only evidence of such an "approval" came from the manufacturer's mine mechanic, Michael Murphy, who testified that he called a supervisor who told him he thought the O-2 test procedure had been "approved" by MSHA. MSHA discounts Mr. Murphy's reliance on the fact that the O-2 procedure had a stamp at the bottom saying that prints were not to be altered without approval by MSHA, and points to the fact that the page did not contain prints. MSHA points out further that Mr. Murphy was a mechanic and that he had little contact with his own national organization and was not familiar with the dealings between his organization and MSHA. On the other hand, Mr. Jerry Lemon from MSHA works closely with the Certification and Approval Division, and has reason to know what machines and what modifications are approved. He testified that the operator is required to submit a test procedure to MSHA and that procedure which was submitted by the manufacturer is contained on the last two pages of S-9. Further, that test procedure was made the subject of a short training course for inspectors which is contained in S-9, and it was the procedure set forth in S-9 which was used to test the twelve shuttle cars.

MSHA believes that the inspector's test is the best test under all circumstances because it tests whether the machine will shut itself off when there is no water in the scrubber tank to cool the exhaust, while the manufacturer's tests only determine whether the machine will shut itself off when the water is drained from the auxiliary lower level tank which contains the float assembly. MSHA further believes that the inspector's test is more accurate because he is concerned with whether or not the machine will shut itself off when there is no water in the scrubber tank and not whether or not it will shut itself off when there is no water in the float tank. MSHA views this difference as critical, and suggests that there are several factors where water could be drained from the scrubber tank, allowing the exhaust to escape to the

hostile environment without draining the low-level tank. The valve to the scrubber tank could be inadvertently left open, it could be accidentally knocked open while the machine is in transit, or the scrubber tank could become ruptured, all of which would allow water to escape from the scrubber tank and allow the machine to run while water was retained in a low water tank.

In response to the testimony by the manufacturer's representative Murphy that the inspector's test should be discounted because of test "quirks" which cause the machine to "lie to itself" because of testing on inclines and the possibility of air locks, MSHA asserts that it is reasonable to conclude that if the machine would not shut itself off on an incline during testing, it would also fail to shut itself off on an incline under normal operating procedures. As for the air lock theory, MSHA concludes that Mr. Murphy's opinion is more speculation, and not based on any "hard evidence."

MSHA concludes that the evidence fully supports the inspector's citations. Twelve cars were tested by draining the scrubber tank; five failed to shut themselves down; after short periods of repair all five worked properly using the same test that discovered the defective condition. The operator's defenses that the inspector used an improper test and that the results were inaccurate do not stand up under close scrutiny. The ventilation plan requires the operator to operate and maintain equipment according to manufacturer's specification. The ventilation plan does not bind MSHA to test the equipment as suggested by the manufacturer. MSHA may use the most accurate test. In any event, the S-9 test used by MSHA is the test submitted by the manufacturer for certification and approval. West Elk's testimony that the inspector's test was inaccurate is based on pure speculation and a twist of logic that the conditions of the test could never be duplicated in actual operations. West Elk's position defies logic and is contrary to the evidence.

West Elk's Arguments

West Elk asserts that no less than four test procedures of the low water shutdown devices were described at the hearing in these cases: First, there was the test procedure utilized in connection with issuing the citations. Second, there was a separate test procedure which the inspector had with him during the inspections but which played no role in the issuance of the citations (Tr. 100, 104). A third test procedure described was that employed for a different series of Jeffrey ram cars as discussed by MSHA's expert, Mr. Lemon (Tr. 125-126;

Exhibit S-9). Finally, there was described at the hearing the test procedure authorized by the manufacturer as contained in Exhibit O-2. This test procedure is part of the manufacturer's specifications and maintenance procedures (Tr. 203).

West Elk points out that the test procedures employed by Inspector Biondich to support the citations were not the manufacturer's approved procedures found in O-2, and that he had not even seen a copy until he attended a school conducted by Mr. Lemon at the mine in December, 1985, several weeks after the citations were issued. West Elk asserts that Mr. Biondich's test procedure was a shortcut method which may or may not produce valid results, and that this accounts for the fact that several other cars tested by Mr. Biondich showed the low water shutdown devices on those cars to be working properly. West Elk further points out that Mr. Lemon indicated that prudence requires that in the event a shortcut procedure does not show the system to be functioning properly, a detailed test should be conducted, and that he agreed that the O-2 test procedures are proper and more thorough than the S-9 procedures relied on by the inspector.

West Elk asserts that the testimony of manufacturer's representative Murphy demonstrated that a shortcut testing method can produce invalid results when the machines are parked on an incline while testing because of air locking, water locking, and the closing of the gate valve between the water supply tank and scrubber tank. West Elk asserts further that the parties are in agreement that the test results may be invalid, and that an apparent flaw in the inspector's test procedure was the closing of the gate valve on some of the cars. West Elk maintains that during the tests the inspector required the closing of this valve, and that Mr. Lemon admitted that this could result in air locking and produce invalid test results, and that he finally concluded that the design of the scrubber may itself be flawed.

West Elk maintains that other significant flaws in the test employed by Inspector Biondich include the fact that in at least two cases the scrubber was not allowed sufficient time to drain fully and that water was still trickling out when the citations were issued. If not given sufficient time to drain, air locks can be created. West Elk points out further that no defective parts were found on any of the cited cars, and that after suspecting that the test procedures employed by the inspector led to inconsistent results, Mr. Skvarch compared both test procedures after the citations were issued and found that procedures O-2 worked, while the inspector's test did not. In one case, Mr. Murphy tested a

cited car utilizing procedure O-2 before any abatement work was done, and the engine shut down, thus showing that there was no malfunction in the system.

West Elk argues that when called in rebuttal near the end of the hearing, Mr. Lemon admitted that the entire scrubber system in question was "a little bit" new to him, and that in view of the evidence adduced during the hearing stated that "we will change our testing procedure." West Elk maintains that since the issuance of the citations, MSHA now uses test procedures O-2 to conduct tests of the low water shutdown systems, and that since these procedures are the only ones approved by MSHA, they are the only proper procedures, and the tests used to support the citations were not authorized.

West Elk maintains that MSHA has not established that the cited scrubber systems were not functioning properly because the inspector's shortcut test procedures were flawed, and were not the proper tests recommended by the manufacturer. West Elk maintains that since the manufacturer has specified a specific test procedure for the testing of the scrubber system, MSHA's use of another procedure not approved by the manufacturer cannot be used as a basis for establishing a violation of the MSHA approved mine ventilation plan which requires that the equipment be maintained in accordance with the manufacturer's (not MSHA's) specifications. West Elk concludes that the MSHA test procedure is simply not a valid one, and that MSHA has not sustained its burden of showing by a preponderance of the evidence that any of the alleged violations occurred.

West Elk argues that even assuming the validity of the test procedure followed by the inspector, under the circumstances presented in these proceedings, the procedure did not produce reliable results. In support of this conclusion, West Elk points out that the inspector required that a gate valve which existed on some, but not all of the cars, be shut off between the main water supply tank and the scrubber tank. According to the testimony of Mr. Lemon and Mr. Murphy, the shutting of this gate valve could cause an air lock to form. Further, since the scrubber tank in each cited instance was not parked in such a fashion as to assure complete draining of the scrubber tank, and because the scrubber tank was drained through the main drain valve rather than the lower level tank as required by the manufacturer's O-2 procedures, the angle at which the cars were tested played a role in the outcome of the tests. In each instance, the lower drain plug from which water in the scrubber tank was drained was elevated

relative to the remainder of the tank thereby possibly trapping water both within the tank and the lower level tank. It is the lower level tank which senses the presence or absence of water needed to cool the hot diesel exhaust gases. Thus, when the cars were tested, water may have been trapped in the lower level tank, thereby producing an invalid result. In essence, because the machines were parked at an angle, water trapped in the lower level tank lead the sensors to conclude that sufficient water was in the scrubber tank thereby misleading the device into the false belief that sufficient water was in the scrubber tank. The manufacturer's O-2 procedures compensates for the effects resulting from the equipment being parked at an angle or on an incline.

Thus, even assuming that the test employed is reasonably calculated to produce a reliable result, West Elk asserts that there is a reasonable likelihood that the results of the test were not valid because of air locks on the one hand and/or the angle on which the machines were sitting at the time the test was conducted. Since the test results are not reliable, West Elk concludes that MSHA has not sustained its burden of proving the alleged violations.

West Elk points out that in reply to an inquiry from Judge Carlson during the course of the hearing, MSHA distilled its case to a single concept: that the shutoff devices did not work, but should have (Tr. 163-164). West Elk asserts that MSHA apparently believes that any test procedure is appropriate so long as it is reasonably calculated to produce a reliable result. However, West Elk insists that MSHA's theory does an injustice to the plain words of the ventilation plan that the equipment be maintained in accordance with the manufacturer's specifications rather than some specifications chosen by MSHA, and suggests that MSHA is not bound by the same requirements as the mine operator. West Elk maintains that MSHA should not be allowed to use an unapproved, arbitrary test procedure to support a violation of the ventilation plan requirement which is related solely to manufacturer's specifications and requirements, and that to do otherwise violates fundamental notions of due process and fairness. West Elk concludes that the same rules must apply to both the mine operator and MSHA, and that Mr. Lemon acknowledged as much when he stated that, in view of the evidence presented, "we will change our testing procedures" (Tr. 363).

West Elk advances an ancillary issue as to whether the test procedure actually employed in testing the cited shutoff devices was a shortcut methodology selected by West Elk or whether it was a procedure dictated by the inspector. If the

former, West Elk acknowledges that one might arguably assert that West Elk is bound by its own procedures and may be estopped to deny the appropriateness as such test procedures in establishing the violations. However, West Elk believes that the entire test procedure employed was that mandated by the inspector, and he admitted that he required a valve to be closed and that this did affect the test results. Notwithstanding the inspector's denial that he directed the tests, West Elk relies on the testimony of its witnesses who accompanied the inspector that in each and every instance they told the inspector that they did not know of the appropriate test procedure, to which the inspector responded he would tell them how to conduct the test. West Elk submits that the testimony of these witnesses, and the testimony of Mr. Murphy, who witnessed one of the tests and confirmed that it was at the direction of the inspector, is much more credible. In any event, West Elk further concludes that it is clear that the manufacturer's test must be employed to determine whether the manufacturer's equipment is being properly operated and maintained, and that any other test procedure used by MSHA would result in de facto rulemaking with respect to those procedures.

West Elk argues that as a matter of law, the citations issued by the inspector state no violation because there is no requirement in its ventilation plan that low water shutdown devices shut off the car engine when water is drained from the scrubber tank. West Elk points out that the sole evidence of its alleged failure to meet its responsibilities under the ventilation plan is the failure of the machine to shut down when water was drained from the scrubber tank. West Elk asserts that MSHA points to no provision of any maintenance manual or operating specifications to support this allegation, and that it seeks to impose by fiat a new requirement that engines on diesel equipment shut down when water is drained from the scrubber tank even though this asserted requirement is not part of the ventilation plan.

West Elk asserts that it has long been held that ventilation plan requirements are enforceable in the same manner as mandatory standards. Ziegler Coal Company v. Kleppe, 536 F.2d 398, 1 MSHC 1424 (D.C. Ct. App. 1976). Mandatory standards must be reasonably precise in order that the operator be given fair warning of the conduct which is proscribed. Secretary of Labor v. Missouri Gravel Company, 2 MSHC 2223 (ALJ, 1983). Since the ventilation plan contains no requirement that the engine shut down when water is drained from the scrubber tank, MSHA cannot maintain that such a requirement exists in view of the holdings of Ziegler and Missouri Gravel. West Elk concludes that no violation is properly stated in

the citations as a matter of law in that neither 30 C.F.R. § 75.316 nor the ventilation plan requires that diesel equipment shut down "when water is drained from the scrubber tank."

West Elk asserts further that the failure of an engine to shut down when a low water shutdown device is properly tested may be some evidence of a failure to achieve the ventilation plan's mandate for proper maintenance and operation, standing alone, test results using proper test procedures do not show by a preponderance of the evidence that the ventilation plan requirements have not been achieved. When it is considered that the test actually employed was wholly invalid, it cannot be said that MSHA has met its burden of proving a violation of 30 C.F.R. § 75.316.

Findings and Conclusions

West Elk is charged with violating the mandatory ventilation system and methane and dust control requirements of 30 C.F.R. § 75.316, because it allegedly failed to maintain the low water shut down devices on the cited shuttle cars in accordance with the manufacturer's operating maintenance specifications. MSHA's theory is that tests conducted by West Elk at the direction of the inspector, for the purpose of determining whether the shut down devices were functioning properly, indicated that the devices were not performing as required, and support the inspector's findings. West Elk's defense is that the citations are not supportable because the test procedures mandated by the inspector in support of the citations were not the proper test procedures, were flawed, and were in fact unauthorized "shortcut" procedures which provided unrealiable and invalid results.

The ventilation plan requirements found in 30 C.F.R. § 75.316, provide as follows:

> A ventilation system and methane and dust-control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be

reviewed by the operator and the Secretary at least every 6 months.

It is well-settled that once a mine operator adopts an approved ventilation plan, the operator is required to comply with its provisions, Ziegler Coal Company, 4 IBMA 30, aff'd 536 F2d 398, 409 (D.C. Cir.) (April 22, 1976); Mid-Continent Coal and Coke Company, 3 FMSHRC 2502 (1981). In short, a violation of an operator's ventilation plan constitutes a violation of 30 C.F.R. § 75.316.

The parties agree that the applicable approved ventilation plan requirements are those which appear in exhibit S-1, and the inspector confirmed that the specific plan requirement he relied on is found in numbered paragraph A.2., page 28. The plan requirements for diesel equipment states as follows:

A. Diesel Equipment

1. Any diesel equipment used inby the last open crosscut will comply with Title 30, Part 36 of the Code of Federal Regulations.

2. All diesel equipment will be operated and maintained in accordance with the manufacturer's operating specifications and maintenance manual. These manuals and specifications will be made available for reference.

3. Each diesel face equipment unit will be examined on a daily basis to insure that the engine and scrubber system are operating properly to minimize poisonous exhaust gases. Additionally, the exhaust of each unit will be examined to insure compliance with Section 75.301-2, 30 C.F.R., regarding current threshold limit values for carbon monoxide and oxides of nitrogen.

On working sections using diesel equipment an examination will be made for carbon monoxide and oxides of nitrogen in the immediate return of each split to determine compliance of Section 75.301-2, 30 C.F.R. The examination will be made after normal operations have begun but no longer than 4 hours after start up.

> Any other non-face diesel equipment operating in an outby area will have an examination made for carbon monoxide and oxides of nitrogen gases immediately down wind from the working area on a weekly basis.
>
> A record of each examination and maintenance check will be kept in a book for that purpose which shall include the date, time, examination or maintenance check results, and samplers initials.
>
> 4. The minimum quantity of air to be maintained over each piece of diesel equipment during operation shall be 10,000 CFM, and the minimum quantity of air passing through the last open crosscut where diesel equipment is used shall be 20,000 CFM. (Emphasis added).

One basic issue which needs to be addressed is whether or not the citations issued by the inspector sufficiently describe a condition or practice which allegedly violates West Elk's approved ventilation plan. In each of the citations, the inspector alleges that West Elk failed to comply with its approved plan because it failed to follow the manufacturer's specifications in the care and use of diesel equipment . . . in that the low water shut down . . . would not shut the engine off when the water was completely drained from the scrubber. West Elk argues that the sole evidence of its alleged failure to comply with the plan is the failure of the cited machine engines to shut down when water was drained from the scrubber tank. West Elk points out that since there is nothing in the plan mandating that the engine shuts off when water is drained from the scrubber tank, no violations of its plan have been established.

I take note of the fact that the inspector failed to include in the citations any specific references to the applicable ventilation plan provisions, manufacturer's specifications, or permissibility standards which he believed were violated. Section 104(a) of the Act requires that a citation describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, . . . alleged to have been violated. Although the citations do include a specific reference to the general ventilation plan requirements of section 75.316, the inspector's failure to pinpoint the particular permissibility standard, plan provision, or manufacturer's specifications allegedly violated puts the presiding judge in the untenable

position of fishing through the record and standards to identify the applicable requirements.

I have reviewed the transcript of Inspector Biondich's testimony, and find that it is devoid of any references to any specific applicable permissibility standards or manufacturer's specifications allegedly violated. The inspector identified the ventilation plan, quoted paragraph 2, and concluded that "They weren't being operated, maintained, in accordance with the manual" (Tr. 11). He also identified a diagram of a low water shutoff device, and confirmed that it was "illustrative" and "on the order of this type of equipment we were checking." He also confirmed that it was "illustrative" and "on that order" of the scrubber on the No. 6 car which he cited on October 25, 1985 (Tr. 21). However, the schematic was not offered or received as part of the record, and was withdrawn.

I have also reviewed the transcript of Mr. Lemon's testimony, and find no reference to any specific permissibility standards allegedly violated in this case. Mr. Lemon referred to a diesel equipment permissibility "checklist" used by MSHA for training purposes (exhibit S-9), and stated that he is involved in conducting training for "diesel inspection of permissible schedule 31 equipment and underground coal mines for all electrical inspectors" (Tr. 125). Assuming that Mr. Lemon was alluding to the permissibility requirements found in Part 31, Title 30, Code of Federal Regulations, I take note of the fact that they pertain to standards dealing with diesel locomotives.

MSHA's posthearing brief contains no discussion with respect to any applicable permissibility standards for the cited cars in question. The only reference to any permissibility requirements is found at page 2 of the brief which states in pertinent part as follows:

> The 12 ram shuttle cars are used to carry the coal from the face area to a dump point. Since the cars work in the face and passed the last open crosscut they are required to be in compliance with the permissibility standards. Those permissibility standards require the hot exhaust from the diesel engine to be routed through a device known as the scrubber. The purpose of the scrubber is to cool the exhaust so that exhaust and expelled carbon particles will not act as sources of ignition.

The only clue in the transcripts as to the applicable permissibility standards appears at page 167 where MSHA's counsel makes reference to "part 36" (Tr. 167). During a colloquy with the Court, counsel stated as follows (Tr. 167-169):

* * * * * * *

But here, Your Honor, the case, what we have simply said is that the shutoff devices do not work. Didn't say why they don't work. Whether they were inspected or inspected regularly or inspected properly. Obviously, they wouldn't be put on there if the manufacturer didn't intend for them to work. Ventilation plan says that what is on there, what's required to be on there, has to work.

JUDGE CARLSON: Okay. Fine. Where does it say that? I'd like to know. It should say that certainly, but --

MR. BARKLEY: It's in the first exhibit which, I believe, is S-1.

JUDGE CARLSON: Okay. I have not seen that. (Pause.)

MR. BARKLEY: The first two paragraphs of that deals with this question. First of all, part 36 requires that all these be maintained and permissible equipment and we feel that the scrubbers weren't working. Obviously, they weren't being maintained in permissible condition. Also, paragraph two says generally you have to operate this equipment in accordance with manufacturer's specifications. And there's a scrubber on there that's meant to work. It should work.

JUDGE CARLSON: Where does it say that? It certainly makes good sense to me, but does it say that somewhere in the operator's manual?

MR. BARKLEY: Your Honor, I think that's one of the things that's so basic, nobody says it. I have looked at the manual since I've been here and there are pages devoted to the maintenance of this particular system. Obviously,

with the intent to maintain it, you expect it to work, but it doesn't say the obvious fact, chapter 2, we've equipped with machine with a scrubber, it should work. Here's how you make it work. I don't have the permissibility standards. I believe I've got some. The standards that you referred -- but you referred to the permissibility standards. Here's a general catch-all there that says face equipment operator -- last open crosscut has to be maintained in a permissible condition. We have evidence that the fact equipment operator passed the last open crosscut. Permissible diesel equipment has to have a scrubber on it. The standard says it has to be maintained in a permissible operating order. Our theory is that the tests show this was not maintained in a permissible operating order. Just didn't work. Just didn't shut the machine off.

Paragraph 1 of the ventilation plan requires that all diesel equipment used inby the last open crosscut comply with Title 30, Part 36, Code of Federal Regulations. I take note of the fact that Part 36 are the MSHA regulatory construction and design requirements for approval and certification of diesel powered equipment used in noncoal mines. Since West Elk is a coal mine operator, my assumption is that it has agreed to abide by these regulations since they have been incorporated as part of the approved ventilation plan. Under the circumstances, it would appear that these are the permissibility standards applicable to the cited cars in question. Section 36.25 covers the requirements for engine exhaust systems, and subsection (b) and (c) deals with exhaust flame arresters and "exhaust-gas cooling boxes." I assume that the scrubbers in question fall within these requirements, and take note of the fact that subsection 36.25(b)(1), (3), and (c) provide in pertinent part as follows:

> (b)(1) The exhaust system of the engine shall be provided with a flame arrester to prevent propogation of flame or discharge of heated particles to a surrounding flammable mixture.
>
> (b)(3) In lieu of a space-place flame arrester, an exhaust-gas cooling box or conditioner may be used as the exhaust flame arrester . . . . When used as a flame arrester the cooling box shall be equipped

with a device to shut off automatically the fuel supply to the engine at a safe minimum water level.

(c) A device shall be provided that will automatically shut off the fuel supply to the engine immediately if the temperature of the exhaust gas exceeds 185 degrees F. at the point of discharge from the cooling system.

The general permissibility test procedures for engine exhaust-gas cooling systems is found in section 36.47. Aside from general statements that tests should be made to determine the performance of the cooling system, "and low water level when the cooling system fails" (subsection (b)), and the adequacy of the temperature actuated automatic fuel shutoff device, there is nothing in the procedures detailing the specific test procedures which the parties believe are applicable to the cited cars.

Although I agree that the narrative description of the alleged violative conditions cited by the inspector may be inartfully stated, after review of the entire record, including the answer filed by West Elk, its motion for summary judgment, and the testimony of all of its witnesses, I am not convinced that West Elk was unaware of what it was being charged with.

West Elk's suggestion that an allegation that it violated its ventilation plan because the car engines would not shut down when water was drained from the scrubber tanks cannot be sustained because the plan contains no such specific requirement is rejected. In my view, the inspector's conclusions that the engines would not shut down when the cars were tested simply reflect the inspector's opinion and belief that West Elk did not maintain the low water shutoff devices in an operable condition so as to permit them to do what they were intended to do, i.e., shut down the engine when the water in the scrubber reached a certain level. MSHA still has the burden of proving by a preponderance of the credible evidence that this was in fact the case. MSHA also has the burden of establishing that the test procedures relied on by the inspector in support of the alleged violations were proper, valid, and probative.

There is a dispute as to whether the test procedures followed by the inspector to support the citations were proper and valid. West Elk believes that the O-2 test procedures are the approved manufacturer's test procedures which apply to the

cited cars, and are the procedures which should have been followed. MSHA believes that the S-9 procedures represent the manufacturer's suggested test procedures, and it sees "little difference" in the two. However, at page 4-5 of its brief, it goes into some detail in describing three, and possibly four, differences between the two procedures. At pages 2-3 of its brief, West Elk points out that no less than four different test procedures were described during the hearing.

I take note of the fact that the approved ventilation plan does not specifically include any reference or guidance with respect to the proper test procedures for insuring that once placed in operation, the approved diesel equipment is in fact being maintained in accordance with the permissibility requirements of 30 C.F.R. Part 36, as required by paragraph 1 of the plan. Although I enjoy the benefit of hindsight, it seems to me that during the ventilation plan approval process, the specific testing requirements for all diesel equipment used in the mine to insure continued compliance with MSHA's permissibility requirements should have been addressed and incorporated as part of the plan. Only in this way can the parties clearly know what the ground rules are. In my view, this case is a classic example of how a broadly drawn and ill-defined ventilation plan can generate litigation and enforcement issues such as those presented in these proceedings.

MSHA's threshold suggestion that the ventilation plan language found in paragraph 2 is only limited to equipment operational and maintenance requirements, and does not speak to the manner in which the cited equipment is to be tested is precisely the point raised above. MSHA's suggestion that it is not bound by the approved ventilation plan, or the suggested manufacturer's testing procedures, and may "use the most accurate test," are not well taken.

On the facts of this case, the inspector issued the citations because he concluded that the cited equipment low water shutdown devices were not being maintained in accordance with the manufacturer's operating specifications. The only evidence available to the inspector to support this conclusion are the results of the tests administered by the operator following the inspector's directions and instructions. Since the operator is required to follow the manufacturer's specifications to insure compliance with MSHA's permissibility requirements, and exposes himself to liability if he does not, I do not find it unreasonable to expect an operator to use the testing requirements suggested by the manufacturer to insure that the equipment is maintained properly. I believe

it is basically inconsistent and unfair for MSHA to insist on the one hand that a mine operator follow the manufacturer's specifications to stay in compliance, and on the other hand argue that when it is found out of compliance, MSHA can use any test it chooses to support violations and civil penalty assessments for those violations. In these circumstances, I agree with West Elk's position that the use of arbitrary, unapproved or invalid testing methods to support a violation of its ventilation plan violates fundamental notions of due process and fairness.

MSHA's assertions that the ventilation plan language relied on by the inspector as the underpinning for the citations is limited to operational and maintenance specifications, and not to the methods used for testing the equipment to insure compliance with those specifications, ARE REJECTED. I conclude and find that a reasonable interpretation of the plan and its intended purpose to insure continued compliance with MSHA's permissibility requirements, supports a conclusion that West Elk was not only required to rely on the manufacturer's specifications to insure compliance with MSHA's requirements, but was also required to follow the manufacturer's test procedures to insure that it stays in compliance. If West Elk decides to use some other testing methods, and the equipment is subsequently found to be out of compliance, it does so at its peril, and assumes the risk of being cited. Conversely, since MSHA bears the burden of proof in establishing a violation by a preponderance of the credible evidence, I further conclude and find that MSHA must play by the same rules, and any alleged violations of its permissibility requirements must be established by the same testing requirements imposed on West Elk pursuant to its approved plan. Of course, if MSHA can establish that an approved testing procedure other than that of the manufacturer is part of the plan requirement, and that the procedure has in fact been adopted as part of the plan after fair notice to the operator, then both parties would be bound by that test procedure.

The S-9 test procedures which MSHA claims are the only MSHA-approved procedures applicable to the cited cars state as follows:

Exhaust System

* * * * * * *

3. Low water shutdown test.

With the water tank air pressure turned off and the engine running at idle, slowly drain the water from the scrubber at the drain. Continue to drain the water until the low water shut-down system activates the safety system and shuts down the engine. Quickly close the drain so as not to loose (sic) any more water. Remove the cap on top of the scrubber and measure the water depth. This measurement must be 8-1/2 + 1/2 inches.

The O-2 test procedures which West Elk claims are the MSHA-approved procedures applicable to the cited cars state as follows:

2. Low Scrubber Water Shut Down

a. With supply water tank full and scrubber water at running level, close needle valve between low-air pressure regulator and water supply tank. Vent water tank by pushing red button on top of fill cap. Rotate cap counter-clockwise to first safety catch, thus allowing water tank to remain vented during test.

b. With engine running, disconnect the air supply line at the upper tank vent valve. Loss of air should shut down the engine. After engine shuts down, reconnect the air line, reset the trip indicator, and restart the engine.

c. Slowly drain the water from the scrubber through the drain valve in lower level tank until the engine shuts down. Immediately close the drain valve. Check the scrubber water level by removing first the top pipe plug on the rear of the lower tank (7" level) and if no water is visible, then reopen the valve (6" level). If no water flows from the bottom valve the system is not functioning properly.

The introductory language which appears on page 1 of the O-2 test procedures states in pertinent part as follows: "Listed below are the items and functions that must be maintained at all times in order to keep approval status of this vehicle. This checklist should be posted for easy reference by the personnel that have been assigned this responsibility."

MSHA takes the position that the Jeffrey manufacturer's O-2 test procedures do not have MSHA's approval, and that the only test procedures submitted by Jeffrey are those found in S-9. MSHA discounts Mr. Murphy's reference to the MSHA "stamp of approval" which appears on the face of O-2 as an indicia of MSHA approval. MSHA asserts that this printed information refers to "prints," and that the procedures are not "prints."

Mr. Murphy believed that the O-2 procedures have been approved by MSHA, and stated that he was so advised by a Jeffrey manufacturer's representative. Mr. Skvarch agreed (Tr. 210). In describing the procedures, Mr. Murphy characterized them as follows at (Tr. 251):

* * * * * * *

> This is the permissibility checklist that we have submitted to MSHA in Tridelphia and have their approval to distribute as an approved piece of drawing. It's an approved drawing. In other words, it's not just a piece that goes in the maintenance manual. It goes in the parts book as an approved drawing. Something that I understood is not to be deviated from and it has been sent out to customers that have this type of a system to show that that is how the system has to be checked to see if it is working.

Mr. Lemon referred to the very same printed information appearing on O-2 as did Mr. Murphy, and Mr. Lemon believed this information evidenced the fact that the cited Jeffrey cars are MSHA certified and approved, and he confirmed that the O-2 permissibility checklist submitted by Jeffrey is applicable to the model 4114 ram cars (Tr. 129, 133). Mr. Lemon confirmed that he was previously aware of the O-2 checklist even though he never saw it in any manuals, and stated that "it may have come along with the prints, . . . sent out to the different coal operators that have this type of machinery on their property" (Tr. 121).

The term "print" is defined by Webster's New Collegiate Dictionary as "printed matter" or "a reproduction." Although one may speculate that the term "print" refers to the car specifications, I also note that the document contains the word "Drawing No. 532A329," and it is altogether possible that this refers to the car specifications. However, none of these contradictions in terminology is explained or clarified by MSHA's expert witness Lemon.

Mr. Lemon and Mr. Murphy are in agreement that the O-2 permissibility test procedures are included among the materials shipped by Jeffrey as the manufacturer's test procedures. Since the equipment is MSHA certified and approved, and absent any evidence to the contrary, I conclude and find that the O-2 procedures are part and parcel of the Jeffrey manufacturer's specifications, and that the term "print" appearing on each page of O-2 refers to the printed material appearing therein, including the scrubber shutdown test procedures.

MSHA's suggestion that the testing procedures followed by the individuals who tested the cited cars were their responsibility, and that Inspector Biondich was merely a "casual observer" are not well taken. I believe the testimony of the three company representatives who accompanied Mr. Biondich, and conclude that he dictated the test procedures and gave instructions as to how the tests were to be performed.

Mr. Skvarch testified that the O-2 procedures are kept at the mine and that they are part of the equipment specifications and maintenance procedures (Tr. 203). Even though the ventilation plan requires that they be made available for reference, Inspector Biondich admitted that he never asked to see them at the time of his inspections. He conceded that the O-2 procedures are the proper ones for testing the cited cars, and admitted that he did not follow them when he issued the citations (Tr. 65, 69, 91), and that the instructions he gave for shutting the water supply between the supply tank and scrubber tank were not part of the O-2 procedures (Tr. 73). Mr. Biondich also agreed that the O-2 procedures appeared to be approved by MSHA (Tr. 75).

Although Inspector Biondich alluded to several other test procedures which were in his briefcase at the time of his inspections, he conceded that they pertained to scrubber models 410, HR 150, and 411 H, which are different from the ones he cited, and that he did not use them (Tr. 100-101).

As a matter of fact, there is no evidence that Mr. Biondich relied on any written test procedures at the time he inspected the cars and issued the citations, and simply relied on his own notions as to the test procedures which should be used. The three West Elk representatives who accompanied Mr. Biondich during his inspections all confirmed that he did not refer to any written test procedures during his inspections, and maintenance manager Skvarch expressed concern that Mr. Biondich was using the wrong test procedures.

Mr. Murphy testified that the S-9 test procedures are not the proper procedures for testing the cited cars because they pertain to a different type of low water shutdown devices than those on the cited cars (Tr. 261). Mr. Skvarch was of the same opinion (Tr. 201). Although Mr. Lemon believed that the S-9 procedures deal with the "same type of scrubbers" as those cited by the inspector, and identified a diagram of a cylindrical type 4110 flame arrestor which appears at page 4 of S-9, as one of these which was cited, he conceded that it was not the same type scrubber which the inspector said he cited (Tr. 70, 125-127).

MSHA suggests that since Mr. Murphy is "a mechanic" with little contacts with Jeffrey and no familiarity with the dealings between Jeffrey and MSHA, his testimony is less credible than Mr. Lemon, who works closely with MSHA's Certification and Approval Division, and has reason to know what machines and modifications are approved. MSHA's position is not well taken. Mr. Murphy is an experienced senior equipment serviceman whose duties include troubleshooting and instructions as to how to maintain and service the equipment. The fact that he is not directly involved in the certification and approval process, and all of the paperwork that goes with that process, is no basis for concluding that he is ignorant of the test procedures which apply to the equipment in question. Since testing is an integral part of maintaining and servicing the equipment, and since Mr. Murphy is an experienced serviceman, I conclude that he is just as competent as Mr. Lemon, and that his testimony regarding the O-2 test procedures is credible.

There is nothing in S-9 that reflects that the procedures detailed therein are approved by MSHA. S-9 was characterized by Mr. Lemon as a "training outline" he uses to train inspectors, and he claimed that the outline was adopted from procedures submitted by Jeffrey "to make it basic and easy for the mine inspectors in the field to check out Jeffrey equipment" (Tr. 125). Mr. Lemon stated that he conducts training "for diesel inspection of permissible schedule 31 equipment and underground coal mines for all electrical inspectors." I take

note of the fact that Part 31 of MSHA's regulations deals with diesel mine locomotives, and not the type of equipment cited by Inspector Biondich.

Mr. Lemon agreed that the O-2 checklist test procedures are the proper procedures for testing the cited scrubber low-water shutdown devices, and that they are more thorough than the S-9 procedures (Tr. 139-140). He confirmed that he used the O-2 procedures as part of the training course he conducted at the mine after the citations were issued (Tr. 136, 346, 348). He also confirmed that the car manufacturer is required to submit such checklists with the equipment when it is submitted to MSHA for certification and approval, and that such a checklist was submitted for the equipment in question.

Mr. Lemon confirmed that he was aware of the O-2 test procedures some 5-months prior to the issuance of the citations, and was shown a copy by a service representative at a mine in Utah (Tr. 357). He has since requested a copy from another mine operator in Colorado (Tr. 359). When asked why he did not request a copy from "his people" at any time prior to the issuance of the citations, he explained that he "never had a need" for them because the diesel equipment under his jurisdiction was equipped with older model 4110 scrubbers, rather than the newer model 4114, and that "90% of ours in the Utah area still have the old scrubbers on them" (Tr. 358). He conceded that the new models "are a little bit new to me," and that based on his familiarization with the newer models during the course of the hearing, "we will change our testing procedures" (Tr. 363). Further, Mr. Lemon confirmed that since the issuance of the citations, MSHA has tested the very same cited cars using "the proper test procedures" and that "they all shut down and operated properly." He also confirmed that he has never determined why the test procedures mandated by Inspector Biondich to support the citations did not work (Tr. 215).

Inspector Biondich made no mention of the S-9 test procedures as such, and after review of his testimony I take note of the fact that he was never asked about them. However, with respect to the O-2 test procedures, and in response to West Elk's questions on cross-examination, Mr. Biondich referred to them as the proper test procedures that are part of the maintenance manual test procedures (Tr. 65). In a later reference to O-2 test procedures, Mr. Biondich again confirmed that the O-2 test procedures are the proper procedures contained in the maintenance manual for the testing of the cited Jeffrey cars (Tr. 69). In responding to a question

from West Elk's counsel who was quoting from the O-2 procedures, Mr. Biondich affirmed that the instructions are "approved" (Tr. 77). Still later, he confirmed that the O-2 procedures distributed to him and the other MSHA inspectors during the training session conducted by Mr. Lemon were instructions out of the West Elk maintenance manual for Jeffrey ram cars (Tr. 90).

The only evidence suggesting that the O-2 test procedures were not approved by MSHA is the testimony of Mr. Lemon that he never saw them in any manuals, that he relied primarily on the S-9 procedures while conducting his training courses, and that the O-2 procedures do not contain the signature or initials of any MSHA approving official.

I have carefully reviewed Mr. Lemon's testimony regarding the O-2 and S-9 test procedures, and I find it rather equivocal and contradictory with respect to the question of any MSHA approvals. For example, while confirming that Jeffrey is required to submit permissibility checklists for each piece of equipment submitted to MSHA's Tridelphia Office for approval and certification, Mr. Lemon confirmed that such a checklist was submitted. However, he did not specify which one he had in mind. When asked about the S-9 procedures which he used as part of his training outline, Mr. Lemon stated that it was prepared from a checklist submitted by Jeffrey and that the checklist dealt with the same type of scrubbers cited by the inspector. Since the cited scrubbers were approved by MSHA, I believe one can reasonably conclude that the O-2 procedures were also approved by MSHA. Further, I find it highly unlikely that a large and well-known manufacturer such as Jeffrey would expose itself to liability by disseminating permissibility test procedures which on their face clearly imply that they are approved by MSHA if this were not the case.

In confirming that the cited Jeffrey cars have MSHA's approval, Mr. Lemon referred to the same information which appears on each page of the O-2 test procedures implying MSHA's approval, as evidence of that approval (Tr. 129). Under the circumstances, I see no reason why West Elk cannot rely on that very same information to support its assertion that the O-2 procedures likewise have MSHA's approval.

At one point during the hearing, Mr. Lemon was asked whether the O-2 test procedures were the approved Jeffrey permissibility procedures. He responded "I can't answer that," and he explained that he had never seen them as part of any maintenance manuals (Tr. 138-139). However, he also "assumed that they came from Jeffrey," and he believed that

they were "separate from the maintenance manual" (Tr. 139). If this is true, then I fail to understand why Mr. Lemon would have expected to find them in any manuals. Although West Elk's ventilation plan requires that equipment manuals and specifications be made available for reference, I find nothing in the plan requiring the permissibility test procedures to be physically kept in the manuals.

In confirming that his prior knowledge of the O-2 test procedures came about as the result of his visits to two other mines, Mr. Lemon did not state that he requested to review the maintenance manuals or that he made any effort to do so. This may also explain why he did not find them in any manuals. In explaining why he had not previously requested a copy of those procedures from his own MSHA people, Mr. Lemon stated that he never had a need for them because 90 percent of the scrubbers under his jurisdiction were older 4110 models. Since the scrubber diagram included as part of the S-9 procedures is an older 4110 model, and since those procedures applied to the older model, one can reasonably conclude that Mr. Lemon did not consider the O-2 procedures particularly important or relevant. However, this is hardly a basis for concluding that the O-2 procedures are not the approved procedures for testing the cars cited by the inspector. Likewise, the fact that Mr. Lemon may not have seen the O-2 procedures in any manuals is no basis for concluding that they were not approved by MSHA.

Mr. Lemon is one of three diesel "coordinators" working out of the MSHA district office which considers equipment approvals and certifications. He conceded that there are occasions when equipment approvals are made while he is on leave, and that he may not be totally aware of all of these approvals. When testifying about the possible design deficiencies in some of the cited cars, even though the cars have been approved by MSHA, Mr. Lemon conceded that it was possible that he "could have overlooked something" (Tr. 365). In my view, the same could be said about the O-2 test procedures.

In view of the foregoing, and after a careful weighing of all of the testimony, I cannot conclude that MSHA has established through any credible testimony that the O-2 test procedures were not approved by MSHA. To the contrary, I conclude and find that the preponderance of the evidence supports a conclusion that the O-2 test procedures have MSHA's blessing and approval, and that they were the proper procedures which should have been followed by the inspector at the time of his inspections.

The thrust of MSHA's case is that the cited low water shutdown devices were not functioning properly, and that the test administered by Inspector Biondich established this as a fact. I disagree. On the facts of this case, it seems clear to me that Inspector Biondich failed to follow the proper manufacturer's O-2 test procedures. MSHA's suggestion that the S-9 test procedures followed by the inspector are basically the same as those found in O-2 are rejected. There are differences in the two test procedures. For example, the first sentence of test procedure 2.a. of O-2 requires the closing of a needle valve with the supply water tank full and the scrubber water at running level. S-9 makes no reference to any needle valve, nor does it mention the water supply levels in the tanks. The first sentence of test procedure 2.c. of O-2 requires that water be slowly drained from the scrubber through a drain valve in the lower level tank until the engine shuts down. The second sentence requires that the scrubber water level be checked at the lower tank 7 and 6-inch levels. The S-9 procedure simply requires that the water level be tested by measuring the water depth through a cap on the top of the scrubber. Further, MSHA acknowledges that there are differences in the two test procedures, and it details those differences at page 4 of its brief.

Inspector Biondich admitted that he failed to follow the O-2 procedures in issuing the citations. He admitted that he did not check the water level as required by procedure 2.c., even though water could be trapped in the scrubber tank and upper float tank. He admitted that he instructed the test personnel to shut off the water between the water supply tank and the scrubber by means of a valve not specified in the O-2 procedures, and that the procedures in O-2 for the draining of the water from the low level tank at the 7 and 6-inch levels were not followed. Mr. Lemon conceded that at no time during the testing of the cited cars did the inspector measure the water tank level. He confirmed that he always checks the water level "because that's part of the check" (Tr. 173).

Mr. Lemon and Mr. Murphy agreed that if a "shortcut" version of the O-2 test procedures were done, and the low water shutdown devices did not work properly, a prudent thing to do would be to run through the entire detailed O-2 procedures in order to determine whether the device itself was defective or whether the malfunction might be caused by an air lock or something unconnected with the test procedure itself (Tr. 150; 258-259). Mr. Lemon also conceded that testing the cars on inclines, and other aspects of the test procedures followed by the inspector could produce invalid results because of air

locking and water locking, and he also concluded that the design of the scrubber system itself may be flawed.

MSHA's assertions that the test procedures followed by Inspector Biondich were properly calculated to give reliable results and support the violations are rejected. I agree with West Elk's arguments that the tests used by the inspector were "shortcut methods" which did not produce reliable results in that they failed to take into account the possibility of air locks and trapped water resulting from testing the cars on inclines, the presence of gate valves on some of the cars, and the draining of water through the scrubber main valve, rather than the scrubber lower level tank. I also take note of the fact that in each of the cited cars, the scrubber parts which were replaced as part of the abatement process were not found to be defective, and that subsequent testing following the O-2 procedures, rather than those followed by the inspector, indicated that the devices were operating properly. Further, MSHA's own expert (Lemon) agreed that part of the test procedures dictated by the inspector, i.e., closing of a gate valve, testing the cars on inclines, and failure to drain the main tank and low level tank, could result in air locks and trapped water, and produce invalid test results. As a matter of fact, at the conclusion of the hearing, Mr. Lemon candidly stated that based upon the testimony and evidence, "we will change our testing procedures" (Tr. 363). Although Mr. Lemon acknowledged that the cited scrubbers are MSHA approved, as stated earlier, he admitted that possible design deficiencies may cause the low water shutdown devices "to lie," and that this is something that he could have overlooked or missed by MSHA, and that it "needs to be brought to the attention of appropriate people" (Tr. 365).

In view of the foregoing findings and conclusions, I cannot conclude that MSHA has established by any credible or probative evidence that the cited low water shutdown devices were in violation of the ventilation plan or out of compliance with the manufacturer's permissibility specifications. I further conclude and find that the testing procedures mandated by the inspector were improper, that he failed to follow the approved manufacturer's O-2 test procedures, and that the test methods he did employ were unrealiable and invalid, and do not support the alleged violations. Under the circumstances, the citations ARE VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. West Elk's Contests ARE GRANTED.

2. Section 104(a) Citation Nos. 2336427, 2336428, 2336430, 2833301, and 2833302, ARE VACATED.

3. MSHA's proposals for assessment of civil penalties for the alleged violations, Civil Penalty Docket No. WEST 68-73, ARE DENIED, and the civil penalty 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
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 21 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-60-M A.C. No. 42-01804-05506
v.	:	Lapoint Gravel Pit
JAY TUFT & COMPANY, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Douglas E. Grant, Esq., Grant & Grant, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating Section 109(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on August 12, 1986. The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the Act; if so, what penalty is appropriate.

Citation 2084520

This citation alleges respondent violated section 109(a) of the Act in that it failed to post a previous Citation (No. 2084519). The citation, which had allegedly not been posted dealt with respondent's interference with an MSHA investigation.

Section 109(a) of the Act, now 30 U.S.C. § 819(a), provides as follows:

> Sec. 109. (a) At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Summary of the Evidence

Benjamin M. Johnson, a special investigator for MSHA, conducted an investigation of respondent at its Midvale office on January 31, 1985 (Tr. 8, 9). The investigation concerned an electrical violation at the Lapoint pit where the citation had been served. The focus of the investigation concentrated on whether the violation was of a knowing and willful nature (Tr. 35).

During the investigation Jay Tuft, respondent's president, objected to the use of a tape recorder. He had been instructed by his attorney not to permit their use (Tr. 20, 21). Later, while inspector Johnson was interviewing the company foreman, Mr. Tuft entered the room and confiscated the cassette tape in the recorder (Tr. 9, 10, 20). As a result Citation 2084519 was issued for interfering with a special investigation (Tr. 10; Ex. P1). At the time it was served the inspector explained to Mr. Tuft that he was responsible to post it on the mine bulletin board (Tr. 11). Tuft asked if he was required to make a special trip to the mine located 145 miles away from the company office (Tr. 11, 12).

Inspector Johnson requested another federal inspector, who was conducting a regular inspection at the mine site, to ascertain if the citation had been posted at the mine (Tr. 12). Field notes generated by MSHA inspector Joslin were received in evidence. They indicated the citation had never been posted although other citations appeared on the bulletin board (Tr. 14).

Subsequently, on March 21, 1985, Citation 2084520 was issued for a failure to post the previous citation (Tr. 14; Ex. P3).

On April 19, 1985 inspector Johnson visited the mine site. The office manager indicated she had never received the citation from Mr. Tuft (Tr. 16, 17). The inspector next issued a section 104(b) non-compliance order for the failure to post the two citations (Tr. 18). The company office manager then talked to

Mr. Tuft's secretary and was advised that both copies of the citation were in her desk and they had not been mailed to the mine site (Tr. 18). The front-end loader operator also indicated to the inspector that he had never seen the citations posted on the bulletin board (Tr. 19).

Jay Tuft testified that during the course of his two hour interview with Johnson he objected to the use of a tape recorder. When he objected the inspector put it away (Tr. 24, 25).

Later that day Tuft heard men's voices in his wife's office. When he opened the door he found the inspector taping his interview with foreman Richard Logan. Tuft again objected to the use of the recorder. When Johnson failed to stop the recorder Tuft did so and removed the cassette. Johnson left. The following day an MSHA attorney called Tuft from Denver. That afternoon Johnson reappeared with a Midvale policeman and demanded his tape. Tuft contacted his attorney and then surrendered the tape (Tr. 26). Respondent thereafter paid a $600 penalty for the citation that followed (Tr. 27).

When he received the citation Tuft was told by Johnson to post it. Tuft put it on his bulletin board in his Midvale office (Tr. 27, 29). The large bulletin board contains workman's compensation notices, minority matters, licenses, diesel permits and things of that nature (Tr. 33). All business affairs are conducted out of the Midvale office. At the mine site the trailer office contains a desk, a chair and a small bulletin board (Tr. 33). All of the contact between Tuft and Johnson took place in the company office. None of it took place at the mine site 160 miles away (Tr. 27). The citations were all personally posted by Tuft at the mine site after he received notice of the requirement (Tr. 27, 28).

Tuft indicated that there were two or three copies of the citation at his office. He agreed there could have been a copy in his desk (Tr. 30). Tuft believed Johnson was lying when he related his interview with the company office manager to the effect that the citation had not been received at the mine site by April 19th (Tr. 31, 32). The loader operator would not know if the citation was posted because he cannot read or write (Tr. 32).

Discussion

The statutory requirement mandates that citations are to be posted at the mine site.

In this factual situation a credibility issue arises as to where and if the citation was posted. Inspector Johnson testified it was not posted. His testimony is verified by the field

notes of inspector Joslin together with the statements of the office manager and the loader operator. I credit MSHA's evidence over Mr. Tuft's bare contrary statement that he posted the citation at the mine site.

However, I credit Mr. Tuft's testimony that he posted the citation at the company office in Midvale. He was in a position to know what occurred. In addition, many items are posted on the company bulletin board at the Midvale office. But such posting at the office and at a place apart from the mine site does not constitute compliance with section 109(a) of the Act. Such evidence, however, relates to respondent's negligence and good faith. These latter elements are factors to be considered in assessing a civil penalty.

For the foregoing reasons, I conclude that Citation 2084520 should be affirmed.

Civil Penalty

The statutory criteria to assess a civil penalty is contained in Section 110(i) of the Act.

In considering the statutory criteria I find that the computer printout received in evidence indicates respondent had eight violations in the two year period ending March 24, 1985 (Ex. P4). In view of these few citations I conclude that respondent's history of previous violations is below average. The penalty appears appropriate in relation to the size of the business. The parties have stipulated that the proposed penalty of $106 would not impair the ability of the company to continue in business (Tr. 5). The operator's negligence is mitigated somewhat by the fact that the notice was posted at the Midvale office. The gravity of the violation is low since it is a posting requirement. Respondent in fact abated after it was advised of the requirement. On balance, I believe that a civil penalty of $50 is appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated Section 109(a) of the Act.

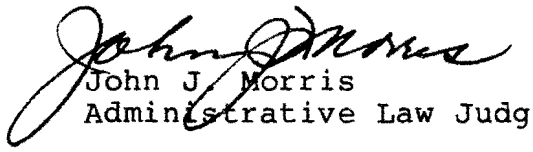
Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 2084520 is affirmed.

2. A civil penalty of $50 is assessed.

3. Respondent is ordered to pay the sum of $50 to the Secretary within 40 days of the date of this decision.



John J. Morris
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 28 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. SE 86-85-R
	:	Order No. 2812055; 5/14/86
v.	:	
	:	Docket No. SE 86-86-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 2812056; 5/14/86
	:	No. 4 Mine
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-123
	:	A. C. No. 01-01247-03714
	:	
	:	No. 4 Mine
v.	:	
	:	
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER DISMISSING NOTICES OF CONTEST

Before: Judge Merlin

The parties have filed a joint motion to approve settlements of the two violations involved in these cases. The total of the originally assessed penalties was $1,900. The total of the recommended settlements is $600.

The motion discusses both violations in light of the six criteria set forth in section 110(i) of the Mine Safety and Health Act of 1977. Order No. 2812055, the subject of SE 86-85-R, was issued for violation of 30 C.F.R. § 75.316. A scoop operator had knocked down a ventilating curtain and failed to repair it. Order No. 2812056, the subject of SE 86-86-R, was issued for violation of 30 C.F.R. § 75.200. This same scoop operator proceeded to clean up coal from under an unsupported roof. Both orders were issued pursuant to Section 104(d)(2) of the Act.

Further investigation revealed that the scoop operator had been ordered to clean up a different face. Through no fault of

the supervisor, the scoop operator went to the wrong face. The scoop operator was later disciplined. In light of these facts, MSHA has reduced these 104(d)(2) orders to 104(a) citations because the violations were not the result of an unwarrantable failure on the part of the mine operator. In addition, these facts show that negligence was less than was originally believed. A reduction in the proposed penalty for Citation No. 2812055 from $900 to $300 is now recommended. A reduction in the proposed penalty for Citation No. 2812056 from $1,000 to $300 is also recommended.

The representations and recommendations of the parties are accepted. The mine operator has withdrawn its request for a hearing.

Accordingly, it is ORDERED that the motion to approve settlements is GRANTED.

It is further ORDERED the above-captioned notices of contest are DISMISSED.

It is further ORDERED that the mine operator is 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

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

January 28, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-135
	:	A. C. No. 01-00515-03650
v.	:	Mary Lee No. 1 Mine
DRUMMOND COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a joint motion to approve settlements of the two violations involved in this case. The total of the originally assessed penalties was $2,200. The total of the proposed settlements is $1,950.

The motion discusses both violations in light of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Order No. 2606500 was issued for violation of 30 C.F.R. § 75.200 because a roof bolter began installing bolts before the temporary roof support jacks were in place. A reduction in the proposed penalty for this violation, from $1,250 to $1,000, is now recommended because of reduced gravity. Only one miner was exposed to the hazard, rather than two, as was originally believed. The one miner exposed was protected somewhat by a canopy and by the fact that he was standing next to the rib.

Order No. 2605858 was issued for violation of 30 C.F.R. § 75.316 because of failure to comply with the approved ventilation plan. The line brattice was 38 feet from the deepest penetration of the face, rather than 10 feet as required by the plan. The air velocity was only 47 feet per minute, rather than 60 feet per minute as required by the plan. A concentration of methane of 1.4 percent had been allowed to accumulate. The operator has agreed to pay the $950 penalty originally assessed for this violation.

The representations and recommendations of the parties are accepted. The settlements are for substantial amounts and are in accord with the statutory purposes.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $1,950 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law

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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 29 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-64 A.C. No. 36-04596-03507
v.	:	Bark Camp Strip
GLEN IRVAN CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On January 12, 1986, the Secretary of Labor, filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $5400 and the parties propose to settle for $2700.

Three violations are charged, all growing out of a fatal fall-of-material accident. The operator was charged with a violation of 30 C.F.R. § 77.1006(b) because an employee was working between a highwall and a front end loader. A penalty of $4000 was initially assessed. It was also charged with failure to properly conduct a preshift examination, and with having loose, fractured material on a highwall. These violations were initially assessed at $800 and $600, respectively. The motion states that the violations were serious and caused by Respondent's negligence. However, the settlement is proposed because Respondent has filed under Chapter 11 of the Bankruptcy Act, and its mining operations have ceased. I have considered the motion in the light of the criteria in section 110(i) of the Act, and in the light of Respondent's financial condition, and conclude that it should be approved.

Accordingly, the settlement motion is APPROVED, and Respondent is ORDERED TO PAY the sum of $2700 in accordance with an order for distribution which may hereafter be issued by the Bankruptcy Court in the Western District of Pennsylvania.

James A. Broderick
Administrative Law Judge

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JAN 30 1987

WEBSTER COUNTY COAL CORP., Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 87-9-R
v.	:	Citation No. 9897010; 9/19/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Dotiki Mine

DECISION

Appearances: Susan E. Chetlin, Esq., and Timothy Biddle, Esq., Crowell and Moring, Washington, D.C. for Contestant; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant filed a notice of contest of a 104(a) citation issued September 19, 1986 charging a violation of 30 C.F.R. § 70.100(a). The citation was issued following anaylses of five dust samples in September 1986 taken from the working environment of a cutting machine operator. The concentration of respirable dust in the five samples was 1.4 mg/m3, 3.5 mg/m3, 2.0 mg/m3, 2.4 mg/m3 and 1.5 mg/m3, giving an average concentration of 2.1 mg/m3. On November 25, 1986, Contestant filed a Motion for Summary Decision, seeking a ruling that the special finding on the citation that the violation was significant and substantial is invalid. On December 24, 1986, the Secretary filed a Response to the Motion and a Cross Motion for Summary Decision, seeking a ruling that the significant and substantial designation of the violation is valid. Contestant does not dispute the fact of a violation, but only the significant and substantial finding. The Secretary accepts the statement of facts in Contestant's motion as being acurate. Therefore, since there is no issue as to any material fact, the case may be decided on the cross motions for summary decision.

FINDINGS OF FACT

In compliance with 30 C.F.R. § 70.207, Contestant submitted five respirable dust samples of the working environment of the cutting machine operator collected during a bimonthly period in the Dotiki Mine to MSHA for analysis. The concentrations of respirable dust in the samples were 1.4 mg/m3, 3.5mg/m3, 2.0 mg/m3, 2.4 mg/m3 and 3.5 mg/m3, giving an average concentration of 2.1 mg/m3.

CONCLUSIONS OF LAW

30 C.F.R. § 70.100(a) requires coal mine operators to continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner is exposed at or below 2.0 milligrams per cubic meter of air. The facts here establish that Contestant failed to comply with this requirement. It therefore was in violation of the mandatory standard. The issue is whether that violation was significant and substantial.

The Commission determined in Consolidation Coal Company v. Secretary, 8 FMSHRC 890 (1986) that a health standard violation may be denominated significant and substantial if four "elements" are present: (1) an underlying violation of a health standard; (2) a discrete health hazard contributed to by the violation; (3) a reasonable likelihood that the health hazard will result in an illness; and (4) a reasonable likelihood that the illness will be of a reasonably serious nature. The decision went on to state that any exposure to respirable dust above the 2.0 mg/m3 level would satisfy the second element. The third element is presumed by the establishment of a violation. The fourth element was established by medical facts concerning pneumoconiosis which "support a conclusion that there is a reasonable likelihood that illness from overexposure to respirable dust will be of a reasonably serious nature." 8 FMSHRC at 899.

Following its analysis of these elements, the Commission concluded: "Therefore, rather than requiring the Secretary to prove anew all four elements in each case, we hold that when the Secretary proves that a violation of 30 C.F.R. § 70.100(a), based on excessive designated occupational samples, has occurred, a presumption that the violation is a significant and substantial violation is appropriate." id. The presumption may be rebutted if the operator establishes that the miner or miners involved were not exposed to the hazard posed by the excesive dust, for example, through the use of personal protective equipment. There is no evidence in this record which would tend to show that the miners were not exposed to the hazard. The presumption is therefore unrebutted.

The Commission's Consolidation Coal decision refers to portions of the legislative history of the Act tending to show that Congress recognized that exposure to repirable dust below approximately 2.2 mg/m3 would not pose any danger of "disabling disease" or "complicated coal workers pneumoconiosis."

Nevertheless, it is clear that the holding in the Consolidation Coal case, by which I am bound, is that exposure to respirable dust in excess of 2.0 mg/m3 creates a presumption that the violation is significant and substantial. Since the presumption has not been rebutted here, I hold that the violation is significant and substantial.

ORDER

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

(1) The Notice of Contest filed herein is DENIED.

(2) Citation 9897010 issued September 19, 1986 including its special finding that the violation charged was significant and substantial is AFFIRMED.

(3) This proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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JAN 30 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-436 A.C. No. 46-01409-03526
v.	:	
	:	Seneca Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania, 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 $20 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 $20 within 30 days of this order.

Gary Melick
Administrative Law Judge

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