FEBRUARY 1987

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

FEBRUARY 1987

Review was granted in the following cases during the month of February:

Southern Ohio Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 86-35-R, 86-48-R, 86-102. (Judge Fauver, December 31, 1986)

Secretary of Labor on behalf of Ronnie Beavers, et al. and UMWA v. Kitt Energy Corporation, Docket No. WEVA 85-73-D. (Judge Maurer, January 13, 1987)

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket No. SE 87-29-R. (Judge Weisberger, January 15, 1987)

Secretary of Labor v. Jim Walter Resources, Inc., Docket No. SE 86-83. (Judge Broderick, January 21, 1987)

Secretary of Labor, MSHA v. Michael Brunson, Docket No. SE 86-40-M. (Judge Broderick, February 6, 1987)

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

Secretary of Labor, MSHA on behalf of Yale Hennessee v. Alamo Cement Company, Docket No. CENT 86-151-DM. (Judge Koutras, Order of December 30, 1986)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 3, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOSEPH G. DeLISIO, JR.	:	
v.	:	Docket No. PENN 86-83-D
MATHIES COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), counsel for the Secretary of Labor has requested Commission Administrative Law Judge George A. Koutras to clarify the remedial relief awarded in his decision of November 21, 1986. 8 FMSHRC 1772 (November 1986)(ALJ). We remand the matter to the judge to rule upon the merits of the Secretary's request.

In his decision, Judge Koutras concluded that Mathies Coal Company ("Mathies") violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), by unlawfully interfering with Joseph G. DeLisio's right as a representative of miners to accompany federal inspectors during inspection of the mine. To remedy the violation, the judge ordered Mathies to permit DeLisio to drive his private automobile to the mine portal where inspections normally begin or, in the alternative, provide DeLisio with company transportation underground to that location.

Neither party sought review of the judge's decision by filing a petition for discretionary review with the Commission under section 113(d)(1)(A)(i) of the Act. 30 U.S.C. § 823(d)(1)(A)(i). However, on December 22, 1986, the judge received from counsel for the Secretary a document entitled "Request for Clarification." The Secretary asserted that Mathies had refused DeLisio the use of his private automobile and that DeLisio cannot reach, in a timely manner, the portal where inspections begin by using company-provided underground transportation. The Secretary requested the judge to clarify or amend the relief previously ordered by requiring Mathies to provide DeLisio with transportation that will allow him to reach in 20 minutes or less the portal where the inspections begin.

Because he had issued his final decision in this matter under 29 C.F.R. § 2700.65, the judge forwarded the Secretary's request to the Commission. By order dated December 30, 1986, we stayed the running of the period within which the judge's decision would become a final order of the Commission and directed Mathies to respond to the Secretary's request. Mathies has filed a response and contends that the relief ordered originally by the judge is "final and beyond review" and that the Commission lacks jurisdiction to entertain the Secretary's request.

When the judge's decision was released, his jurisdiction terminated and any subsequent request for substantive review or modification must be directed to the Commission, not the judge. 29 C.F.R. § 2700.65(c). Contrary to Mathies' assertions, a judge's decision does not become a final order of the Commission until 40 days after it is issued (30 U.S.C. § 823(d)(1)) and we have jurisdiction to act upon the Secretary's request.

We construe the Secretary's Request for Clarification as constituting, in effect, a timely petition for discretionary review of the relief ordered by the judge. Gravely v. Ranger Fuel Co., 6 FMSHRC 799 n. 1 (April 1984). Under the anti-discrimination provisions of the Mine Act, the Commission has broad authority, "as the Commission deems appropriate," to fashion appropriate remedies to abate violations of section 105(c)(1). See Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985). The purpose of such remedies is to eradicate the existence and effect of the unlawful discrimination to the greatest extent possible. Where, as here, a party timely disputes the efficacy or meaning of the remedy and requests that the judgment be clarified or amended, the request may be entertained by the Commission. Cf. Fed. R. Civ. P. 59(e).

This matter is remanded to the judge to rule upon the request for clarification. The judge may conduct such expedited proceedings as may be necessary for purposes of his ruling. Any party dissatisfied with the judge's further ruling may timely petition the Commission for review of the decision as clarified or amended.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES CORBIN, ROBERT CORBIN, and A. C. TAYLOR	:	
v.	:	Docket No. KENT 84-255-D
SUGARTREE CORPORATION, TERCO, INC., and RANDAL LAWSON	:	

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

ORDER

BY THE COMMISSION:

In this discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the Secretary of Labor has filed a Motion to Dismiss or Vacate Portion of Direction for Review based on a Settlement Agreement submitted with the motion. For the reasons set forth below, the Secretary's motion is granted.

The above-captioned matter is pending on review before the Commission. The Secretary's motion is based on a settlement agreement that has been reached among the Secretary, complainants James and Robert Corbin, Terco, Inc., Randal Lawson, and other individuals associated with Terco. Subsequent to the 1984 discharges of the Corbins and A.C. Taylor at issue in the pending proceeding, the two Corbin complainants were reinstated (pursuant to a Commission judge's order of reinstatement) but were discharged again by Terco in 1986. These latter discharges became the subject of further discrimination complaints filed by the Secretary on the Corbins' behalf. FMSHRC Docket Nos. KENT 86-131-D & 86-132-D.

As related in the Secretary's present motion, the parties in these latter cases have entered into a settlement of the charges involved in those cases. Their settlement involves expungement of references in the respondents' employment records to the discharges of the Corbins (including the 1984 discharges) and payment of $50,000 in damages by the respondents to the Corbins. The Commission administrative law judge presiding over these latter cases approved the parties' settlement and dismissed these cases on January 6, 1987.

The settlement agreement is signed by the Corbins and, according to the Secretary's motion, the $50,000 in damages "has been paid." In the settlement agreement, the Corbins waive any right to employment reinstatement with Terco. Further, the Secretary agrees to "forego any enforcement action with regard to the award made on [the Corbins'] behalf" in the proceeding pending before the Commission, but to "take all action necessary to enforce the award on behalf of A.C. Taylor," who is not a party to the settlement agreement. Based on the assertion that the Corbins, Terco, Randal Lawson, and others associated with Terco have now resolved their differences, the Secretary moves to vacate or dismiss that portion of the Commission's direction for review in the pending matter pertaining to the liability and remedial issues affecting the Corbins.

In light of the above, and upon consideration of the Secretary's motion, we grant the Secretary's motion. That portion of the Commission's direction for review in the instant matter pertaining to liability and personal remedy issues affecting the Corbins is hereby dismissed. We emphasize that all liability issues (including the question of successorship) and all personal remedy issues insofar as they affect the remaining complainant, A.C. Taylor, remain for decision.

For the foregoing reasons, the Secretary's motion is granted on the terms specified above.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1987

HOBET MINING & CONSTRUCTION COMPANY	:	DOCKET NOS. WEVA 84-113-R
	:	WEVA 84-114-R
v.	:	WEVA 84-209
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"). At issue is whether Hobet Mining and Construction Co. ("Hobet") violated 30 C.F.R. § 77.1303(h), a mandatory safety standard specifying procedures to be taken when blasting. 1/ Following a hearing, Commission Administrative Law Judge James A. Broderick found Hobet in violation of the standard and assessed a civil penalty of $5,000. 7 FMSHRC 1807 (November 1985)(ALJ). For the reasons set forth below, we conclude that the Secretary failed to prove the violation under the standard, and we reverse the judge's decision.

1/ 30 C.F.R. § 77.1303(h) provides:

> Ample warning shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

The term "blasting area" is defined in the mandatory safety standards for surface coal mines and surface work areas of underground coal mines as:

> [T]he area near blasting operations in which concussion or flying material can reasonably be expected to cause injury.

30 C.F.R. § 77.2(f).

Hobet is the owner and operator of the No. 21 Surface Mine located in Boone County, West Virginia. At the mine the company engages in a mining process known as "mountaintop removal," in which successive layers of materials that overlie three coal seams are fractured by blasting and removed, thereby permitting extraction of the exposed seams. The topmost layer of material is called the "overburden." Material lying between the seams is called the "innerburden." Blasting the innerburden is called a "bottom shot."

On December 19, 1983, Hobet was bottom shooting to remove the innerburden covering the deepest of the coal seams. The innerburden consisted of sedimentary slate ranging in depths of up to 12 feet. The drilling pattern consisted of 91 bore holes, 7-7/8 inches in diameter and drilled on 14-foot centers. The holes ranged in depth from 3-1/2 to 12 feet.

A five-member crew, including certified blaster David Pauley, was responsible for loading and detonating the explosives. Pauley selected the blasting caps and determined the blasting pattern. Under Pauley's direction, the crew placed blasting caps and primers in the bore holes, then loaded the bore holes with pre-measured waterproof "wet bags" of an ammonium nitrate fuel oil mixture ("ANFO"). Fifteen-pound bags were loaded into the shorter bore holes, while either one or two 40-pound bags were loaded into the deeper holes. The holes were stemmed with drill cuttings and the blasting cap wires were connected in series to a lead wire.

The acting shot foreman had personnel and equipment withdrawn to a location behind a spoil bank at a distance in excess of 1,100 feet from the blasting site. Blasting crew member Barton Lay ran out a spool of lead wire a distance of 500 feet, spliced the end to a second spool and ran it out another 500 feet. He then connected the lead wire to the shooting battery. The shooting battery was positioned in front of the bucket of a front-end loader, near an open space between two parked vehicles. Pauley, Lay, and another crew member remained in the open near the shooting battery in order to detonate and observe the blast. After the shot was detonated, two rocks were observed coming from the center of the blast. The three men sought cover between the parked vehicles. Lay was struck by one of the rocks as it fell between the trucks, approximately 1,115 feet from the blasting pit. Lay sustained severe permanent injuries, including paralysis below his chest.

Following an investigation of the accident by the Department of Labor's Mine Safety and Health Administration, Hobet was issued a withdrawal order under section 107(a) of the Mine Act and a citation under section 104(a). The order and citation each alleged a violation of section 77.1303(h) and each contained the following identical description of the violation:

> [A] practice prevailed of the blasting crew being permitted to position themselves in the open blasting area and not under suitable blasting shelters to protect the miners endangered from fly-rock. Also, the blasting area from which the

> blasting was detonated, ranged in distances from approximately 700 to 1,115 feet from the material to be blasted and on numerous occasions the flyrock extended to the area where the blast was detonated and beyond.

The order was terminated and the citation was abated after additional training for blasting personnel was completed and a new blasting procedure was implemented. The new blasting procedure provided that blasts would be detonated and that all persons would be withdrawn at least 1,500 feet from the shot.

The judge concluded that the validity of the withdrawal order was dependent upon the existence of the alleged violation of section 77.1303(h). 7 FMSHRC at 1812-13. As to the violation, the judge considered the crucial issue to be whether Hobet had a practice "of blasting from an open area where flyrock could reasonably be expected to cause injury." 7 FMSHRC at 1813. He stated that, "evidence of many prior bottom shots throwing flyrock in excess of 1000 feet establishes a blasting area -- that is, an area in which flying material could reasonably be expected to cause injury -- in excess of 1000 feet." Id. He further concluded that Hobet did not clear or remove all persons from the blasting area before detonating shots. Id. The judge recognized that the number of bore holes and the shot pattern may affect the size and location of the blasting area and that these factors played some part in determining where miners positioned themselves before detonation. 7 FMSHRC at 1813-14. However, the judge stated that the evidence clearly established that Hobet followed a practice of blasting from an area which flyrock frequently reached and that it did not have or follow a plan that would ensure removal of miners from areas where flyrock reasonably could be expected. 7 FMSHRC at 1814.

We hold that the judge erred in concluding that the Secretary proved a violation of section 77.1303(h). On its face, section 77.1303(h) specifies alternative means for protecting miners from the threat of concussion or flyrock caused by blasting: Either all persons shall be cleared and removed from the blasting area or suitable blasting shelters shall be provided. To establish a violation of the standard, based on a failure to clear and remove all persons from the blasting area, the Secretary must prove that an operator has failed to clear and remove all persons from the "blasting area," as that term is defined in section 77.2(f). This requires the Secretary to establish the factors that a reasonably prudent person familiar with mine blasting and the protective purposes of the standard would have considered in making a determination under all of the circumstances posed by the blast in issue. The Secretary must then prove that the factors were not properly considered or employed. See, e.g., Magma Copper Co. 8 FMSHRC 656, 660 (May 1986); U.S. Steel Corp., 6 FMSHRC 2908, 2910 (August 1984); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1982); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982).

An operator's pre-shot determination of what constitutes a blasting area is based not only upon the results of prior shots, but also depends upon a number of variables affecting the upcoming shot.

These variables may include, but are not limited to, the amount and type of explosive used, the depth of the holes that constitute the shot, the topography, and the expertise and prior experience of the blaster. See Austin Powder Co., 5 FMSHRC 81, 123 (January 1983)(ALJ). 2/

Here, the Secretary failed to offer sufficiently specific evidence regarding Hobet's lack of consideration of the various factors that affected flyrock generation on December 19, 1983, or on previous occasions when Hobet blasted. The MSHA inspector stated that in the process of investigating the accident, he could not recall inquiring about or otherwise determining the composition of the material being blasted, the depth and diameter of the bore holes, or the amount of the explosives used, and the inspector did not ask Pauley whether he had considered these factors. I Tr. 130-31, 137-38. The inspector did offer his opinion that the blasting area on December 19, 1983, was in excess of 1,400 feet. I Tr. 130, 137, 139-40. The opinion was derived from Pauley's statement during the accident investigation that the furthest distance flyrock had traveled previously was in excess of 1,400 feet. I Tr. 139-40.

We conclude, however, that a determination of what constitutes a blasting area which is based solely upon a statement of the furthest past projection of flyrock is not sufficient to establish what reasonably might be expected in a given situation without also considering the appropriate variables that effect flyrock projection. Hobet, on the other hand, offered evidence which supports a finding that appropriate variables for determining the blasting area were considered by Hobet's employees prior to blasting. Pauley testified that between December 1979 and December 1983, he detonated approximately 1,880 shots at Hobet's No. 21 Surface Mine. III Tr. 149. He also testified that in his experience with shots like the one that caused the injury to Lay -- that is, shots comprised of 91 bore holes, 7-7/8 inches in diameter on 14-foot centers, loaded with wet bags of ANFO and detonated with electric blasting caps -- he had never seen flyrock travel over 1,000 feet. III Tr. 194. This testimony was not refuted. Considering the above factors, and the composition of the innerburden which he was shooting on December 19, 1983, Pauley testified that he expected flyrock to travel 150 to 200 feet. III Tr. 194-95.

2/ At the hearing, on both direct and cross-examination, the inspector who issued the withdrawal order and citation identified similar variables that he believed should be considered by an operator in determining the blasting area. I Tr. 50-51, 126-27. Among the factors he identified were the composition of the material being blasted, the depth and diameter of the bore holes, the configuration of the shot, the amount of explosives used, whether bulk ANFO or wet bags were used, the delay pattern of the shot, and the amount of stemming in the bore holes.

During oral argument before the Commission, counsel for the Secretary stated that if Hobet had taken the factors identified above into account prior to detonating individual shots and on that basis determined the blasting area, Hobet "would have achieved compliance with ... the regulation." O.A. Tr. 24. Pauley's undisputed testimony establishes that he did take those factors into consideration in determining the blasting area prior to detonating the shot on December 19, 1983.

Because the judge based his finding of a violation solely upon the distance flyrock previously had traveled and because substantial evidence is not present in the record that Hobet, in the December 19 blast or as a practice, failed to clear and remove all persons from the blasting area as required by 30 C.F.R. § 77.1303(h), the judge's decision is reversed and the order and citation are vacated. 3/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ Given our disposition, we do not reach the question of whether Hobet, as a practice, failed to provide suitable blasting shelters.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
February 10, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 86-115
UPRIGHT MINING, INC.	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on January 26, 1987, finding Upright Mining, Inc. ("Upright") in default for failure to respond to a show cause order. The judge assessed a civil penalty of $578. The record indicates, however, that shortly before issuance of the default order Upright in fact had filed with the Commission its response to the show cause order; due to certain unusual circumstances this response was not brought to the judge's attention until after issuance of the default order. We vacate the default order and remand for further proceedings.

On February 24, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Upright a citation alleging a violation of 30 C.F.R. § 70.208 for failure to submit a required respirable dust sample. On March 11, 1986, Upright received an imminent danger order and citation alleging a violation of 30 C.F.R. § 75.200 for inadequate roof support. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Upright filed a "Blue Card" request for a hearing before this independent Commission. On June 30, 1986, the Secretary of Labor filed a Proposal for Assessment of Civil Penalty seeking a $578 penalty. Upright did not file an answer to the penalty proposal.

On November 13, 1986, Judge Merlin issued an Order to Show Cause directing Upright to file an answer to the penalty proposal within 30 days or be placed in default. Upright did not respond within the 30 days, and on January 16, 1987, the Secretary filed a Motion for Summary Decision. On January 22, 1987, the Commission's Docket Office received Upright's response to the show cause order. Due to circumstances created by a local snow emergency, Upright's answer was not routed internally to the judge's attention until the day after his default order was issued on January 26, 1987.

The judge's jurisdiction in this matter terminated when his default order was issued on January 26, 1987. 29 C.F.R. § 2700.65(c). Under the unusual circumstances presented, we regard Upright's response to the show cause order as constituting, in effect, a timely request for review of the judge's default order. Cf. Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986).

We recognize that Upright's response/answer was filed beyond the time limit set by the judge in his show cause order, and Upright has not provided any explanation for its late filing. Nevertheless, in mitigation, we assign weight to the fact that Upright filed a response before the default order was issued. Cf. Sigler Mining Co., 3 FMSHRC 30 (January 1981)(attempt to comply at least partially with a judge's order may be a mitigating factor in default situations). Inasmuch as Upright has not explained its late filing, we are not prepared to rule summarily. In fairness, however, we conclude that Upright should be afforded the opportunity to explain its late filing to the judge, who shall determine whether relief from default is warranted. Cf. Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

For the foregoing reasons, the judge's default order is vacated and the matter is remanded for proceedings consistent with this order. Upright is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 27, 1987

LOCAL UNION NO. 5817, DISTRICT 17, UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. WEVA 85-21-C
MONUMENT MINING CORPORATION and ISLAND CREEK COAL COMPANY	:	

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

DECISION

BY: Ford, Chairman; Backley, Doyle, and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"). The question presented is whether the mine owner as well as its independent contractor may be held liable for a compensation claim under section 111 of the Mine Act, 30 U.S.C. § 821, when the compensation claim arises from a violation of a mandatory safety standard committed solely by its independent contractor. Commission Administrative Law Judge George A. Koutras concluded that only the contractor could be held liable in this instance and dismissed the idled miners' compensation complaint against the mine owner. 7 FMSHRC 1519 (September 1985)(ALJ). For the reasons that follow, we affirm.

The parties waived a hearing and stipulated to the facts in this case. Island Creek Coal Company ("Island Creek") owns the No. 1 Surface Mine located in Holden, West Virginia. At the time the miners were ordered to be withdrawn from the mine, Monument Mining Corporation ("Monument"), an independent contractor, was party to a five-year contract with Island Creek pursuant to which it was to operate the mine. Under the contract, Monument had "full and complete control of the work to be performed" at the mine. The miners were employees of Monument. Island Creek had no control over Monument's employees or its mining

operations, except as necessary to protect Island Creek's property and to ensure conformity with its mining plans. 1/

On August 1, 1984, two and one-half months before Monument unilaterally terminated its contract with Island Creek, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Monument an order of withdrawal, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), withdrawing the miners from the pit area of the No. 1 Surface Mine. The order alleged a violation of 30 C.F.R. § 77.1303(j), a mandatory safety standard requiring special precautions when blasting is done at surface mining areas in close proximity to underground operations.

Monument performed and wholly controlled the blasting that resulted in the issuance of the withdrawal order. Island Creek had no involvement in the planning or execution of the blasting. Monument abated the violative condition in approximately 48 hours. As a result of the withdrawal order, the affected miners were idled from 6:45 a.m., August 2, 1984, until 5:30 a.m., August 4, 1984. Monument filed a notice of contest of the withdrawal order. Monument failed to participate in that proceeding, and its notice of contest was dismissed. Monument Mining Corp., 7 FMSHRC 232 (February 1985)(ALJ).

On October 30, 1984, Local Union No. 5817, District 17, of the United Mine Workers of America ("UMWA" or "Union"), filed a complaint against Monument seeking compensation, pursuant to section 111 of the Mine Act, on behalf of the miners idled by the withdrawal order. 2/

1/ Island Creek retained the right under the contract "of entering upon, examining and surveying [the] mine operations and inspecting, examining and verifying all books, accounts, statements, maps and plans of [Monument] for the purpose of ascertaining the coal taken from [the No. 1 Surface Mine, and] to determine the manner in which the mining operations of [Monument] are being conducted...."

2/ Section 111 states in part:

> [1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ... section [104] ... or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an

Monument failed to answer the UMWA's complaint or to respond to its interrogatories. On February 4, 1985, the judge issued a show cause order directing the parties to show why Monument should not be held in default and a summary decision in favor of the UMWA issued. Monument did not respond to the judge's order. Also, by this time Monument had ceased mining operations at the No. 1 Surface Mine.

Subsequent to the judge's show cause order, the UMWA learned that the No. 1 Surface Mine was owned by Island Creek. Based on this information, the Union moved to amend its complaint by adding Island Creek as a respondent. The motion was granted. By agreement of the UMWA and Island Creek, this proceeding was submitted to the judge on stipulations and briefs.

In his decision, the judge found that Island Creek "was in no way responsible for the violative conditions which gave rise to the withdrawal order idling the miners." 7 FMSHRC at 1531. The judge held that liability for compensating the idled miners attached to Monument, the independent contractor responsible for the violation, and he dismissed the UMWA's complaint against Island Creek. Id. The judge relied on Commission precedent to the effect that, in appropriate circumstances, an independent contractor may be held solely liable for the violations it commits. 7 FMSHRC at 1530-31. Finding Monument in default, the judge concluded, "While it is unfortunate that Monument is no longer in business, I find no basis for the UMWA's attempts to hold Island Creek liable for the payment of these claims." 7 FMSHRC at 1531. Accordingly, the judge ordered Monument to pay the compensation claims filed against it by the UMWA. Id. The Commission granted the UMWA's petition for discretionary review, and we subsequently heard oral argument in this matter.

On review the UMWA argues that because a mine owner may be held liable for the violative actions of its independent contractor, it also may be held responsible for remedying those actions, including paying compensation to miners idled as a result of a withdrawal order even though the mine owner had no connection with the independent mining operator. Arguing for joint and several liability in this case, the Union candidly states, "[T]he purposes of the Act were best achieved when the UMWA sought relief from the operator who had the deepest pocket...." We disagree. The plain meaning of section 111 of the Mine

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> order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser...

30 U.S.C. § 821 (sentence numbers added).

Act, as well as the overall purpose of the Act, establish that the "operator" responsible for the conditions or violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners.

Section 111 of the Mine Act entitles miners idled by certain withdrawal orders to compensation "by the operator." The third sentence of section 111 links compensation to an idling withdrawal order issued "for a failure of the operator to comply with any mandatory health or safety standards." Consistent with our holdings in Local Union No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1178 (May 1981) and Local Union 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317, 1324 (September 1986), we adhere to the principle that determinations of compensation under section 111 must focus upon the conduct of the operator responsible for the conditions of the mine. We find no statutory basis upon which section 111 compensation should be distinguished from the liability for the underlying health and safety violation.

Moreover, section 2(c) of the Mine Act, 30 U.S.C. § 801(c), embodies congressional policy "to prevent death and serious physical harm" from occurring in the nation's mines. This legislative purpose is best effectuated if the operator responsible for a violation is also held responsible for any compensation claim of its employees arising from such violation. Thus, the result we reach here today furthers the Act's policy by reinforcing that the independent contractor must make every effort to create and maintain a hazard-free mine environment, and insures that he will not be able to avoid the remedial or compensation consequences of citations and orders by shifting them to the mine owner.

In the instant case Monument alone was cited for the underlying violation. The UMWA has stipulated that Monument was solely responsible for performing and controlling the blasting practices that led to the issuance of the withdrawal order. The judge determined that the Secretary properly charged Monument with the underlying violation. He considered and applied the relevant case law regarding independent contractor/owner liability and properly concluded that Monument alone was responsible for the underlying violation giving rise to the subject withdrawal order.

Accordingly, the judge's decision that Monument alone is liable for the idled miners' section 111 compensation claim is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lastowka, dissenting:

The Commission and the courts often have been called upon to address issues concerning a mine operator's liability for violations of the Mine Act committed by independent contractors. The present case, however, presents for the first time a question concerning a mine operator's liability for compensation of miners prevented from working as a result of a violation committed by its contractor. In my opinion my colleagues reach an erroneous conclusion on the novel and important issue presented. For the reasons that follow, I respectfully dissent from their affirmance of the administrative law judge's decision. In my opinion, the judge's decision should be reversed and the case remanded for further proceedings.

In section 111 of the Mine Act, 30 U.S.C. § 821, Congress mandated that certain limited compensation be paid by mine operators to miners idled from working due to withdrawal orders issued by MSHA inspectors because of unsafe conditions at the mine. Section 111's grant of compensation to miners is but one component of the Mine Act's comprehensive regulatory scheme for achieving safe working conditions in the nation's mines. As such, section 111 must be interpreted in harmony with the other provisions of the Act with which it is interwoven. Rather than harmonizing the interpretation of the various statutory provisions to determine the outcome of the present case, the practical effect of the majority decision is to relegate the statute to a role subservient to a private contractual arrangement structured by the mine operator.

The starting point for resolving the issue before us must be the recognition of the well-settled principle that as a matter of law under the Mine Act an operator of a mine is liable, regardless of fault, for violations of the Act committed by independent contractors hired by it. This principle has been stated repeatedly and clearly. Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); Old Ben Coal Co., 1 FMSHRC 1480 (October 1979); aff'd, No. 79-2367, D.C. Cir. (December 9, 1980); Phillips Uranium Corp., 4 FMSHRC 549 (April 1982); Calvin Black Enterprises, 7 FMSHRC 1151 (August 1985). See also Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535 (D.C. Cir. 1986). Cf. Bituminous Coal Operators' Assoc., 547 F.2d 240 (4th Cir. 1977); Republic Steel Corp., 1 FMSHRC 5 (April 1979)(identical holdings under predecessor 1969 Coal Act). Although the majority decision purports to be guided by the decisions in Old Ben, Phillips Uranium and Calvin Black, it ignores the primary and clear holding in those cases concerning the Act's liability without fault structure. Instead, it focuses on the separate discussion in those decisions addressing a very distinct issue, i.e., the scope of Commission review of the Secretary of Labor's actions in initiating

enforcement against mine operators for their contractors' violations. */ That issue, however, is not before us.

The underlying history in the present case reflects appropriate enforcement action by the Secretary. Monument Mining was operating a surface mine pursuant to a mining contract with Island Creek. Insofar as the operation of the surface mine is concerned, it is indisputable that: Monument was Island Creek's contractor; Monument was an "operator" of the mine within the meaning of section 3(d) of the Act, 30 U.S.C. § 802(d); and, importantly, Island Creek also was an "operator" of the mine within the meaning of section 3(d). In the course of its mining activities Monument engaged in blasting in a manner that an MSHA inspector determined to be hazardous. The inspector took enforcement action directly against Monument by issuing a closure order to Monument. Because Monument was the operator to whom the order was issued, it logically was the operator in the position to contest before the Commission the validity of the order pursuant to section 105(d), 30 U.S.C. § 815(d), and it did so. In the meantime, a separate claim for compensation under section 111 of the Mine Act was filed with the Commission on behalf of the miners who had been idled by the issuance of the withdrawal order. This claim for compensation logically and appropriately named Monument as respondent.

Up to this point the enforcement of the Act and the litigation thereunder was proceeding in the normal fashion. At this juncture, however, the litigation took an unusual and unexpected turn: Monument unilaterally ceased operations and went out of business. This action by Monument naturally affected the litigation before the Commission. In the litigation initiated by Monument to challenge the Secretary's withdrawal order, Monument defaulted. In the separate compensation proceeding initiated by the miners, however, the miners responded to the turn of events by seeking to add Island Creek as a respondent in its capacity as operator of the No. 1 surface mine. The majority precludes the attempt by the miners to add Island Creek as a respondent in the compensation proceeding. The reasons offered for doing so are not convincing.

My colleagues first state that "the 'operator' responsible for the conditions or violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners." Slip op. at 4.

*/ As to that issue it has been consistently recognized in the cited cases, and I agree, that secretarial enforcement solely against mine operators for violations committed by their independent contractors, to the exclusion of the contractors themselves, is an inefficient manner of achieving the Act's purposes and runs counter to the clear intent of Congress to have contractors directly subjected to the Act's requirements. Rather, direct enforcement against contractors who create hazardous conditions, whose employees are exposed to the hazards, and who are in the best position to immediately secure abatement is the most effecient and effective enforcement course. In fact, subsequent to Old Ben the Secretary adopted a regulatory approach of enforcement directly against contractors that create and control violative conditions, while expressly reserving for use in appropriate circumstances his clear legal authority to also pursue enforcement against mine operators for their contractors' violations. 45 Fed. Reg. 44,494 (1980).

The case law set forth above makes clear, however, that an operator who contracts out work at a mine site is jointly and severally responsible and liable for violations of the Mine Act committed by its contractor. E.g., Harman Mining Corp., 671 F.2d at 797; Old Ben, 1 FMSHRC at 1483. The majority further states that it "adhere[s] to the principle that determinations of compensation under section 111 must focus upon the conduct of the operator responsible for the conditions of the mine." Slip op. at 4. The cited case law makes clear, however, that a mine operator such as Island Creek is responsible for conditions at its mine regardless of whether it contracts out work at the mine. E.g., Cyprus Industrial Minerals Co., 664 F.2d at 1119-20 citing Republic Steel Corp., 1 FMSHRC 5, 11 (April 1979). Finally, the majority states that the administrative law judge "considered and applied the relevant case law regarding independent contractor/owner liability and properly concluded that Monument alone was responsible for the underlying violation giving rise to the subject withdrawal order." Slip op. at 4 (emphasis added). As stated, however, the relevant case law in fact places joint and several liability for the underlying violation on Island Creek. Simply stated, the majority appears to mistakenly assume that there is only one "operator" of a mine. The law is clear that where a contractor performs work for a mine operator the contractor and the mine operator are both "operators" of the mine within the meaning of the Act. Therefore, to the extent that the majority's holding is based on the belief that under the Mine Act Island Creek is not liable or responsible for the violation of the Mine Act committed by its contractor it is fundamentally flawed.

Given the fact that Island Creek is an operator of the No. 1 Surface Mine and given the resulting conclusion that as a matter of law it is responsible for violations of the Mine Act committed by its contractors at the mine, it accordingly has a residual liability under section 111 for compensation due miners as a result of the violation of the Act. Section 111 contains no special definition of the term "operator" limiting its application exclusively to independent contractors in situations where the mine operator chooses to employ contractors to undertake mining activities. Therefore, the same general principle of joint and several liability previously discussed applies equally in the section 111 compensation context. The Commission recently has eschewed a narrow, purpose-defeating interpretation of section 111. E.g., Local Union 1889, District 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317, 1323-24 (September 1986). A similar approach is required here.

To the extent that the majority's conclusion may be influenced by an underlying concern for a perceived "unfairness" in adding Island Creek as a respondent at the present stage of the proceedings, those concerns should be allayed by the record and certainly could be accommodated in a remand to the judge. The contract between Island Creek and Monument reveals that Island Creek, as principal, carefully protected its interests in structuring the terms of its contractual mining arrangement with Monument. Exhibit A. For example, the contract provides that:

> Contractor shall be solely responsible for and shall fully idemnify and forever defend Owner from and against any and all liability for any

> citation or any withdrawal order issued pursuant to the Federal Mine Safety & Health Act of 1977, as the same may be amended or superceded, and any state health and safety laws, and their respective regulations and standards, relating to the operations and work performed under this agreement. Contractor shall be solely responsible for abatement of the alleged violation or danger and shall be solely liable for any civil or criminal penalty assessed pursuant to and as a result of said citation or order, whether assessed against Contractor or Owner. In the event any such penalty is assessed against and paid by Owner, Contractor shall promptly reimburse Owner for said penalties, and Owner may deduct and withhold from the payments due to contractor under this agreement an amount sufficient to cover any penalties which are assessed against Owner, and the costs, including reasonable attorney's fees, for defending any actions brought to assess and collect said penalties.

Exhibit A, Article 13. Furthermore, the contract required the giving of 90 days notice prior to termination of the contract by either party (Article 9) and also required Monument to deposit $40,000.00 with Island Creek in an escrow account. Exhibit A, Article 21. Thus, any monetary damages suffered by Island Creek as a result of its legal liability for its contractor's violations of the Mine Act were anticipated and provided for. To the extent that Island Creek might be considered procedurally harmed by Monument's default prior to a hearing on the merits of its challenge to the validity of the withdrawal order giving rise to the compensation claim, the Commission certainly possesses the discretion in these circumstances to direct the administrative law judge to broaden the scope of the compensation hearing to entertain any available substantive challenges to the validity of the underlying withdrawal order that would affect an award of compensation under section 111.

For these reasons, I dissent from the affirmance of the administrative law judge's decision. I would reverse and remand for further proceedings.

James A. Lastowka
Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 3, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 87-6 A. C. No. 01-00328-03608
v.	:	Bessie Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a joint motion to approve settlements of the three violations involved in this case. The total of the originally assessed penalties was $357. The total of the proposed settlements is $60.

The three citations were issued because valid respirable dust samples allegedly were not submitted by the operator. In their motion the parties state that the operator did, in fact, submit the requisite number of samples, i.e., five samples from each designated occupation. However, in each designated occupation one sample of the five contained oversized particles which could not be analyzed. The Solicitor has orally advised that the presence of an oversized particle cannot be attributed to any negligence on the operator's part. Also, the miners here wore respirators. Finally, once valid samples were submitted, the average concentrations of respirable dust in all samples were within acceptable limits. In light of the foregoing, I conclude the violations were not serious and the operator was not negligent.

The history of previous violations with respect to this medium-sized operator is average. Payment of the proposed settlements will have no effect on the operator's ability to continue in business.

The representations and recommendations of the parties are accepted.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $60 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

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

FEB 3 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-141-M A.C. No. 42-00377-05502
v.	:	Fife Brigham Pit
FIFE ROCK PRODUCTS COMPANY, INC., Respondent	:	

DECISION AFTER REMAND

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Clifford P. Woodland, Fife Rock Products Company, Inc., Brigham City, Utah, pro se.

Before: Judge Morris

On October 14, 1986, the Commission remanded the above case and directed that respondent be granted the opportunity to present its position seeking a hearing after the entry of a default order in the case. Respondent reasserted its position and the judge concluded that a hearing should be granted, (Order, November 20, 1986).

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on January 6, 1987. The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulation, if so, what penalty is appropriate.

Citation 2360673

This citation charges respondent with violating 30 C.F.R. § 56.15007, which provides as follows:

> Protective clothing or equipment and face shields, or goggles shall be worn when welding, cutting or working with molten metal.

Summary of the Evidence

Tyrone Goodspeed, an experienced MSHA inspector, conducted an investigation at respondent's sand and gravel operation on April 16, 1985 (Tr. 6, 7).

This was an average sized plant with three employees (Tr. 8). The plant area consists of a set of screens, conveyor belts, a control room and a dump point (Tr. 9).

The inspector located plant manager Harper who was then cutting holes in a screen with an oxygen acetylene torch (Tr. 10). He was lying on his side and not wearing glasses or any protective equipment (Tr. 10, 12, 13). Harper explained that he had forgotten about wearing the glasses (Tr. 11). He had been in a three foot space with the torch approximately 18 inches from his face (Tr. 11, 12).

In the inspector's experience Harper could have been blinded or incur a serious eye injury from molten material (Tr. 12). The inspector believed that it was reasonably likely that an injury could occur in these circumstances (Tr. 13, 15).

The inspector believed this was a condition involving imminent danger (Tr. 13, 14). Further, he believed that the negligence was high (Tr. 14).

The inspector further indicated the citation was incorrectly dated (Tr. 16-29, 33). The inspector's notes and the form indicating the operator had been advised of his rights to a conference were received in evidence (Tr. 24).

Respondent offered in evidence its written narrative filed with the Commission (Tr. 35, 36; Ex. R3, R4). Respondent does not deny the violation but it condemns the action of its employee (Tr. 37).

Earl Harper, testifying for the operator, indicated he has been employed by Fife Rock for 30 Years (Tr. 38). He is now designated as the plant manager (Tr. 38, 46).

He normally uses glasses but on the day of the inspection he was at the Eljay screen installing J-bolts by first punching holes in the screen deck with a torch (Tr. 39, 40, 67). It was his neglect in failing to take his glasses with him (Tr. 41). The company, as well as the citation, stresses the use of glasses (Tr. 41). Harper realized that a potential for injury existed here and he should have used safety equipment (Tr. 43, 45, 50). Harper, who has been using a torch for 35 years, has no supervisory authority at the plant. There were two other operators at the site (Tr. 47).

Notwithstanding the company rule to the contrary, Harper admitted he had previously used a welding torch without wearing glasses. But he had not done so since the citation was issued (Tr. 51).

Don Perry runs the front-end loader. He also assisted with installing screens when necessary (Tr. 52-54). Perry didn't think Harper was wearing any protective equipment that day (Tr. 55). The company stresses safety (Tr. 56).

Ray Hardy feeds the crusher with a rubber tire dozer (Tr. 57). Hardy also assisted in installing the new screens (Tr. 57). When he was called Harper replied that he'd be through in a minute (Tr. 58, 59). Later, when they discussed the citation, the inspector seemed upset with Harper (Tr. 61, 64).

The company always instructed the employees to cooperate with MSHA (Tr. 61). Signs in the shop stress safety and accidents (Tr. 62).

Discussion

The evidence establishes that the violation occurred. Harper was seen by the inspector to be using a torch without protective gear. Respondent's evidence confirms the violation. The citation should be affirmed.

The principal issue concerns the assessment of a civil penalty. The statutory penalty to assess a civil penalty is contained in Section 110(i) of the Act which provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering the statutory criteria I find that the computer printout received in evidence establishes that the operator had three assessed violations in the two year period ending April 15, 1985. This is a considerable improvement over the 11 violations assessed in the period before April 16, 1983. Three violations indicate respondent's prior adverse history of violations is below average. The operator with three employees should be considered as small and the penalty hereafter assessed appears appropriate in relation to the size of the business. The operator was negligent since it failed to offer any persuasive

evidence that it enforced its safety rules relating to the use of protective eyeglasses. There is no evidence relating to the effect of the penalty on the ability of the operator to continue in business. But the obligation rests with the operator to produce such evidence. Buffalo Mining Company, 2 IBMA 226, (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity of the violation should be considered as high. The employee could have been blinded by molten lead. It is to the operator's credit that it rapidly abated the violative condition.

On balance, I consider that a civil penalty of $250 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 30 C.F.R. § 56.15007 and Citation 2360673 should be affirmed.

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

ORDER

1. Citation 2360673 is affirmed.

2. A civil penalty of $250 is assessed.

3. Respondent is ordered to pay to the Secretary the sum of $250 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

FEB 3 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-15-M A.C. No. 42-01789-05510
v.	:	Cottonwood #1 Mine
HYDROCARBON RESOURCES COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Robert K. Murray, Esq., 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 the merits took place on August 14, 1986 in Salt Lake City, Utah.

The Secretary waived his right to file a post-trial brief but respondent filed a brief.

Issues

The issues concern the appropriateness of the civil penalties to be assessed.

Citation 2360975

This citation alleges respondent violated 30 C.F.R. § 57.19110 which provides as follows:

> § 57.19110 Overhead protection for shaft deepening work. A substantial bulkhead or equivalent protection shall be provided above persons at work deepening a shaft.

Summary of the Evidence

The citation and orders in contest here were issued as a result of inspections that occurred on June 5, June 25, and June 26, 1985.

Ronald L. Beason, a metal and nonmetal mine inspector experienced in mining, previously inspected respondent's Cottonwood mine on December 28, 1982 (Tr. 20-22).

The inspection occurred because of a fatal accident at the mine (Tr. 22). At that time an imminent danger order was issued to Chad Evans, then vice president of Hydrocarbon Resources. The order alleged respondent violated § 57.19110 in failing to build and maintain substantial bulkheads (Tr. 23, 72). The citation was later terminated. The bucket and the bulkhead were used to protect the miners in the shaft (Tr. 24, 25, 86, 87).

This particular gilsonite mine had a 4 foot by 12 foot shaft and it was about 700 feet deep (Tr. 27). The shaft consists of the skip, manway and utility compartments. The shaft was not perfectly vertical but it varied from foot to hanging wall (Tr. 27, 28, 68). There were no guides in its 700 foot length (Tr. 36, 69). This would increase the probability of dislodging a rock (Tr. 36, 38).

The skip compartment is used to haul ore, men, and materials in and out of the mine. At the time of this inspection the vacuum system was transporting the gilsonite. In addition, they were blasting the rock and mucking it into the skip (Tr. 29, 30).

Bulkheads are timbers placed five to ten feet from the bottom of the shaft. They are directly over the miners' heads when they are in the bottom of the shaft. The bulkheads prevent the miners from being struck by falling rock (Tr. 30, 31). The skip itself can dislodge loose and rocks from the foot or hanging wall (Tr. 37, 38).

On the June 5, 1985 inspection the first (and only) bulkhead on the utility shaft was 354 feet from the shaft bottom (Tr. 31, 32, 82). The bulkhead was located approximately at the point where the Green fatality occurred in 1982 (Tr. 32). In addition to the single bulkhead there were various other obstructions such as pipes and lagging in the shaft (Tr. 84).

There was also a single bulkhead on the manway side 38 feet above the shaft bottom. There were no bulkheads on the utility side. Bulkheads are required for the skip compartment but there

were none. Lagging is required under the skip (Tr. 32, 34, 39). Lagging (3 x 8 timbers) is pulled across the bulkhead so the miners are protected while the skip travels to, and returns from, the surface (Tr. 33). There was lagging in isolated places (Tr. 70). The skip can be used as a bulkhead when situated at the bottom but a bulkhead is required when the skip is at the surface or descending or ascending (Tr. 33).

When the inspector arrived at the site the skip was on the surface. In addition, there was no bulkhead at the bottom of the shaft (Tr. 33). There was nothing to stop the fall of any rocks 700 feet in the skip compartment and 350 feet in the utility compartment (Tr. 34).

At the time of the inspection three shifts were working (Tr. 38).

When the inspector descended in the skip the miners were 10 to 12 feet (laterally) from the shaft bottom (Tr. 77). There were not sinking shaft but they were preparing to mine into a stope (Tr. 78, 81). The inspector questioned each miner and he learned that the day shift had completed mucking out the bottom of the shaft. They stated that no bulkheads or timbers had been removed (Tr. 79).

Inspector Beason measured and took notes. He indicated there was no lagging in the skip compartment. His notes directly contradict witness Jorgensen (Tr. 293-297; Ex. P3).

Don E. Jorgensen, testifying for respondent, indicated there were continuous glancing boards from the surface to the bottom of the shaft (Tr. 212, 213). There were stulls and lagging every five feet and 3 x 8's on every landing (Tr. 213). Jorgensen observed the inspector measure a hole at 13 inches but many measured two or three inches and they were not covered with pipe (Tr. 213, 214). On the manway side there were 14 foot ladders with landings every 10 feet. The first bulkhead was 38 feet from the bottom of the shaft (Tr. 215). When the June 5 citation was issued for failure to use bulkheads they had flooring out to the sides whenever they were working under the bucket for any length of time. The witness had never seen the bottom of the Cottonwood shaft without timbers or lagging. On the morning of June 5, 1985 the miners had started to mine gilsonite and they had moved out of the shaft (Tr. 216, 217).

Witness Jorgensen claimed bulkheads were used after the first citation was issued. In fact, Hydrocarbon discharged Royce, Grant and Dan Green for failing to use bulkheads when sinking a shaft at another location (Tr. 217-221, 248, 249, 256, 257).

Before the June 5 inspection Jorgensen had talked to Royce Green and his two boys urging them to be sure the bulkhead was installed (Tr. 221, 222).

Discussion

Respondent's answer admits this violation. Further, the parties have stipulated that the only issue concerns the appropriateness of the penalty (Tr. 16-18).

Accordingly, the citation should be affirmed. Issues relating to a civil penalty are discussed hereafter.

Citation 2359401

This citation alleges a violation of 30 C.F.R. § 57.20032 which provides as follows:

> § 57.20032 Two-way communication equipment for underground operations.
> Telephones or other two-way communication equipment with instructions for their use shall be provided for communication from underground operations to the surface.

Summary of the Evidence

During his inspection on June 25, 1985 inspector Beason was directed by Ken Cooper, shift foreman, to the company telephone. It was located on the bench in the hoist room under boxes, rags and other materials (Tr. 39, 40, 43).

The inspector determined there was no communication with the bottom of the mine (Tr. 40). He found the telephone did not work (Tr. 41). They then took it apart. The panels were rusty and the plug-ins had rusted off. The rust on the phone could not have accumulated within four days. In addition, the inspector did not observe any damage to the box itself (Tr. 42).

Ken Cooper stated the phone had been removed from service because of water in the shaft (Tr. 42).

When Mr. Cooper showed the inspector the telephone he made no claim that it had been damaged by blasting (Tr. 43).

On the following day company representatives, Don Jorgensen and Ralph Musick, told the inspector that the phone was new (Tr. 43). It had just been installed, blasted off the wall and rusted out after two days in a muckpot (Tr. 44). The inspector had the underground water analyzed by MSHA and contacted MSA (Mine Safety Appliance), the manufacturer. The company stated the neutral acidity solution would not cause it to corrode (Tr. 44, 45, 106-115). The inspector's investigation caused him to conclude that the phone was not four days old as claimed by the company (Tr. 45).

Management also asserted their backup communication system involved shutting off the ventilation. They did so five times

over 30 to 45 minutes. The men did, in fact, appear 45 minutes later (Tr. 47). The problem with this system of communication is that the miners below could not communicate to the surface (Tr. 47).

In the inspector's opinion the lack of communication could have aggravated any injury caused to a miner below ground (Tr. 48, 49). On a previous inspection (April 24) the company had a problem with the phone (Tr. 102, 103). The inspector believed the Pager 3 telephone in place on June 25th was the same instrument in use on April 24 (Tr. 104).

The inspector left the mine by signaling the hoistman for the skip. But he did not consider such signals nor a signal board to be effective communication because the hoistman could not return the signal (Tr. 116, 117). In addition, a signal board does not have an emergency code (Tr. 118).

Witness Don Jorgensen disagrees with inspector Beason concerning the telephone. On May 30th the company ordered a new phone. On June 5 he pointed out the new phone to the inspector (Tr. 222, 223).

The new phone had apparently been dislodged in a Friday night blast. As a result it was in the water until Monday morning (Tr. 223).

The original phone, seen in April, was an old instrument (Tr. 223). The witness produced an order for a telephone dated May 30. The order was for a Pager 3 and a battery (Tr. 224). The order bears a date stamp of May 31, 1985 and the witness installed it on June 3 (Tr. 224; Ex. R6).

The company was cited for failing to have a phone on June 25 (Tr. 224, 225). The new phone had to be replaced because it was corroded and rusted from being in the water and muck caused by the Friday night blast (Tr. 226).

Royce Green didn't tell anyone about the phone and Jorgensen didn't hear about it until Tuesday (Tr. 228).

On June 25 the company ordered a Pager and a 12 volt battery (Tr. 229; Ex. R7). The Pager 3 was an MSA phone (Tr. 230).

Witness Jorgensen indicated the signal code for operating the hoist directs the hoistman to either stop, start or position the conveyance at some predetermined location. Nine bells indicates impending danger or accident (Tr. 230, 231). Turning the air on and off also constitutes a signal system (Tr. 231). The signal system is posted at every landing and known to the miners (Tr. 231).

If the phone isn't available a person can talk down the vent pipe or suction pipe (Tr. 232).

The mine had to replace an entire length of galvanized suction pipe because the corrosion in the water had eaten through it (Tr. 233).

Discussion

Respondent's answer and the stipulation of the parties confirms that this violation occurred. Accordingly, the citation should be affirmed.

The evidence in a large degree addresses the issue involving the replacement to the telephone and the reason for its replacement. The regulation requires a two-way communication system. It is clear that there was no effective two-way system. Accordingly, the violation existed. The Mine Act imposes absolute liability on the operator. ASARCO, Incorporated, 8 FMSHRC 1632 (1986). Accordingly, the evidence relating to why the telephone was in-operative and why it became that way is relevant only as it relates to the imposition of a penalty. On the credible evidence I find that the telephone was inoperative only for a short period of time. In addition, it became rusted by lying in the water after only two days in the muckpot. These elements reduce the gravity as well as the operator's negligence. These features are hereafter considered in assessing a penalty.

Respondent's evidence that they signaled the miners by turning off the ventilation and by signalling the hoistman totally fail to comply with the regulation. Section 30 C.F.R. § 57.20032 requires a two-way communication system.

Citation 2359512 and 2359405

These citations allege separate violations of 30 C.F.R. § 57.12025 which provides as follows:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Summary of the Evidence

On June 25, 1985, Mr. Beason inspected a 480 volt submersible metal water pump in the bottom of the shaft (Tr. 49, 50).

The previous evening Larry Day, an electrical inspector, had checked the switch box containing 30 amp fuses and he determined that the ground wire had been cut (Tr. 50, 51, 60, 61).

They had abated the citation by connecting the ground wire. Company representatives also indicated they had conducted a continuity test (Tr. 51). Such a test will confirm whether there is an adequate ground to a particular motor (Tr. 52). Based on the company's representations the inspector terminated the electrical citation (Tr. 52).

In continuing his inspection, the inspector observed that the water pump had been spliced and the ground cut out (Tr. 53; Ex. P2). At the inspector's request the splice was cut from the line. It was presented as an exhibit at the hearing (Tr. 53; Ex. P2). The cable had a four wire splice to the cable. After being cut off only three wires led to the pump (Tr. 53, 54). The ground wire terminated in the splice was the same ground wire inspector Day had required to be connected at the panel box on the surface (Tr. 55). A continuity test would have determined that the pump was ungrounded. The pump was ordinarily used to pump out the bottom of the shaft (Tr. 55, 56, 130, 133).

Failure to ground this equipment or to provide equivalent protection presents a shocking hazard (Tr. 56, 60-62). In addition, a person could have touched the exposed electrical conductor (Tr. 58).

In the inspector's opinion respondent's management was very neglectful since they resisted the bulkheads, the grounding and the telephone (Tr. 63-65, 138).

The company had received prior citations for failure to ground (Tr. 65). Respondent extensively examined the inspector concerning the electrical violation (Tr. 119-129).

Cross examination further established that on June 26, 1985 respondent was issued a citation because the company failed to notify MSHA of changes in the partnership and the operator (Tr. 67, 68).

Larry G. Day, an electrical specialist for MSHA, inspected respondent's Cottonwood mine on June 25, 1985 (Tr. 163-167). He determined, with a tick tracer, that the metal water pump in the shaft bottom was not grounded nor was there equivalent protection (Tr. 167, 169). The grounding wire connected to the switch box on the surface had been cut (Tr. 168, 168A, 177, 192). An ungrounded pump submerged in water creates a very hazardous condition (Tr. 170-179). Submersing the pump in water would be no protection at all (Tr. 179).

The panel contained 30 amp fuses. Exposure to a milliamp could kill a person (Tr. 173).

The inspector considered that the operator's negligence was high since someone ignored a grounding conductor (Tr. 177, 178).

Cross examination indicated that the inspector's experience generally involved 480 volt three phase AC current (Tr. 181). He further testified extensively in connection with Y and delta connections, impedence, grounding and continuity tests (Tr. 181-190).

Day's citation was issued because of the condition at the surface. Beason's citation related to the condition at the other end of the pump (Tr. 192, 193). The number of breaks in the wire would not affect this condition (Tr. 193, 194, 196).

Witness Jorgensen testified for respondent and indicated that the Berkeley pump was installed after the partnership with Thyssen. The pump was used when the mine filled with water (Tr. 234-236). They did not pump when there were miners in the mine (Tr. 235).

After it was cited the company obtained a letter from the sales company (Tr. 238-240; Ex. R5).

Jorgensen purchased the three wire cable and had it installed by an electrician (Tr. 245).

Jorgensen suspected that Jerry Schrup cut the grounding wire on the pump (Tr. 247, 248).

Discussion

Respondent's answer questions whether this violation occurred but its post-trial brief asserts that the mineralized ground water provided a suitable ground. In addition, no miner was ever exposed to any danger. Further, the two citations are duplicative since they both involve the same piece of equipment.

I credit inspector Day's expertise to the effect that an ungrounded pump submerged in water constitutes no protection. Further, it is not a requirement of the regulation that miners be exposed to the violative condition. Finally, respondent's claim of duplication is rejected. Two separate violative conditions existed. The fact that it involved the same piece of equipment is a factor to be considered in assessing a penalty.

The citations should be affirmed.

Respondent's Evidence as to new Partnership

Don E. Jorgensen was hired as a miner by respondent Hydrocarbon Resources on September 1, 1983. In January 1984 he was promoted to mine superintendent (Tr. 199, 200). His responsibilities included production and safety (Tr. 201). He initially reported to Chad Evans, the mine manager (Tr. 207). Prior to March 1985 a partnership consisting of Miocene

Resources, Hydrocarbon Mining and Ken Wooley operated the mine. On March 15, 1985 that partnership was terminated and a new partnership was formed consisting of Thyssen Mining Construction, Inc. and Hydrocarbon Mining. These partners operated the mine doing business as Hydrocarbon Resources. Thyssen was the operating partner. Hydrocarbon Mining Company was a partner in both ventures (Tr. 201-206).

Jorgensen was aware that a citation was issued as a result of the Green fatality (Tr. 203). After he became superintendent he learned why the citation was issued (Tr. 204).

John Edwin McNeeley has been vice chairman of the managing board of Thyssen Mining Construction, Inc., since November 7, 1985. Thyssen, as managing partner, controls 51 percent of Hydrocarbon Resources (Tr. 258, 1259, 273).

McNeeley was responsible for operating the Wild Horse and Midas mines (Tr. 261). Operations were abandoned at the Cottonwood mine in the fall of 1985 (Tr. 261). All other employees of Hydrocarbon Resources were laid off in May 1985 (Tr. 261).

McNeeley discharged Royce, Danny and Grant Green in November for failing to use a bulkhead (Tr. 2262-266). The company has set a standard of strict compliance with MSHA regulations (Tr. 264). Subsequently the Greens filed discrimination complaints against the company. The complaints were unrelated to the use of bulkheads (Tr. 261-268).

Thyssen Mining Construction, Inc., is a wholly owned subsidiary of Thyssen Mining Construction of Meulheim, West Germany. The principal company sinks shafts, does contract mining and production mining (Tr. 269). Thyssen is one of the largest construction companies in West Germany (Tr. 270). Until it was terminated the members of the managing board of Hydrocarbon Resources were Klaus Wagener, Kenneth Wooley and Chad Evans (Tr. 270).

Lyle D. Weiss, secretary-treasurer of Thyssen Mining Construction, Inc., testified that he is in charge of all financial and administrative matters (Tr. 273, 274).

The partnership agreement between Hydrocarbon Mining, Inc., and Thyssen Mining and Construction, Inc., was executed March 15, 1985 (Tr. 274; Ex. R8). Other than in evaluating the project Thyssen was not involved in the operations before March 15, 1985 (Tr. 275). The partnership was designated as Hydrocarbon Resources Company, (HRC) (Tr. 276; Ex. R8). The parties further agreed that HRC was identical to a joint venture between Hydrocarbon and a company called Miocene Resources, Inc. (Tr. 276).

The vein has ceased to exist at this site at a minable width (Tr. 280, 281). For the nine months ending December 31, 1985 the partnership loss was $1,050,000. A penalty in this case would not help the situation (Tr. 281).

The witness further indicated that 58,268 man hours were involved and 1,830 tons were mined between March 15, 1985 and December 31, 1985 (Tr. 282, 283; Ex. R9). The man hours included approximately 9,000 hours of construction work (Tr. 284).

The witness had prepared and suggested a penalty assessment based on the Secretary's regulations (Tr. 285-291; Ex. R10, R11).

Thyssen is financially sound and a $9,000 penalty would not impair its ability to continue in business (Tr. 291).

Civil Penalites

The Secretary seeks certain penalties for the violations herein. The proposed penalties, as originally assessed, were as follows:

Citation No.		Proposed
2360975	Bulkheads	$1,000.00
2359401	telephone	750.00
2359512	water pump	750.00
2359405	cut ground wire	500.00

Prior to the hearing the Secretary sought and was granted leave to amend the bulkhead violation to a proposed penalty of $9,000.

Discussion

As a threshold matter respondent concedes that the Secretary may modify his penalty assessment at any time during a penalty proceeding but it asserts that the Secretary's action, without new facts, constitute harassment and intimidation especially after respondent choose to challenge the original proposed assessment.

Respondent's arguments are rejected. It is well settled that the assessment of penalties rests solely with the Commission and are not based on the Secretary's proposals. The Commission may raise, lower or affirm the original assessment. Sellerburg Stone Company v. FSMHRC, 736 F.2d 1147 7th Cir. (1984); Shamrock Coal Company, 1 FMSHRC 469 (1979); Consolidation Coal Company, 2 FMSHRC 3 (1980).

For the foregoing reasons respondent's threshold objections are denied.

Accordingly, it is now necessary to consider the statutory criteria relating to the assessment of such penalties. Section 110(i) of the Act, now 30 U.S.C. § 820(i), provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The bulkhead violation (Citation 2360975) involves evidence relating to respondent's negligence and gravity. In 1982 an identical bulkhead citation was issued against respondent after a fatality occurred. In the instant case the judge took official notice of the prior case entitled Hydrocarbon Resources, Inc., 8 FMSHRC 354 (1968), (Order, January 9, 1987).

I agree with respondent that a change in partners creates a new legal entity. Fritz et al v. Commissioner of Internal Revenue, 76 F.2d 460 (1935). I further find from the testimony and the exhibits that when Thyssen Mining Construction, Inc., became the managing and controlling partner on March 15, 1985 a new and entirely legitmate partnership was formed. The transition was in no way a sham arrangement such as discussed by the Commission in Lonnie Jones v. D & R Contractors, 8 FMSHRC 1045, 1054 (1986).

However, the new partnership involving Thyssen Mining is not totally insulated from the prior partnership. This is so because Chad Evans was the mine manager when the bulkhead violation occurred in 1982 (Tr. 157). Subsequently, he was one of the three members on the managing board of the Thyssen partnership (Tr. 270).

The knowledge of supervisory personnel has generally been imputed to an operator under an agency concept Southern Ohio Coal Company, 4 FMSHRC 1459 (1982); Nacco Mining Company, 3 FMSHRC 849 (1981). Accordingly, respondent should have known of the 1982 fatality resulting from the bulkhead violation. This knowledge causes me to conclude that respondent's negligence is high and the gravity of the violation is apparent since the violative condition can and did cause a fatality in 1982.

Respondent's post-trial brief asserts for a number of reasons that the bulkhead citation should not have been issued. The credible evidence here clearly establishes that the four violations occurred.

The gravity of Citation 2359401 (communication system) is low. On the other hand, ungrounded equipment such as in

Citations 2359512 and 2359405 presents the possibility of electrocution. The gravity in such situations should be considered as high.

Since respondent is a separate legal entity it has no prior adverse history.

The testimony establishes that a civil penalty will not affect the operator's ability to continue in business.

Respondent's rapid abatement of all of the violations is to its credit.

On balance, I consider that the penalties set forth in order of this decision are 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.

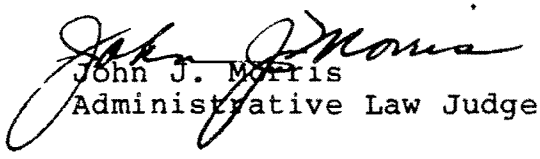
2. Penalties should be assessed for the violations herein.

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

ORDER

The following penalties are assessed for the violations herein:

Citation 2360975	(bulkheads)	$3,000
Citation 2359401	(communication system)	200
Citation 2359512	(water pump)	500
Citation 2359405	(ungrounded wire)	500



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 4 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 86-118 A.C. No. 15-15229-03503
v.	:	Pa Pa Mine
PA-PA COAL MINING COMPANY, Respondent	:	

DECISION

Before: Judge Fauver

By notice issued on December 19, 1986, this civil penalty case was set for hearing on February 10, 1987, at Huntington, West Virginia. Prehearing reports were due from the parties by January 27, 1987. Counsel for the Secretary of Labor submitted a prehearing report by telephone on January 23, 1987, reporting that Mr. Jack Owens, President of the Respondent, informed counsel for the Secretary that Respondent will not appear at the hearing on February 10, 1987. This statement in behalf of Respondent is deemed to be a withdrawal and waiver of Respondent's hearing request.

ORDER

1. The allegations in Petitioner's Citation No. 2303103 are deemed to be true and hereby incorporated as Findings of Fact and Conclusions of Law herein.

2. Respondent is ASSESSED a civil penalty of $650.00 for the violation alleged in Citation No. 2303103 and found herein.

3. Respondent shall pay the above civil penalty of $650.00 with 30 days of this Decision.

4. The hearing scheduled for February 10, 1987, is CANCELLED.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 4 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-204 A.C. No. 35 05018-03614
v.	:	
U.S. STEEL MINING COMPANY, INC., Respondent	:	
U.S. STEEL MINING COMPANY, INC., Contestant	:	CONTEST PROCEEDING Docket No. PENN 86-180-R
v.	:	Citation No. 2678490; 4/28/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cumberland Mine

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor; Billy M. Tennant, Esq., Pittsburgh, Pennsylvania for U.S. Steel Mining Company, Inc.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge a citation issued by the Secretary of Labor on April 28, 1986, to U.S. Steel Mining Company Inc., (U.S. Steel) and for review of civil penalties proposed by the Secretary for the violation alleged therein. The issues before me are whether U.S. Steel violated the regulatory standard as alleged and if so whether that violation was of such a nature as could have significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard, i.e. whether the violation was "significant and substantial." If the violation is established it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with the criteria set forth in section 110(i) of the Act.

The citation at bar, No. 2678490, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

> The belt tail roller that was located at the 5 Face South No. 2 in-line drive was not maintained in a safe operating condition on the afternoon shift of January 28, 1986 and midnight January 29, 1986 due to the bearings on the subject roller was [sic] running hot and smoking at one point.

The cited standard provides that "mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The evidence shows that as Anthony Shiner, a General Inside Laborer at the Cumberland Mine, was cleaning along the subject beltline on his afternoon shift he heard a loud thrashing noise, vibration and the sound of metal grinding in the bearings of the tail roller. Shiner also saw smoke coming from the tail roller and the smoke filled "half the entry." He immediately shut down the belt and called the afternoon shift Foreman Ed Grim to report the problem.[1/]

Mechanic Douglas Carpenter and his Supervisor, Jerry Seaton, subsequently examined the problem bearing, cooled it with water and greased it. Shiner then rigged a hose to maintain a cooling water spray onto the subject bearing, and the belt was restarted. Carpenter and Seaton watched the belt

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1/ While Shiner testified at hearing that these problems developed on the afternoon shift of January 27, 1986 and continued through the afternoon shift on January 28, I believe for the reasons noted below that this recollection was erroneous. First, MSHA Inspector James Conrad testified that he interviewed Shiner on February 12, 1986, shortly after the incident in question, and Shiner then told him that the problem had begun on his afternoon shift on January 28. Second, the "section 103(g)" complaint filed with MSHA by the Union Safety Committee (Court Exhibit 1) and the citation at bar prepared by Inspector Conrad both contain allegations that the problem began on the afternoon shift of January 28 and continued only through the midnight shift of January 29, 1986. Third, Shiner's testimony is also inconsistent with the testimony of government witness Clyde King and U.S. Steel witnesses Mark Skiles (Mine Superintendant), Larry Seaton (Assistant Maintenance Foreman), Charles Grim (the afternoon shift Mine Foreman), Ronald Stull (afternoon shift Belt Foreman), Eugene Barno (third shift Mine Foreman), and Dan Laurie (afternoon shift Belt Cleaner Foreman).

run for an hour and, since the bearing was holding up "okay," they left. Seaton nevertheless told Shiner to maintain a watch on the suspect bearing for the rest of his shift, to keep grease in it and to maintain the cooling water spray. The bearing continued to operate normally for the remainder of Shiner's shift until Harry Siebold took over the watch around 10:30 p.m. on the 28th.

According to Shiner the area surrounding the suspect bearing was kept clear of loose coal and coal dust, was rock dusted and was wet from the hose spray. Additional bags of rock dust were available nearby if needed. The evidence also shows that an emergency pull cord ran along the entire belt line and could be reached by anyone nearby to cut off power to the belt within 15 to 30 seconds. There was also a fire protection system that would deluge the belt when triggered by a heat sensor. A chemical fire extinguisher and a mine telephone were also nearby.

Beltman Jimmy Perani was assigned to stand watch over the subject bearing on the midnight shift (11:00 p.m. to 7:00 a.m.) beginning January 28. Harry Siebold was standing watch when he took over. The belt continued running during Perani's shift with water spraying on the subject bearing. Perani observed however that the bearing was generating heat and would occasionally make "loud screaming noises." In addition according to Perani the bearing would not hold grease. Perani testified that no one relieved him at the end of the shift.[2/]

General Inside Laborer Clyde King testifed that his Foreman, Gene Barno, told him to watch the subject bearing on the midnight shift of January 29. King was told to leave the water running over the bearing and was told that he would be relieved at quitting time. King relieved someone else

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2/ Perani was confused at hearing as to which particular shift or shifts he stood watch over the subject bearing and was unclear whether he first stood watch on midnight of January 27 or midnight of January 28. According to the testimony of Anthony Shiner it was Harry Siebold who took over his watch on the bearing at around 10:30 p.m. the evening of January 27. Although Siebold did not testify in these proceedings it appears that Siebold took over the watch from Shiner at about 10:30 on the evening of January 28, (see footnote 1) and Perani then took over from Siebold at around 11:00 p.m. the same night. Indeed Perani recalls that he did relieve Siebold on January 28. Perani's testimony at hearing concerning "loud screaming noises" emanating from the bearing is also in contrast to his statement to Inspector Conrad that he heard "squeeking" noises.

(apparently Perani) who had been standing watch. According to Inspector Conrad, King stated in an interview on February 12, 1986, that he had been assigned at 6:00 a.m. on January 29, to relieve the person then standing watch and remained to the end of his shift at 7:45 a.m. In light of this statement to Conrad given closer to the time of the event I find this version of events to be the more credible. King testified without contradiction however that when he left his assigned position at the end of his shift no one relieved him. It is therefore undisputed that the suspect roller was thus left unattended while the belt continued to operate.

King also observed that the maintenance foreman examined the suspect bearing during his shift and admitted that it was "bad" and would have to be replaced. King observed that when the water spray was removed the bearing would get hot and sparks would appear. So long as the water spray was maintained however there were no sparks and nothing was "abnormal."

Mine Manager Weir acknowledged to Inspector Conrad on February 12, 1986, that the bearings had subsequently been removed and were found to be scarred and flat. Conrad opined, based on that statement, that the bearings had been running in a hazardous condition. Conrad considered the violation to be "significant and substantial" in that he felt that fire and smoke could have been generated by the defective bearings thereby creating carbon dioxide, fire and smoke inhalation problems. Indeed Conrad opined that if the bearing began smoking heavily it would be reasonably likely to overcome the miner standing watch before he could stop the smoke. He opined that it was also reasonably likely for the smoke to be taken inby to miners working at the longwall face.

Conrad also believed that fire was reasonably likely even though the hose was spraying on the bearing if there was coal spillage up to the level of the bearing. In addition during the time that the bearing was left unattended he felt that a rock could displace the water flow thereby creating the noted hazardous conditions. Conrad also observed that bearings operating in the noted condition could disintegrate at any time causing the tail roller to come loose with hot metal splattering all over. Conrad found the operator's negligence to be moderate because he felt that the operator knew of the violative condition but tried to remedy the violation by stationing an observer and hosing-down the defective bearing.

Underground mine superintendent Mark Skiles learned of the problem bearing through a phone call from his shift clerk around 9:30 p.m. on January 28. According to Skiles, failed bearings are not unusual and it is standard procedure to cool them down and pump them full of grease until they can be

replaced. He acknowledged that if the bearing was running hot it could ignite loose combustible material or coal dust if it was in contact. It was his understanding however that in this case the bearing was not in contact with any flammables and indeed the tail piece was located in a puddle of water. Skiles acknowledged that his opinion concerning the nonhazardous nature of the problem bearing was based on his assumption that someone was always in attendance to watch the roller and shut down the belt line.

When Skiles arrived at the mine at 8:00 a.m. on January 29, he was told that the roller was "running cool but failing." He then directed that the bearing be changed and it was in fact changed sometime between 10:00 a.m. and 2:00 p.m. on that day. Skiles did not immediately replace the bearing but wanted to keep the belt running until the maintenance shift scheduled for the coming weekend. The bearing was changed earlier because "everything was in place" and it was "obvious that we were not going to make it to the weekend."

Assistant Maintenance Foreman Jerry Seaton learned of the problem bearing around 4:00 p.m. on January 28, 1986. He and Carpenter pumped it full of grease and Shiner was directed to stay in the area and apply grease every 20 minutes. A 3/4 inch hose was also set to spray water on it. According to Seaton the area surrounding the subject bearing was damp and well rock dusted. There were additional bags of rock dust within 20 to 30 feet and a "pager" within 30 feet. There were no "squeeking noises" or sparks emanating from the bearing and Seaton found the condition not to be unsafe.

Afternoon Mine Foreman Charles Grim became aware of the subject bearing between 3:00 and 3:30 p.m. on January 28. Grim also thought that the condition was not unsafe because someone was in attendance to shut the belt down if necessary, to keep it greased, and to maintain a cooling water spray. He also observed that the area was wet and rock dusted.

Ronald Stull, the afternoon shift Belt Foreman, assigned Harry Siebold to replace Shiner at the end of his shift on January 28. Stull acknowledged that if the bearing had been "sparking" he would have shut the belt down because it would have been a fire hazard. He did not recall that anyone told him about sparks coming out of the bearing.

Eugene Barno the third shift Mine Foreman, was told that grease was being pumped into the subject bearing every 20 minutes, that it was holding grease, and that it was being cooled down with water. He visited the problem bearing during his shift when he brought Perani to take over the watch. Barno touched the bearing and found it to be "room temperature." It was also then holding grease. He

instructed Perani to shut the belt down if it became hot. Perani was still watching the bearing when Barno returned around 6:00 a.m. bringing his relief-man Clyde King. Perani told him there had been no problems. Barno testified that the belt continued to run when he left his shift at 8:00 a.m. and he did not know who shut down the belt thereafter or who relieved Clyde King to watch the bearing on the next shift.

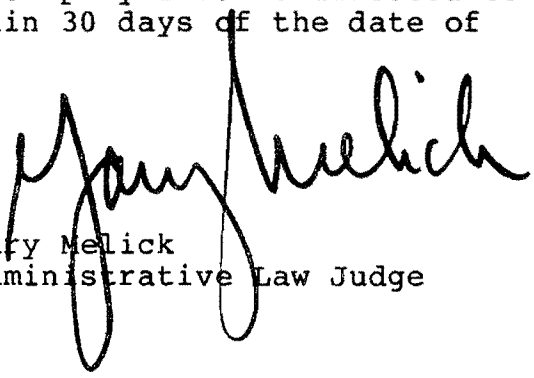
Within the above framework of evidence it is clear that the tail roller on the cited belt was not being "maintained in safe operating condition" as required by the cited standard. Based on the undisputed evidence alone it is clear that the bearings on both sides of the tail roller shaft were being operated for some period of time while scarred and flattened. Even Superintendant Mark Skiles acknowledged that the bearing had already "failed" by the time he received the phone call on Janaury 28. Skiles observed that when the shaft starts to wobble with a defective bearing on one side, the bearings on the other side are also ruined. Skiles further observed that if the shaft starts to wobble because of bad bearings the entire tail piece could be torn up. This is consistent with the testimony of Inspector Conrad that if the roller continues to operate with defective bearings it could suddenly disintigrate and splatter hot metal all over.

This condition clearly presented a serious hazard to the miners standing watch over the defective bearing and who were required to grease that bearing every 20 minutes while the belt was in operation. Under the circumstances there is sufficient evidence from which it may be concluded that it was "reasonably likely" for the tail piece to "disintegrate" and seriously injure the watchman with flying hot metal. Accordingly there was a "significant and substantial" and serious violation of the cited standard. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). In addition there was at least one period of time (following Clyde King's watch) during which no one was keeping watch over the subject bearing. Thus the hazard from fire and smoke described by Inspector Conrad was reasonably likely without the availability of someone to signal an alarm and/or remedy the hazard. For this additional reason I find the violation to be "significant and substantial" and serious. Mathies, supra.

The fact that the mine operator kept the area around the subject bearing clean, wet and rock dusted, and that it maintained partial watch over the subject bearing may be considered in mitigation of negligence. In assessing a penalty herein I have also considered that the operator is large in size, has a substantial history of prior violations, and abated the condition even before it was cited by MSHA or was the subject of the "103(g)" complaint. Under the circumstances a civil penalty of $200 is warranted.

ORDER

Citation No. 2678490 with its "significant and substantial" findings is hereby affirmed. The Contest Proceeding is dismissed and U.S. Steel Mining Company Inc. is directed to pay a civil penalty of $200 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

FEB 4 1987

DAN L. THOMPSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 85-77-DM
	:	MSHA Case No. MD 82-27
GILBERT INDUSTRIAL, Respondent	:	Cyprus Thompson Creek Project

ORDER OF DISMISSAL

The Complainant, Dan L. Thompson, requests approval to withdraw his Complaint in the captioned case on the grounds that a mutually agreeable settlement of the underlying controversy has been reached. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed. At the request of the parties the specific terms of the settlement agreement are hereby sealed subject to review only by order of the Commission, a Commission judge, or Court having jurisdiction.

Gary Melick
Administrative Law Judge

Distribution:

W. Craig James, Esq., Skinner, Fawcett & Mauk, 515 South Sixth Street, P.O. Box 700, Boise, Idaho 83701 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-202 A.C. No. 15-15192-03501
v.	:	No. 1 Mine
MOUNTAINEER COAL COMPANY, Respondent	:	

DECISION

Before: Judge Fauver

On January 14, 1986, because of Respondent's failure to comply with a prehearing order, a show cause order was issued allowing Respondent until February 3, 1987, to explain, in writing, why (1) it should not be deemed to have waived its right to a hearing, and (2) the Secretary's proposed penalties should not become the final order of the Commission.

Respondent has failed to file a response to the show cause order, and is hereby deemed to have waived its right to a hearing. The proposed civil penalties shall therefore be made the final order of the Commission.

WHEREFORE IT IS ORDERED that Respondent shall pay the Secretary's proposed civil penalties in the amount of $624.00 within 30 days of this decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Therese Ball, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, Nashville, TN 37203 (Certified Mail)

Wayne Davidson, General Manager, Mountaineer Coal Company, Route 2, Box 60, Manchester, KY 40972 (Certified Mail)

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FEB 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 86-164
	:	A.C. No. 36-02667-03525
	:	Benjamin No. 1 Strip Mine
BENJAMIN COAL COMPANY, Respondent	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Mine Act", for one violation of the regulatory standard at 30 C.F.R. § 40.4. The general issue before me is whether Benjamin Coal Company (Benjamin) violated the cited standard and, if so, the appropriate civil penalty to be assessed in accordance with § 110(i) of the Mine Act.

The citation at bar, No. 2404451, as amended, alleges as follows:

> The operator failed to post a copy of the information provided the operator pursuant to part 40.3 Code of Federal Regulations. This part [sic] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.
>
> A certified form letter authorizing the UMWA to act as representatives for several employees, was received by the operator on 10-23-85.

The cited standard, 30 C.F.R. § 40.4, requires that "a copy of the information provided the operator pursuant to § 40.3 of this Part shall be posted upon receipt by the

operator on the mine bulletin board and maintained in a current status."[1/]

The parties in this case agreed to waive hearings and to submit the matter on a stipulation of facts. According to the stipulation Benjamin owns and operates the No. 6 Preparation Plant located in Clearfield County, Pennsylvania. The plant employs approximately 35 miners and processes coal from various strip mines operated by Benjamin. On October 21, 1985, four miners who worked at the No. 6 Preparation Plant designated the United Mine Workers of America (UMWA) to be a miner's representative at the plant. This written designation was filed with the Federal Mine Safety and Health

1/ The standard at 30 C.F.R. § 40.3 provides as follows:

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name and address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; or if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information filed is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

Administration's (MSHA's) Manager of District 2 and a copy was sent to Benjamin in accordance with 30 C.F.R. § 40.2(a) and §40.3(b). The designation specifically listed Barry Mylan and Lester Poorman as the UMWA representatives. Mylan and Poorman are employees of the UMWA as Health and Safety Representatives but neither is employed by Benjamin.

There is no dispute that Benjamin has never posted on the mine bulletin board the information it received under 30 C.F.R. § 40.3 designating the UMWA as a miners' representative at the No. 6 Preparation Plant. Accordingly, on November 7, 1985, an MSHA inspector cited Benjamin for a violation of 30 C.F.R. § 40.4. Since Benjamin continued in its refusal to post the requisite information a section 104(b) "failure to abate" order was issued on December 16, 1985.

In defense, Benjamin first argues that the UMWA cannot be a representative of miners at the plant because the UMWA 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. The statutory authority for representatives of miners in the context of this case is not however the NLRA but the Mine Act. Accordingly, the UMWA's status as exclusive collective bargaining agent under the NLRA is irrelevant to its status as a representative of miners under the Mine Act.

The Mine Act makes several references to miners' representatives for a variety of purposes under the Act. One of the major functions of a miners' representative is set forth in section 103(f) of the Mine Act:

> Subject to regulations issued by the Secretary, . . . a representative authorized by [the operator's] 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. . . .

The term "representative of miners" is not defined in the Act. Under regulations issued by the Secretary, however, the "representative of miners" means: "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act. . . ." 30 C.F.R. § 40.1(b). This definition of "representative of miners" is "a reasoned and supportable interpretation of the Act." United Mine Workers v. FMSHRC, 671 F.2d 615, 626 (D.C. Cir. 1982). See also Magma Copper Co. v. Secretary of Labor, 645 F.2d 694, 696 (9th Cir. 1981). Accordingly the UMWA, designated by

four miners at the No. 6 Preparation Plant, may be a "representative of miners" within the meaning of 30 C.F.R. § 40.1(b) of the Mine Act, and the fact that it may lack certification as the exclusive collective bargaining agent under the NLRA is not at all relevant.

It is also significant that in the preamble to Part 40 of the Secretary's regulations the Secretary unequivocably rejected the NLRA definition:

> [Some] commenters suggested that the National Labor Relations Board (NLRB) definition of representative 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 representative 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..

43 Fed. Reg. 29508 (July 7, 1978).

Benjamin next argues that the UMWA and its Safety and Health Representatives, Barry Mylan and Lester Poorman, cannot be representatives of miners under the Mine Act because they are not employees of Benjamin. As the UMWA points out in its brief however, one of the most important functions of a miners' representative under the Mine Act is the inspection walkaround right under Section 103(f). That section provides in part that "such representative of miners who is also an employee of the opertor shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." (Emphasis added.) It is apparent that if all miners' representatives were required to be employees of the operator, the noted language would be meaningless surplusage. Clearly, Congress intended that non-employees, as well as employees, could be designated as

representatives of miners. See Secretary of Labor on behalf of Mylan and Poorman v. Benjamin Coal Co., and UMWA, Docket No. PENN 86-125-D, (Judge Koutras, January 8, 1987); Consolidation Coal Co., v. UMWA, 2 FMSHRC 1403, 1408 (Judge Broderick, 1980); and Emery Mining Corp. v. Secretary of Labor, 8 FMSHRC 1182, 1202 (Judge Morris, 1986) (review pending). Indeed allowing nonemployees to serve as miners' representatives furthers the purposes of the Mine Act by allowing participation in mine inspections by those specially trained and skilled in mine safety and health matters.

In this case Benjamin concedes that the UMWA was designated by "two or more miners" as a representative of miners at its No. 6 Preparation Plant, and that it was so notified pursuant to 30 C.F.R. § 40.3. Under 30 C.F.R. § 40.4 Benjamin was required to post on the mine bulletin board the information it thus received concerning the identity of the representative of its miners under the Mine Act. Benjamin concedes that it has not posted that information and accordingly the violation is proven as charged.

In determining an appropriate civil penalty in this case I note that Benjamin continued to refuse to post on the mine bulletin board a copy of the requisite information pertaining to the representative of miners even after being cited. Accordingly an order under § 104(b) of the Act was issued for failure to abate the violative condition. However inasmuch as the operator's position in this case has an arguable basis in law and it appears that its refusal to comply with the citation and 104(b) order was founded in its effort to obtain a ruling of law concerning at least in part an issue of first impression I do not attribute high negligence or give significant consideration to the failure to abate under the circumstances.

In addition I find it difficult, based on the limited stipulations of fact before me, to properly evaluate the gravity of the violation. It is not known for example whether the designated representatives of miners were actually denied entry to the mine or whether there was merely a failure to post the requisite notice. Thus it cannot be determined from these facts whether the failure to post the required information, the specific violation charged herein, was in itself of high gravity. In assessing the penalty herein I have also considered the history of violations and the size of the operator's business. Within this framework I find that a civil penalty of $50 is appropriate.

Gary Melick
Administrative Law Judge

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FEB 6 1987

GERALD C. BRUNTON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 86-109-D
v.	:	
SHAWNEE COAL COMPANY, Respondent	:	

DECISION

Appearances: Gerald C. Brunton, Shawnee, Ohio, pro se;
Thomas F. Sands, Esq., McClelland, McCann and Ransbottom, Zanesville, Ohio, For Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as a welder with Respondent for activity protected under the Act. Pursuant to notice, the case was heard in Columbus, Ohio on January 15, 1986. Gerald C. Brunston testified on his own behalf. James N. Denny testified for Respondent. The parties waived their right to file post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Respondent was the owner and operator of a surface coal mine near Zanesville, Ohio. Complainant began working for Respondent on November 11, 1984 as a laborer on the coal tipple. After about one and one-half months, he became a welder. He was paid $7.00 an hour plus $140 a month for the use of his truck and welding machine. He worked on the average of 50 hours per week and was paid time and one-half over 40 hours. Complainant had studied welding for 2 years at the Tri-County Vocational school. James Denny was Complaiant's foreman during all the time he worked at Respondent.

Complainant testified that he was reprimanded ("yelled at") by his foreman about once every week and was sent home on one occasion as a disciplinary measure. Denny testified that

Complainant was unable to do "hang" or "vertical" welding, but could only weld flat. He stated that he reprimanded Complainant for failure to service the radiator on a scraper in December 1985, resulting in substantial damage to the scraper. In November 1985, a State inspector "red tagged" a piece of equipment for inadequate brakes after Complainant told the inspector to check the loader because it had no brakes. It was repaired within 3 or 4 days. Complainant testified that he was required on a couple of occasions to work under an unsafe highwall. Denny denies that allegation.

On April 17, 1986, Denny told Complainant and fellow worker Joe Humphrey to get haircuts. Denny stated that Complainant's hair stuck out on both sides of his hard hat and Denny was afraid that a spark from the welder could ignite it. Complainant stated that he had a haircut on April 14, 1986 and his hair was of moderate length and not a safety hazard. On the following Monday, April 21, Complainant was asked if he had gotten a haircut, and when he said no, was told to go home until he got it cut. Complainant did not return. He aplied for and received State unemployment compensation. Joe Humphrey did get a haircut, and continued working.

Complainant has sought employment at various places since leaving Respondent, but has not found any significant work to the date of the hearing.

ISSUE

Whether Complainant was discharged or otherwise discriminated against because of activity protected under the Mine Safety Act?

CONCLUSIONS OF LAW

Complainant and Respondent are subject to and protected by section 105(c) of the Act, the former as a miner, the latter as an operator. I have jurisdiction over the parties and subject matter of this proceeding.

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act, and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981).

Complainant's refusal to get his hair cut is not activity protected under the Act. It is not related to safety complaints

or safe working conditions except insofar as it may itself (as Respondent contends) be a safety hazard. Complainant testified that there was equipment with safety defects on the premises, and that he was told to work under unsafe conditions. He did not state that he refused to work or complained of these conditions. I conclude that Complainant has failed to establish that he engaged in activity protected under the Act.

Complainant was told not to return to work until he got his hair cut. Respondent denies that he was fired. It is clear that his job was terminated however, and I conclude that this was adverse action. The reason for his termination was, everyone agrees, his refusal to get his hair cut. Since I have concluded that this was not protected activity under the Act, I must also conclude that his employment was not terminated for protected activity.

If Complainant had established that he was terminated in part because of protected activity, I would nevertheless conclude that Respondent was motivated by unprotected activities and would have taken the adverse action for the unprotected activities alone, i.e., Complainant's refusal to follow an order which Respondent believed was a safety hazard. Pasula, supra. Therefore, I conclude that Complainant has not established that Respondent discharged or otherwise discriminated against him in violation of section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the Complaint and this proceeding are DISMISSED.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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Thomas F. Sands, Esq., Graham, McClelland, McCann & Ransbottom Co., L.P.A., 400 1st Nat'l Bank Bldg., Box 669, Zanesville, OH 43702-0669 (Certified Mail)

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FEB 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-40-M A.C. No. 01-02340-05504-A
v.	:	Pit No. 4
MICHAEL BRUNSON, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Michael Brunson, Saraland, Alabama, pro se.

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner (the Secretary) seeks a civil penalty from Respondent under section 110(c) of the Federal Mine Safety and Health Act (the Act). The Petitioner charges that Respondent, acting as an agent of the corporate mine operator, knowingly authorized, ordered or carried out a violation by the operator of the mandatory safety standard contained in 30 C.F.R. § 56.9003. Respondent denied authorizing, ordering or carrying out the violation. Pursuant to notice, the case was heard on January 13, 1987 in Mobile, Alabama. Charles Bates, Charles Gwin and Robert Lee Evert testified on behalf of the Secretary. Respondent testified on his own behalf. Both parties waived their rights to file posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

The Brunson Construction Company, Inc., a corporation, produces sand and gravel, and, as of January 1985, operated two sand and gravel pits in the State of Alabama, including Pit No. 4 in Clarke County, Alabama. Its products were sold within the State, but much of its equipment was manufactured out of the

State. The company began its business in 1947. In January 1985, there were two employees working at the No. 4 Pit.

Respondent Michael Brunson was the Vice President of Brunson Construction Company, Inc. He did not regularly visit the sand and gravel pits, but spent most of his time in the company office in Saraland, Alabama. He is shown in MSHA records as the person in charge of health and safety for the company.

On January 23, 1985, a combined 107(a) order-104(a) citation was issued to the Brunson Construction Company by Federal Mine Inspector Charlie Bates. The order/citation charged that a caterpillar front end loader was being operated in the No. 4 pit without any brakes. The citation charged a violation of 30 C.F.R. § 56.9003. This standard requires that powered mobile equipment be provided with adequate brakes. The left front wheel brake booster was leaking, and there was a leak in the air line from the compressor. The brakes would not stop the vehicle on an incline.

The operator of the loader, Charles Gwin, who testified under subpoena, stated that he knew of the leak in the booster brakes, and that he had reported this to the company mechanic and to W.D. Brunson, the company president. His testimony concerning when he reported the brake problem to Respondent Michael Brunson was contradictory, but he finally stated that he told Michael Brunson about one week before the order was issued that the brakes were going bad. Respondent told him if the brakes were bad to shut down the machine. Gwin replied that the brakes had a leak but were holding. Brunson testified that he did not recall being told this by Gwin. I find as a fact that Gwin orally told Respondent about a week before the order that the brakes on the loader were defective. Respondent took no action to have the brakes repaired until after the order was issued.

The order/citation was terminated on February 11, 1985 after the brakes on the loader were repaired and found to be in good operating condition. MSHA proposed an assessment of $500 against Brunson Construction Company for the violation, and the assessment was paid by the company. The history of the company's prior violations shows that 5 violations were asessed and paid in the previous 24 months, including 2 violations of 30 C.F.R. § 56.9003. No previous violations under section 110(c) of the Act were issued to Respondent.

ISSUE

Does the evidence show that Respondent knowingly permitted the operation of powered mobile equipment without adequate brakes?

CONCLUSIONS OF LAW

Brunson Construction Company, a corporation, was the operator of a mine as those terms are used in section 110(c) of the Act. Respondent, the Vice President of Brunson Construction Company, was an officer and agent of the corporation. Brunson Construction Company violated 30 C.F.R. § 56.9003 in operating a front end loader without having adequate brakes. The foregoing conclusions are undisputed. The crucial issue is whether Respondent knowingly permitted the violation.

In the case of Secretary v. Richardson, 3 FMSHRC 8 (1981), the Commission held (in a case under section 109(c) of the 1969 Coal Act which is substantially indentical to section 110(c) of the Mine Act) that the term knowingly means knowing or having reason to know. It does not imply willfulness, bad faith or evil purpose. I have accepted as factual the testimony of Charles Gwin that he told Respondent about a week before the order, that the brakes on the loader were going bad. I therefore conclude that Respondent knew or had reason to know that the brakes were not adequate. Therefore, I further conclude that he knowingly permitted the violation of 30 C.F.R. § 56.9003. The violation was serious. Defective brakes on mobile equipment are the largest single cause of fatalities and serious accidents in the sand and gravel industry. I conclude that an appropriate penalty for the violation is $300.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent shall, within 30 days of the date of this decision, pay to MSHA the sum of $300 for the violation of section 110(c) of the Act found herein.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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

Michael Brunson, P.O. Box 336, Saraland, AL 36571 (Certified Mail)

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FEB 6 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-430-D
ON BEHALF OF	:	MSHA Case No. HOPE CD 86-09
NICHOLAS RAMIREZ,	:	
Complainant	:	No. 21 Mine
	:	
v.	:	
	:	
W-P COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of a settlement agreement, and an order directing compliance with the settlement agreement and dismissing this case.

FOR GOOD CAUSE SHOWN, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties will fully comply with the terms of the Settlement Agreement filed herein on January 30, 1987.

2. Any party to this proceeding may move to reopen this case for hearing and determination upon a complaint by such party alleging that, within 90 days of such complaint, the other party violated the terms of the Settlement Agreement herein and for an order granting appropriate relief.

3. Based upon the foregoing, this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 9 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ANDY BRACKNER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 86-69-D
	:	BARB CD 85-41
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 Complainant; R. Stanley Morrow, Esq., and Harold D. Rice, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discriminated against in that he was transferred on March 22, 1985 to a less favorable job because of activities protected under the Federal Mine Safety and Health Act of 1977 (the Act). Respondent denied that it discriminated against Complainant. Both parties had pretrial discovery. Respondent moved to compel the production of certain documents. I denied the motion by an order issued August 5, 1986. Pursuant to notice, the case was heard in Birmingham, Alabama, on October 23, 1986. Anthony Brackner, Russell Weekly, Daryl Dewberry, and William Dykes testified on behalf of Complainant. Respondent did not call any witnesses. Both parties have filed post hearing briefs. Based on the entire record, and considering the contentions of the parties, I make this decision.

FINDINGS OF FACT

At all times pertinent to this decision, Respondent was the owner and operator of an underground coal mine in Tuscaloosa County, Alabama, known as the No. 7 Mine. Complainant Brackner was employed as a miner. He began working for Respondent in 1982 as an electrician, and worked primarily on continuous miner

sections. In January 1985, he was assigned to work as an electrician on the Number 1 Longwall to prepare him to work on the Number 2 Longwall which was being opened up. The longwall sections operate twenty four hours per day, 7 days a week, with shifts "swapping out at the face." The continuous miner sections operate 16 hours per day, 5 days a week, and the shifts change outside. For these reasons, overtime work is always available to miners working on the longwall, and rarely available to miners working on continuous miner sections.

On March 19, 1985, a methane ignition occurred on the Longwall Number 1 Section. No injury or property damage resulted. After the ignition was contained and extinguished, Complainant asked the section foreman whether he was going to report it to MSHA. 30 C.F.R. § 50.10 requires that an unplanned ignition be immediately reported to MSHA. The section foreman replied that he was not going to report it. On the following day, Complainant told the UMWA Safety Committeeman about the ignition, and he reported it to MSHA. On March 22, 1985, MSHA conducted an investigation and issued two citations, one for failure to report the ignition, the other for failing to shut down the section to prevent the destruction of evidence. In the course of the investigation, Complainant was interviewed by MSHA inspectors at the beginning of his shift on March 22. When he left the interview, he was told by foreman Hugh Bonham to report to the Number 8 continuous miner section. Complainant asked why he was being transferred from the longwall, and Bonham replied that he was told to transfer him. Four or five days later, Complainant asked the Number 1 longwall maintenance foreman Eugene Foster why he was taken from the longwall, and was told that the order came from higher up. The next day Complainant asked James Kelly, maintenance supervisor over all the longwalls, about the transfer. Kelly said he knew nothing about it. When Complainant told Foster about Kelly's response, Foster shrugged his shoulders. A few days after Complainant's transfer, he was replaced on the longwall section by an electrician with less seniority than Complainant. The workload on the longwall section increased after Complainant's transfer.

Complainant worked on the continuous miner section from March 22, 1985 through May 19, 1985. He worked overtime only twice for a total of 2-1/4 hours. During the same period, the electricians who remained on the longwall worked 48, 46 and 50-1/2 hours of overtime during the week. For the seven weeks prior to his transfer, Complainant worked 67.25 weekend hours hours compared to 50 and 38 for the other electricians on the section. From March 22 through May 19, Complainant worked 48 hours of weekend overtime and 17 hours of doubletime. The three other electricians worked the following weekend overtime and

doubletime hours: Seagle 53OT and 19DT; Weekly 39 OT, 2-1/2 DT; Canon 47-1/2 OT, 12 DT.

On March 25, 1985, the electricians on the longwall section filed a grievance to have their classification changed from electrician to longwall mechanic. The grievance was settled May 13, 1985 by the reclassification of the electricians to longwall mechanics. On May 20, 1985 Complainant was awarded the job of longwall mechanic on the number 2 Longwall section by exercising his bid rights under the contract. (When they were classified as electricians, Respondent could transfer them to and from the continuous miner sections.) Complainant did not participate in the grievance and apparently had no right to participate since he was then working on the continuous miner section.

Under the terms of the National Bituminous Coal Wage Agreement of 1984, a miner may be awarded a job by bid only twice during the life of the contract, if the job carries the same or lower wage rate than the job he currently has. The job of electrician carries the same wage rate as that of longwall mechanic. Complainant's hourly rate of pay is $14.415; his overtime hourly rate (time and one half) is $21.6225 and his doubletime rate is $28.83.

ISSUES

1. Is Complainant's claim barred by time limitations?

2. Was Complainant transferred on March 22, 1985 because of activity protected under the Act?

3. Was the transfer adverse action?

4. If Complainant was discriminated against, to what remedies is he entitled?

5. If Complainant was discriminated against, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Complainant Andy Brackner and Respondent are protected by and subject to the provisions of the Act, Complainant as a miner, and Respondent as the operator of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

TIME LIMITATIONS

At the outset of the hearing, Respondent moved to dismiss on the ground that the claim was time-barred. The alleged discrimination occurred on March 22, 1985. Complainant signed his complaint to MSHA on May 21, 1985. (The form indicates that it was filed on May 22, 1985). MSHA conducted an investigation which included interviews with prospective witnesses. MSHA notified Complainant on April 22, 1986 that in its opinion a violation occurred. The complaint was filed with the Review Commission on April 28, 1986.

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary. The complaint here was filed 61 days after the alleged discrimination. Complainant testified that he contacted his union representative, Daryl Dewberry, who advised him of his rights under section 105(c). Dewberry filled out his complaint, and, after Complainant signed it, Dewberry took it to the MSHA subdistrict office. The one day delay in filing shown here in my opinion is excused on the basis of Complainant's ignorance of the applicability of the law, and his bringing the matter to the attention of his union representative within the statutory period. See Herman v. Imco Services, 4 FMSHRC 2123 (1982); Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (1984); Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (1984).

The Act further provides that upon receipt of a complaint by a miner, the Secretary shall commence an investigation within 15 days, and if he determines that discrimination has occurred, shall immediately file a complaint with the Commission. It directs the Secretary to notify the miner within 90 days of the receipt of a complaint of his determination whether a violation has occurred. The Legislative History of the Act makes it clear that this time limitation is not jurisdictional and that Complainant should not be prejudiced by the failure of the Government to meet its time obligations. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978). However, the Commission has held that a long delay coupled with a showing of prejudice to the operator may subject the complaint to dismissal. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986).

In the present case, the Secretary notified Complainant on April 22, 1986 that it was determined that discrimination had occurred. This was 11 months after the complaint was filed with MSHA. The question thus arises whether Respondent has

demonstrated "material legal prejudice attributable to the delay." Secretary/Hale v. 4-A Coal Company, Inc., supra. The evidence shows that many of the potential witnesses no longer are employed at the subject mine, including Douglas Herring, the union safety committeman to whom Complainant reported the ignition, and who called MSHA; Hugh Bonham, a Jim Walter supervisor, who told Complainant to go to the No. 8 Continuous Miner Section after the ignition investigation; Walter Daniels, the Safety Director at the subject mine, with whom Dewberry discussed Complainant's status and his possible filing of a section 105(c) complaint; Troy Miller, maintenance foreman on the evening shift who originally asked Complainant if he wanted to work on the Longwall Section. Respondent asserted that these people no longer work for Jim Walters, but has not established that they were not available for testimony and not subject to subpoena. Further, there is no evidence in the record as to when they left Jim Walter's employ. Therefore, I conclude that Respondent has not shown material legal prejudice attributable to the Secretary's delay in filing the complaint with the Commission.

DISCRIMINATION

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

PROTECTED ACTIVITY

I have found as a fact that Complainant reported an ignition problem to a union safety committeeman who reported it to MSHA. This followed the refusal of Respondent's foreman to make such a report. This is incontestably activity protected under the Act.

It directly relates to mine safety, and to "making a complaint under or related to this Act . . ." (Section 105(c)(1).

ADVERSE ACTION

Complainant was transferred from his job as an electrician on a longwall section to the job of electrician on a continuous miner section. Although the hourly pay rates are the same, the evidence clearly shows that the longwall job is more desirable and affords the opportunity to earn substantially more overtime pay. I conclude that the transfer was adverse action.

MOTIVATION

Direct evidence of a discriminatory motive is usually difficult to produce. However, the fact that "the adverse action . . . so closely followed the protected activity is itself evidence of an illicit motive". Donovan v. Stafford Construction Co., 732 F. 2d 954, 960 (D.C. Cir. 1984). The adverse action here immediately followed Complainant's interview by the MSHA inspectors. This fact together with the refusal of Complainant's supervisors to give him any reason for his transfer is evidence tending to establish that the protected activity was a factor in the adverse action. Complainant has therefore established a prima facie case of discrimination under section 105(c) of the Act. Pasula, supra. Respondent did not submit any evidence to rebut the prima facie case. Therefore, I conclude that Respondent violated section 105(c) of the Act on March 22, 1985 by transferring Complainant from the position of longwall section electrician to the position of miner section electrician.

REMEDY

Secretary's Exhibits 1 and 2 show the overtime hours worked by Complainant and the other electricians prior to his transfer, and the overtime hours worked by Complainant, and the longwall electricians after his transfer. I conclude that, as the attachment "A" to Complainant's brief argues, Complainant lost 42-3/4 hours of overtime during the week and 5 hours of time and one-half overtime and 2 hours of doubletime work on weekends during the period March 23, 1985 through May 19, 1985. He is entitled to receive back pay in those amounts with interest in accordance with the formula in Secretary/Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042 (1983). He is further entitled to have restored the contract bid right which he exercised to obtain the longwall mechanic position on May 20, 1985.

PENALTY

Respondent is a large operator. The violation of section 105(c) found herein was a serious and intentional violation. No mitigating factors were advanced by Respondent. I conclude that a penalty of $1000 is appropriate.

ORDER

Respondent is ORDERED to pay to Complainant, within 30 days of the date of this decision, the sum of $1,105.13 representing overtime pay of which he was deprived from March 23, 1985 through May 19, 1985, plus interest in the amount of $169.18 through December 31, 1986 and thereafter at the rate of 10% per annum. Respondent is FURTHER ORDERED, within 30 days of the date of this decision, to restore Complainant's contract bid right which he exercised on May 20, 1985. Respondent is FURTHER ORDERED to pay to MSHA, within 30 days of the date of this decision, the sum of $1000 as a civil penalty for the violation found herein.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 10 1987

STEVE COLLETT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 86-109-D
	:	MSHA Case No. BARB CD 86-19
CHANEY CREEK COAL CORPORATION, Respondent	:	Dollar Branch Mine

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging that the respondent discriminated against him by discharging him on January 14, 1986, for making safety complaints about a shuttle car which he operated in the mine. Mr. Collett's initial complaint was investigated by MSHA, and it declined to file a complaint on his behalf after determining that a violation of section 105(c) had not occurred. Mr. Collett subsequently filed this action with the Commission through counsel.

A hearing on the merits of the complaint was scheduled on February 11, 1987, in London, Kentucky. However, it was cancelled after Mr. Collett's counsel advised me that the parties had reached a settlement. The parties have now filed their settlement agreement with me, and they jointly move for a dismissal of the complaint on the basis of that agreement.

Discussion

Mr. Collett's counsel states that Mr. Collett is now employed for another coal company, and is no longer interested in reinstatement with the respondent. Under the terms of the settlement, Mr. Collett agrees to withdraw his complaint and to waive all further claims against the respondent. The respondent

agrees to pay Mr. Collett $4,000, in satisfaction of his complaint, in two separate installments of $2,000. The first installment is to be paid on or before February 10, 1987, and the second installment is to be paid on or before March 10, 1987.

Conclusion

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

ORDER

The proposed settlement IS APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply forthwith with the terms of the agreement. Upon full and complete compliance with the terms of the agreement, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 10 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 87-3 A.C. No. 15-14291-03503
v.	:	Marigold Docks
MARIGOLD DOCKS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On February 9, 1987, the parties filed a Joint Motion to approve settlement in this case. The violations were originally assessed at $126 and the parties propose to settle for $120.

Respondent does not agree that the citation was properly issued to it, rather than the employer of the deceased miner. However, it agrees to the settlement of this case by the payment of $120. I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $120 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEB 10 1987

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 86-190-R
v.	:	Order No. 2705915; 2/19/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 86-194-R Order No. 2705881; 2/20/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-254 A. C. No. 46-03805-03723
v.	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Contestant/Respondent;
James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Southern Ohio Coal Company (SOCCO), has filed notices of contest challenging the issuance of Order No. 2705915 (Docket No. WEVA 86-190-R) and Order No. 2705881 (Docket No. WEVA 86-194-R) at its Martinka No. 1 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $2,100 for the violations charged in the above two contested orders as well as that violation charged in Order No. 2705918 which was the subject of Docket No. WEVA 86-192-R. 1/

1/ Docket No. WEVA 86-192-R was disposed of by a separate Order of Dismissal dated April 16, 1986.

At the hearing on these cases, which was held on August 19, 1986, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of that portion of the civil penalty case that pertained to Order No. 2705918. I approved a reduction from $600 to $400 of that part of the civil penalty assessment and granted the motion on the record (Tr. 5).

The general issues before me concerning each of the remaining individual orders and its accompanying civil penalty petition are whether the orders were properly issued, whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 6-7):

1. The Martinka No. 1 Mine is owned by respondent, Southern Ohio Coal Company.

2. The Martinka No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject orders and terminations were properly served by a duly authorized representative of the Secretary of Labor on an agent of respondent on the dates, times, and places stated therein and may be admitted into evidence for purposes of establishing their issuance without waiving any objections as to their truthfulness and the relevancy of the statements contained therein.

5. The alleged violations were abated in a timely fashion.

6. The respondent's annual production for the year 1985 was approximately 7 million production tons. The subject mine had 2,495,783 production tons in 1985.

7. Respondent had 2,773 assessed violations during the 24-month period prior to the issuance of the orders at the subject mine.

8. Respondent received a section 104(d)(1) order on September 1, 1981, issued by Federal Mine Safety and Health Inspector Frank Bowers. Martinka No. 1 has had no clean inspections of the mine from the issuance of that order to February 20, 1986.

I. Docket No. WEVA 86-190-R; Order No. 2705915

Order No. 2705915, issued pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), alleges a violation of the regulatory standard at 30 C.F.R. § 75.1403 2/ and charges as follows:

> In the 2 east C section, there was less than 24 inch clearance between the left coalline rib and the Stamler belt coal feeder for approximately 6 to 7 feet, only 12 inch clearance was between the Stamler and ribline and the start and stop switch was installed for the belt conveyor in this area. Coal and slate was being dump on the right side of the Stamler instead of the front and the fire warning box was installed outby the Stamler Feeder. Mechanics, electricians, and belt cleaners use this area. Jim Kincell and Robert Molshan, belt foremen. Safeguard No. 2034480 - issued 11-03-82. FDB. .

The above-referenced safeguard provides in pertinent part: "24 inches of clearance shall be provided on both sides of the coal feeders in this mine."

As a factual matter, the witnesses for both parties were able to agree that the coal feeder in question was indeed closer than 24 inches to the left coal line rib on the morning of February 19, 1986, at the time the instant order was issued.

However, a threshold legal issue raised by SOCCO is whether the safeguard which is Government Exhibit No. 2 constitutes a valid and enforceable notice to provide safeguards. If the safeguard is not valid, then the (d)(2) order which purports to enforce it would likewise be invalid.

2/ 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.

Normally, mandatory safety standards are developed and promulgated in accordance with section 101 of the Act and the rule-making provisions contained in the Administrative Procedure Act, 5 U.S.C. § 551, et seq. SOCCO maintains that the requirements set forth in the instant safeguard should have properly been the subject of such rule-making, rather than a safeguard notice issued under section 314(b) of the Act. 3/

Section 314(b) of the Act grants the Secretary the extraordinary authority to essentially create mandatory safety standards on a mine-by-mine basis without resorting to the normal rule-making procedures contemplated by the Act. However, this authority is not without bound. The Secretary cites Southern Ohio Coal Co., 7 FMSHRC 509 (1985) for the proposition that the Commission has approved the issuance of safeguards without rule-making for a particular mine and that the Commission has stated that the operator's interest is nevertheless protected by narrowly construing the terms of the safeguard to assure that the operator understands the hazard sought to be regulated. However, SOCCO's position in this case is not that they didn't understand the terms of the safeguard at bar, but rather that the Secretary is not authorized to issue safeguards of a universal nature on a mine-by-mine basis in the first instance.

The operator contends that the subject matter of the instant safeguard is of general applicability. It simply requires 24 inches of clearance on both sides of coal feeders. Inspector Delovich testified that the hazard involved if the feeder is closer than that to the rib line is that a miner could conceivably be crushed between the feeder and the rib if the feeder should be bumped by a shuttle car dumping coal into it. The company's argument is that there is nothing unique about the Martinka No. 1 Mine that would increase this hazard at that mine and no others; rather, the hazard sought to be eliminated by the safeguard exists equally in all mines using coal feeders.

SOCCO also makes the point that the previous Southern Ohio Coal Co. case which the Secretary relies on here as authority concerned a notice to provide safeguards issued pursuant to 30 C.F.R. § 75.1403-5(g), one of the specific criteria set forth in the Code of Federal Regulations. The point being that the specific criteria set forth in 30 C.F.R. § 75.1403-2 through 30 C.F.R. § 75.1403-11 were established via the rule-making process. Whereas in the instant case, Safeguard No. 2034480, which is the underlying safeguard in the (d)(2) order at bar, was not issued pursuant to and does not relate to any of those specific criteria.

3/ Section 314(b) of the Act consists of the identical language contained in 30 C.F.R. § 75.1403 as fully set out in fn. 2.

It is noteworthy that the other case relied on by the Secretary, Zeigler Coal Co. v. Kleppe 4/, although cited for the court's holding that violations of an approved ventilation plan may properly be considered a violation of a mandatory safety and health standard even though such plans are approved without rulemaking, had more to say on the subject of when rulemaking would be required. The Court went on to state that:

> It [section 303(o) of the Act] was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
>
> Thus an operator might contest an action seeking to compel adoption of a plan, on the ground that it contained terms relating not to the particular circumstances of his mine, but rather imposed requirements of a general nature which should more properly have been formulated as a mandatory standard, under the provisions of § 101. This would appear to render all but inconsequential the actual circumvention of § 101 resulting from the enforceability of ventilation plans. For insofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application. 5/

While the Secretary concedes that the particular safeguard at issue here may have application beyond the Martinka No. 1 Mine, he argues that it cannot be held on its face to have such a general and universal application so as to compel rulemaking. The operator's position is that it is abundantly clear that the requirements of the safeguard are of a general nature applicable to all coal mines and therefore should have been formulated as a mandatory standard under the provisions of section 101 of the Act. Reading the record as a whole, I believe that a clear inference may be drawn that the requirements of the instant safeguard are applicable to at least a significant number of coal mines which employ coal feeders and shuttle cars to transport coal. Importantly, there is no reason given in this record why the 24 inch clearance requirement should be imposed only in the particular mine herein involved and not in mines using coal feeders generally.

4/ 536 F.2d 398 (D.C. Cir. 1976).
5/ Id. at 407.

The Act provided for flexibility by creating safeguards to cover those situations where conditions vary on a mine-to-mine basis. Through the use of safeguards, certain requirements can be imposed on a particular mine because of its peculiar physical lay-out or circumstances. "However, the potential scope of safeguards is very broad and accordingly, care must be taken to ensure that they are employed only in the proper context and do not become a means whereby the usual rule-making process is ignored and circumvented." U.S. Steel Mining Co., Inc., 4 FMSHRC 526, 529-530 (1982). In that case, Judge Merlin held that the safeguard had nothing to do with conditions peculiar to that mine as opposed to other mines. He concluded that the safeguard and subsequent citation based upon it were improperly issued and invalid.

I conclude that where, as here, the safeguard is not issued under any of the specific criteria for safeguards contained in 30 C.F.R. §§ 75.1403-2 through 75.1403-11, then the requirements of that safeguard must be demonstrably related to some mine-specific hazard or unsafe condition sought to be corrected. In the instant situation, I find that the requirements set forth in Safeguard No. 2034480 and the hazards sought to be protected against are of a general nature applicable to at least a significant number of other coal mines utilizing coal feeders and therefore should have properly been promulgated using the rule-making procedures contained in § 101 of the Act. Therefore, I find that Order No. 2705915, being based on an invalid safeguard was improperly issued and will be vacated.

II. Docket No. WEVA 86-194-R; Order No. 2705881

Order No. 2705881, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.400 6/ and charges as follows:

> On the B-6 longwall belt conveyor there was 23 bottom rollers turning in wet to dry coal dust, 11 bottom rollers frozen, damaged, in wet coal dust under the belt takeup and the front bottom roller at the belt drive was turning in coal dust directly outby the belt drive roller drums and the bottom belt for approximately 10 feet at the belt drive, running in coal, bottom belt was running

6/ 30 C.F.R. § 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

out of line and rubbing the steel leg stands cutting into the leg stands 1/4 to 1/2 inch in the area where the rollers were turning in the coal, frozen bottom rollers under the belt takeup were shining. Conditions present a fire hazard. Larry Morgan, longwall foreman, Dave Williams, longwall coordinator foreman.

MSHA Inspector Harry C. Markley issued the instant order during an AAA inspection of the Martinka No. 1 Mine on February 20, 1986. He observed accumulations of coal starting to build up under the rollers of the B-6 longwall belt conveyor, and the further he walked toward the section, he saw the rollers running in dry to wet coal. Finally, when he got to the tailpiece and saw the muddy conditions there, he told Mr. Resetor, the operator's safety inspector for the mine, that he was under a (d)(2) order. These accumulations and conditions existed for a distance of approximately 300 feet outby the tailpiece. Mr. Markley further opined that there was an average accumulation of from one to two bushels of dry to wet coal under each roller, of which 23 were involved in this violation. He modified his original description of the condition of the coal somewhat in response to later questioning. He stated that the coal was dry or would dry in those areas where the water would run-off and leave the solids at the rollers.

Inspector Markley testified that the hazard presented by the situation he observed was that the belt and rollers were turning in this accumulation of fine coal and coal dust and the belt was rubbing the stands causing friction. He testified that heat was thereby produced, the coal was or could be dried by the heat, and in his opinion a mine fire could result.

The condition of the coal, vis-a-vis its wetness or dryness, is a critical initial issue in this case because the cited regulation speaks to accumulations of combustible materials. If the coal accumulation was not combustible as a factual matter, then it follows that there can be no violation of 30 C.F.R. § 75.400. The Secretary contends that the coal around at least some of the 23 rollers was dry and could present a fire hazard. The operator contends that the coal was too wet along the entire 300 foot section cited to constitute either an accumulation of combustible materials or a fire hazard.

Mr. Mugmano, the Belthead Man at the time the order was issued, testified that at the time this order was issued he believed they were mining under a creek because his area was always wet and muddy. He testified that the coal under

the belt was damp to wet under each of the 23 rollers cited in the order, and the area around the rollers was saturated. Because of these extremely wet conditions, he opined that the rollers in question could not become dry. Additional water comes from the sprays on the longwall shear and the crusher. Approximately 60 to 75 gallons of water per minute are sprayed on the coal that is cut and goes on the belt, making it a very wet belt in the opinion of this witness. When asked if there was any wet to dry coal dust in the area cited he replied that the only dry area would have been where an accumulation of mud came off the rollers and was heated by the friction of the running belt touching the steel leg stands. It would get warm there and form a crust of an inch or two. The rest of the area he described as resembling chocolate pudding, and being too wet to even shovel. SOCCO Exhibit Nos. 8, 9, 10, and 11 are photographs that bear this out, at least insofar as it appears to be an accurate description for the areas they depict, which I take note is obviously not the entire 300 feet at issue.

Mugmano agreed with the inspector that the bottom belt was running out of line and rubbing the steel leg stands and when it does that, and the belt is so saturated with water, it causes a big mudpile to form where it rubs mud off the belt. Mr. Mugmano disagreed, however, with the characterization of the material as "coal". He stated it was more properly called a mixture of coal dust, water and rockdust, of which he uses approximately thirty (30) 50-pound bags each day.

The Commission has held that:

> [I]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary [subject to challenge before the administrative law judge] it likely could cause or propagate a fire or explosion if an ignition source were present. Old Ben Coal Co., 2 FMSHRC 2806, 2808 (1980).

When evaluated against that standard the Secretary's case fails of proof. The Secretary has the burden of proving that a sufficient quantity of combustible material existed which could cause or propagate a fire or an explosion were an ignition source present. I am not convinced by the evidence in this record that enough dry coal or dry coal mixture existed to amount to anything. I find as a fact that the overwhelming majority of the accumulation cited was a damp to water saturated mixture of coal dust, rock dust and

water. I further find that the only dry part of this accumulation was as Mr. Mugmano testified where accumulations of mud formed a crust an inch or two thick in those spots heated by the friction of the running belt touching the steel leg stands. The remainder of the material in question I find as a fact was too wet to be considered "combustible." Ultimately, therefore, I conclude that there was not a violation of 30 C.F.R. § 75.400 proven.

ORDER

On the basis of the foregoing findings and conclusions, Southern Ohio Coal Company's contests ARE GRANTED, Order Nos. 2705915 and 2705881 ARE VACATED, and MSHA's related civil penalty proposals ARE REJECTED.

The respondent IS ORDERED to pay to MSHA a civil penalty in the amount of $400 in satisfaction of that portion of the civil penalty case that pertains to Order No. 2705918 within thirty (30) days of the date of this decision and order. Upon payment, the civil penalty proceeding IS DISMISSED.

Roy J. Maurer
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

FEB 12 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-1-M A.C. No. 05-03143-05511
v.	:	Parachute Creek Mine
UNION OIL COMPANY OF CALIFORNIA, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Anthony D. Weber, Esq., Union Oil Company of California, Los Angeles, California, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of a civil penalty ("Proposal for Penalty") by the Secretary of Labor (herein the Secretary) on November 15, 1985, pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820 (1977) (herein the Act). A hearing on the merits was held in Denver, Colorado, on June 25, 1986, at which both parties were represented by counsel. Subsequent to the hearing the presiding administrative law judge, John A. Carlson, passed away and by Order of Assignment dated October 17, 1986, this matter came on the docket of the undersigned for decision.

The Secretary charges Respondent with one violation, i.e., violating 30 C.F.R. § 57.5001/5005 as described in Citation No. 2355268 issued by MSHA Inspector Michael T. Dennehy on May 115, 1985, as follows:

> "On May 15, 1985, a Union Oil Company employee welding underground at the secondary crusher area was over exposed to welding fumes (Vanadium) while applying hard surfacing welding rods (nickel-chrome manganese and Vanadium-carbide) to the crusher. The welder was exposed to .0678 mg/M^3 of Vandium fume whereas Vanadium fume has a ceiling limit of .05 mg/M^3 and should not be exceeded. Personal respiratory protection was not being worn by the employee while he was

welding nor was the ventilation fan operating the entire shift. Analytical results were received June 7, 1985. This citation is issued June 27, 1985. The samples were taken May 15, 1985."

The subject 104(a) Citation further charges that the violation was "significant and substantial" (herein "S & S") 1/.

Insofar as relevant, the air quality standard allegedly infracted, 30 C.F.R. § 57.5001, which sets forth exposure limits for airborne contaminants, provides:

"Except as permitted by § 57.5005 - (a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

X X X X X X X X

(c) Employees shall be withdrawn from areas where there is present an airborne contaminant given a "C" designation by the Conference and the concentration exceeds the threshold limit value listed for that contaminant." 2/

1/ In Secretary v. Consolidation Coal Company, 6 FMSHRC 189 (1984), the Commission held that S & S findings may be made in connection with a citation issued under Section 104(a) of the Act. Considering this ruling in conjunction with U.S. Steel Mining Company, 6 FMSHRC 1834 (1984), where the mine operator was allowed to contest S & S findings entered on Section 104(d)(1) citations in a penalty case, it is concluded that S & S findings contained in a Section 104(a) Citation similarly are properly reviewable in this penalty proceeding. See also Allentown Cement Company, Inc. v. Secretary of Labor, 8 FMSHRC 1513, at 1517 (1986).

2/ At the hearing, the presiding judge took official notice of (1) the applicable threshold limit values (herein TLV's)(T. 7, 8), and (2) A 1973 TLV booklet from ACGIH. (T. 251). Reproduced copies of both documents have been placed in an "Exhibits" folder which, together with other exhibits and the transcript of hearing, constitute the official record in this matter.

The pertinent TLVs referred to in 30 C.F.R. § 57.5001 provide as follows:

	"Substance	ppm[a)]	mg/M[3b)]
	Vanadium (V_2O_5), as V		
	Dust	___	0.5
C	Fume	___	0.05

X X X X X X X X X

a) Parts of vapor or gas per million parts of contaminated air by volume at 25°C and 760 mm. Hg. pressure.
b) Approximate milligrams of substance per cubic meter of air." 3/

30 C.F.R. § 57.5005, entitled "Control of exposure to airborne contaminants", also cited by the issuing Inspector, provides:

> Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:
> (a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.
> (b) A respirator program consistent with the requirements of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. 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.

3/ The effect of the "C" designation in front of the Vanadium Fume TLV is shown in § 57.5001(c), supra, and I infer from the fact that withdrawal of employees is required where the "C" designation appears that such a concentration of the airborne contaminant, in the opinion of ACGIH poses a potentially serious hazard (T. 140, 141, 236, 237).

(c) When respiratory protection is used in atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment.

In general aid of the record, the dictionary definitions of these two terms are set forth here. Thus, vanadium and vanadium pentoxide are described in "A Dictionary of Mining, Mineral and Related Terms" (complied and edited by Paul W. Thrush and the Staff of the Bureau of Mines, U.S. Department of the Interior, 1968), as follows:

> Vanadium. A gray or white, malleable, ductile, polyvalent metallic element in group V of the periodic system. It is resistant to air, sea water, alkalies, and reducing acids except hydrofluoric acid. It occurs widely but mainly in small quantities in combination in minerals (such as vanadinite, patronite, carnotite, and roscoelite), in the ashes of many plants, in coals, in petroleums, and in asphalts. Usually obtained in the form of ferrovanadium or other alloys, or in almost pure metallic form containing small amounts of oxygen, carbon, or nitrogen by the reduction of ores, slags, or vanadium pentoxide (V_2O_5). Used chiefly in vanadium steel. Symbol, V; atomic number, 23; and atomic weight, 50.942. Webster 3d; Handbook of Chemistry and Physics, 45th ed., 1964, pp. B-2, B-143.

> Vanadium pentoxide. Yellow to red; orthorhombic; V_2O_5; molecular weight, 181.88; specific gravity, 3.357 (at 18° C); toxic; melting point, 690° C; decomposes at 1,750° C before reaching a boiling point; slightly soluble in water; soluble in acids and in alkalies; and insoluble in absolute alcohol. Used in ceramics and as a catalyst. Handbook of Chemistry and Physics, 45th ed., 1964, pp. B-144, B-236.

As noted in the foregoing, and as reflected in the TLVs, V is the symbol for vanadium and V_2O_5 is the symbol for vanadium pentoxide.

Preliminary Findings and Conclusions

While the form of Vanadium at which the subject safety and health standard is directed is Vanadium Pentoxide (V_2O_5). (T. 100-102, 140, 141), the violation created by 30 C.F.R. § 57.5001 is for exceeding the TLVs for Vanadium fume or Vanadium dust. Vanadium pentoxide is one of several forms of Vanadium and is a separate, more toxic form thereof (T. 140, 141, 168, 208). The technique for the determination of Vanadium requires (1) determining the particular TLV (threshold limit value) of Vanadium (fume or dust) and then (2) determining approximate milligrams of Vanadium itself per cubic meter of air and applying to such determination a multiplication factor (error factor) to

account for any vagaries inherent in the process. (T. 36-38, 97, 140, 159, 168). The Vanadium fume TLV of .05 mg/M is equivalent to a Vanadium Pentoxide reading of 2 1/2 times such level (T. 168).

The subject Citation was issued by MSHA Inspector Michael T. Dennehy on May 15, 1985, the second day of a two-day inspection of Respondent's Parachute Creek Mine, an underground oil shale mine located near Parachute, Colorado. On the first day of the inspection, May 14, Inspector Dennehy ascertained that hard surface welding using vanadium rods was being conducted on the secondary crusher and decided to sample miners engaged in this work on the following day. In furtherance thereof he called an MSHA health technician in Grand Junction, Colorado and requested that welding fume filters be prepared for his survey to be conducted the following day and precalibrated his P-2500 pumps in preparation therefor. (T. 11-15; Ex. P-1).

After calibrating the pumps on May 14, 1985, and charging them overnight, Mr. Dennehy returned to the mine site the next morning with five pumps and air filters (T. 15). Mr. Dennehy proceeded to the crusher area of the mine where four employees were welding (T. 16) and he placed the pumps on them by fastening the pump to their belt, putting the pump hose behind their back, and placing the top of the hose in their breathing zone (T. 18). Each pump contained a filter that was placed in the pump by Mr. Dennehy after removing the preseal number (T. 19, 22). Mr. Dennehy recorded the preseal number on his health field notes (Ex. P-2)(T. 22, 23). Mr. Dennehy also recorded on Exhibit P-2 the time he turned on the pumps and he noted the names of the employees (T. 21). After turning on the pumps, Mr. Dennehy left the area to conduct further inspection (T. 24).

At issue in this matter is sample number MD-1 as indicated on Ex. P-2. Mr. Dennehy left the pump on the employee wearing sample MD-1 for the entire shift period. He interrupted the fume sampling at one point during the day to take a 30 minute short term sample (T. 25). He indicated the 30 minute sample by making entries on his notes (Ex. P-2, P-1)(T. 27). At the end of the shift Mr. Dennehy removed the pumps from the employees, removed the filter from each of the pumps, and sealed the cassette. He put the cassette back into the holding tubes and returned to his office in Grand Junction. He then did a post calibration of the pumps and entered this on his presampling calibration sheet (Ex. P-1).

At the Grand Junction field office Mr. Dennehy returned the sampling cassettes and filters to the health technician (T. 28, 29). Mr. Dennehy returned the entire sealed cassette to the technician. The technician then sent the cassette to Denver for analysis (T. 85, 86). Along with the cassettes was sent a request for analysis, specifically, the analysis of the 16 elements of welding fume (T. 86).

In response to his request, Mr. Dennehy received from the Denver Safety and Health Technological Center, MSHA, in Denver, an Elemental Analysis Report dated 6/5/85 (Ex. P-3)(T. 29, 86). The report from the technology center indicated to Mr. Dennehy that sample MD-1 contained 47.4 micrograms of vanadium. To determine the exposure to the elements listed on Exhibit P-3, Mr. Dennehy conducted calculations on a fume worksheet (T. 30-32) and determined that the concentration of vanadium was .0678 milligrams per cubic meter (T. 33). Mr. Dennehy next looked in the 1973 TLV booklet for the TLV for vanadium. He found the TLV to be .05 milligrams per cubic meter (T. 34). Mr. Dennehy indicated that although vanadium was listed twice in the TLV book he used the TLV for vanadium fume because the employees involved were conducting welding which creates fumes from the vanadium welding rod (T. 34, 49).

The .05 mg/M^3 TLV for vanadium fumes is a ceiling limit. As Mr. Dennehy indicated, a ceiling limit means that at no time should this limit be exceeded (T. 35). Once he ascertained the TLV for vanadium, Mr. Dennehy discussed his calculations with Richard L. Duran, an MSHA industrial hygienist in Denver to be certain of his calculations. Mr. Duran concurred that the calculations were correct.

Mr. Dennehy also discussed with Mr. Duran an error factor in the exposure. He then calculated an error factor of 1.16; even with this error factor the exposure was above the .05 milligrams indicated in the TLV booklet (T. 38).

Vanadium is an element found in hard metal, in this case, in the rods being used to weld. Aplication of heat vaporizes the material and if it is mixed with air or it oxidizes, vanadium pentoxide results (T. 100). The sample taken by the Inspector indicated the presence of vanadium; as above noted, the TLV is stated in terms of vanadium (fume or dust) not vandium pentoxide (T. 100, 102, 168). A welding operation using a rod containing V will produce V_2O_5 (T. 34, 101). The TLV booklet indicates that the standard for vanadium fume is .05 milligrams per cubic meter. Here, where the value is .0678 milligrams per cubic meter of vanadium, there would have been two and one-half times as much vanadium pentoxide as vanadium because vanadium pentoxide is heavier than vanadium. The value for V_2O_5, vanadium pentoxide, would be two and one-half times as great as the value for vanadium (T. 102). An overexposure then to .0678 milligrams per cubic meter of vanadium would indicate an exposure to V_2O_5 at two and a half times that amount (T. 102, 168). The TLV booklet indicates a ceiling level of .05 for vanadium fume. An exposure of .0678, as in this case, is an incursion of 35 to 36 percent over the TLV (T. 103, 159) and is in and of itself a violation of the subject safety standard (T. 220, 223, 236, 237).

At no time did the employees tested use respirators while engaged in welding and while the sampling was being conducted (T. 35), nor was the exhaust fan at the crusher system turned on (T.

35, 36) until the afternoon of the sampling day (T. 36). Had the exhaust fan been operating, the miner (welder) involved would not have been over-exposed (T. 35, 36, 71).

Visible dust in the area where the sampling was conducted was not observed by either the Inspector (T. 17) or by Respondent's observor, Steve Findlay (T. 191, 192).

After discussing the matter with Mr. Duran, the Inspector indicated on the Citation that the occurrence of the event against which the cited standard is directed was reasonably likely and that the injury resulting from or contemplated by the occurrence of such event could reasonably be expected to be "permanently disabling" (T. 38-40, 77-80). At hearing, the Secretary abandoned the contention that any resultant injury would be permanently disabling (T. 156).

At all times during the inspection and the conducting of the air samples, Mr. Dennehy followed the proper procedure and used the proper filters and equipment (T. 83, 95-96, 99, 136, 140-142, 168). Mr. Dennehy's sample, therefore, was accurate and showed that overexposure had occurred to at least one employee as indicated by sample MD-1 on Exhibit P-4. The sampling was conducted for vanadiumn fume which I conclude was proper in this instance. Thus, Mr. Duran, MSHA's expert witness, testified that during the welding process, when the materials vaporized and mix with the air and condense, fume is produced (T. 98-99). Mr. Duran also credibly testified with respect to the propriety of testing for fume, to wit:

"Q. Based on Mr. Dennehy's testimony and in your opinion, was it appropriate for Mr. Dennehy to test for fume?

A. Yes.

Q. Why is that?

A. The rod and the metal that's being welded in the welding process, there will be material vaporized when the vapor -- and as I indicated, when materials vaporize and mixes with the air and condensed, it is a fume. The welding process itself does not produce any dust.

Q. Just a fume.

A. Yes.

Q. Now, based on the testimony you heard and in your opinion, was there a fume present?

A. Yes.

Q. I'll refer your attention again to the TLV booklet that you have in front of you. There's a listing for vanadium and right after vanadium it says V_2O_5. Will you explain what that indicates?

A. The standard is for vanadium V_2O_5, vanadium pentoxide. But the standard is in terms of vanadium. Not vanadium pentoxide.

Q. What does that mean as far as --

A. It just simply means that in the case of welding the standard is vanadium pentoxide. But as far as the analysis and the concentration of air, it's all based just on vanadium. Not vanadium pentoxide.

Q. Okay. How does one get vanadium pentoxide?

A. You get it from welding.

Q. What is it exactly?

A. Well, as I indicated, you may have, say, a metal, vanadium, and if you heat it or in the case of welding, you vaporize some of the material. If it mixes with air or oxidizes, then you can get vanadium pentoxide.

Q. In your opinion, was vanadium pentoxide present?

A. Yes." (T. 99-100).

Inspector Dennehy's testing for vanadium fume, rather than testing for vanadium dust or some other "mixed" test, is thus supported in the record and found to be proper (T. 34-35, 50-53, 96-99, 136-138, 140, 159, 168, 236-238). The TLVs themselves, being an incorporated and integral part of the safety and health standard involved, call only for determination of either a fume or a dust measurement.

Discussion

As one of its concerns, Respondent, citing the decision of the Federal Mine Safety and Health Review Commission in Secretary v. Tammsco, Inc. and Schmarje, 7 MSHRC 2006 (1985), argues that "the law requires that a violation of 30 C.F.R. § 57.5001/5005 be established by actual sampling and analysis." Respondent emphasizes in its argument that exposure levels are to be determined by actual sampling, not by inference, and goes on to argue (1) that a reading for vanadium alone is insufficient to sustain a finding of vanadium pentoxide exposure, and (2) that the law requires and MSHA must prove that the type of activity performed by Respondent created the presence of vanadium pentoxide. Respondent's contention to the contrary, the TLVs patently contemplate the determination of vanadium pentoxide be made by testing (sampling) either vanadium fume or vanadium dust. (T. 100-102, 168, 236-238). In Tammsco, supra, MSHA conducted no sampling or testing. However, in the instant matter, the record is clear that Inspector Dennehy's determination that the exposure

level exceeded the applicable TLV was based on acutal sampling following lengthy procedures and not on inference. The differences between that proceeding and this, as well as the differences and interplay between 30 C.F.R. § 57.5001 and 5005 were pointed out by the Commission in Tammsco, to wit:

"We agree with the judge that in order to establish a violation of section 57.5-5, the Secretary must first prove a violation of section 57.5-1. It is clear from the language of the Secretary's standard that section 57.5-5 establishes an exception to the general mandate of section 57.5-1 which requires that airborne contaminants not exceed their TLV, and that the application of section 57.5-5 is conditioned specifically on a determination that miners are exposed to excessive levels of airborne contaminants in violation of section 57.5-1. These exposure levels are to be determined by actual sampling, not by inference. As the judge noted, however, the citation at issue alleges a failure to comply with a provision of the "dust control plan", and does not allege overexposure to airborne contaminants. We agree with the judge that the Part 57 air quality standards do not provide for the adoption and approval of a dust control plan which can be enforced as a mandatory health standard. Cf. Carbon County Coal Co., 7 FMSHRC 1367, 1370 (September 1985)(discussing the approval and adoption of dust control plans required by 30 U.S.C. § 863(o)). For this reason, and because no monitoring, testing or sampling of employees or the atmosphere was performed by MSHA during the inspection, the judge correctly dismissed the proceedings." (Emphasis added).

The "exception" to the proscriptions of subsection 5001 referred to in the opening line of 5001, i.e. "Except as permitted by § 57.5005" is contained in the second and third sentences of subsection 5005. These two sentences permit miners in certain specified situations to work "for reasonable periods of time" in concentrations of airborne contamination exceeding permissible levels "if they are protected by appropriate respiratory protective equipment."

In this proceeding the Secretary has established that a miner was exposed, in violation of 30 C.F.R. § 57.5001, to an excessive level of airborne contaminant. The Secretary also established that the miner was not wearing protective equipment and that a ventilation fan in the area involved was not operating for a significant part of the time that sampling was conducting (T. 35, 36). Respondent, on the other hand, made no showing that it was entitled to relief under the Subsection 5005 exception, and its various contentions in this connection, being unsupported in the record in either fact or legal authority, are rejected.

Nor does the record support the certitude in Respondent's flat assertion (Respondent's Brief at page 5) that "... MSHA mistakenly assumed that the samples taken on or near the welders at the mine on May 15th were entirely welding fumes. In reality,

vanadium dust from surface brushing entered the filter." Thus, Respondent's chief witness on this critical point, Steve Findlay, on direct examination, gave an "opinion" on what is a question of fact to this effect "... I believe, the sample was contaminated ..." (T. 186).

Subsequently on cross-examination, Mr. Findlay, with commendable candor, significantly qualified even this opinion:

"Q. did you, on that particular day -- see if I understand this. You testified that the employees were brushing the metal?

A. Yes.

Q. Did you see them brushing the metal?

A. No, I didn't.

Q. Do you know when that occurred?

A. I'm sure that occurred prior to them doing the hard surfacing. What would happen is they would have to -- each teeth, like I said, the separate teeth on the grinder -- as they're working on each one of those, the next row they go to they probably brush it and so forth. Clean it.

Q. So you say they probably did that?

A. Well, it's a standard operating procedure.

Q. Could they brush the entire -- all of the teeth first and then weld?

A. That's possible, but normally that's not done.

Q. They lift their mask when they do the grinding?

A. They usually take off their helmets.

Q. And they don't use any personal protective equipment when they brush?

A. No.

Q. And you're not saying they did any grinding on that particular day?

A. Not that I'm aware of.

Q. You indicated that you were in the area when the inspector was, is that correct?

A. The majority of the time.

Q. Did you notice any dust in the air?

A. Well, no. But, you know, you can't see dust. Like some micron particles of dust or micron particles, of course, you won't be able to see. Visual test of the dusting is not one way to monitor the presence of dust.

Q. I understand that. I'm just asking if you saw anything in the air that day that would indicate the presence of dust.

A. No.

Q. Is it your testimony then that this brushing put dust particles into the air?

A. Yes. That's a good possibility.

Q. What kind of dust particles?

A. Well, there's shale dust, there's dust also from the vanadium that's been laid on before that.

Q. I'm sorry. Are you saying that they brushed the vanadium that's already been laid?

A. No. What I'm saying is they had put a surface of vanadium on there prior. Like I said, they've done this before. So possibly there was surface metal there brushing and so forth.

Q. So you're saying that the brushing then puts the dust in the air?

A. That's a possibility.

Q. That's a possibility. During the welding process, if that flame, the welding flame, hits the dust, what effect does it have on the dust?

A. Depending on the force of the flame, I don't know. It could make it airborne. I'm not sure.

Q. Could it turn into a fume?

A. The dust itself?

Q. Yes.

A. I wouldn't think so. No. I don't know.

Q. I'm sorry. You don't know or you don't think so?

A. I don't know.

Q. You don't know. All right. I'm not sure I heard exactly what you said, but you said that the samples were -- what word did you use? You had an opinion as to the sampling procedure.

A. I believe what I said was the sample might have been contaminated.

Q. Might have been contaminated. And what's the basis of that opinion?

A. Well, we're sampling for fume and there's a possibility that particulates could have ended in the filter.

Q. Would those particulates have entered the filter while they had their masks down? Their welding masks.

A. I don't see how.

Q. So it would have been during the time they had taken their -- are they called masks or shields?

A. Hoods.

Q. Hoods. During the time they took those hoods off?

A. Right. The shades on those are so dark that it would be quite impossible to do any work outside of welding using that torch with the hood on. You just couldn't see.

Q. I believe you told me that you didn't stay with these welders all day as the inspector didn't stay with them.

A. Right.

Q. And did you see how often or were you able to observe how often they had their hoods on or off?

A. No. The only time I observed it, of course, was when I went up to change my filters.

Q. What were they doing when you changed your filters?

A. Mr. Everett, I believe, was sitting -- I was talking to him for a while. He was changing some rods. And he was talking about taking a break. It was close to 2:00 o'clock. And I didn't observe him doing anything else.

Q. Did you observe them welding during the day?

A. Yes.

Q. Did you observe them doing any brushing during the day?

A. Not that I can recall.

Q. Now, you indicated that in your opinion -- correct me if I'm wrong. In your opinion the sample might have been contaminated.

A. Yes.

Q. Contaminated with --

A. Particulates.

Q. Particulates. Now I understand you're not a chemist, right?

A. Right.

Q. Do you know if that has any effect on the analysis that is done?

A. It could. I mean, if you have vanadium from other sources it could have an effect because what you're measuring on the analytical is the total vanadium. You can't distinguish between one that's coming from a fume and one that's not. (T. 190-195)." (Emphasis supplied.)

On the basis of the speculative nature of this evidence, and in the absence of testimony from other witnesses having actual knowledge with respect to dust being present, the quantities thereof, as well as the specific effect if any, such would have on the sampling results, I am unable to find, as Respondent urges, that the Inspector's vanadium fume testing procedures were defective or that the results thereof were invalid as to sample number MD-1 (Ex. P-2). I jhave previously determined that the Inspector's choice to sample for vanadium fume - rather than V dust - was proper and justified in the record. From evaluation of Mr. Findlay's testimony-and the remainder of the record-one is constrained to conclude that Respondent did not establish by probative evidence that dust, in any amount, entered the sampling filter employed by Inspector Dennehy. In any event, Respondent did not establish what, if any, amount of dust entering the sampling filter would vitiate the result of Inspector Dennehy's testing.

Although Respondent makes various attacks on the validity of the Secretary's testing procedures, the record is bereft of the required factual and/or legal foundations therefor. It appearing that the Secretary has established by a preponderance of the reliable and probative evidence that a miner was exposed to a level of airborne contaminant in excess of the applicable TLV, a violation of 30 C.F.R. § 57.5001 is found to have occurred.

The question remains whether this was an S & S violation, that is, whether it is of such nature as could significantly and substantially contribute to the cause and effect of amine safety or health hazard.

A violation is properly designated S & S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission listed four elements of proof for S & S violations:

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

In the United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985) the Commission expounded thereon as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

I have previously found that a violation occurred. It is also determined on the basis of my prior findings that a measure of danger to safety, or in this matter, health, was contributed to by the violation. The primary issue raised is whether the Secretary established that there existed a reasonable likelihood that the hazard contributed to would result in an injury (illness).

Inspector Dennehy indicated in the Citation that an over-exposure was reasonably likely to occur. Inspector Dennehy, at hearing, expressed a belief this event was reasonably likely to occur because the operator did not provide ventilation at the site of the welding, nor did they provide respirators to the

employees who were conducting the welding. As part of the process of completing the citation Inspector Dennehy discussed this finding with Mr. Duran, as well as the part of the citation where he indicated that an injury could occur that might be permanently disabling.

Mr. Duran indicated that the symptoms resulting from an overexposure to vanadium "could" create serious health hazards (T. 105, 106). His opinion was based on the fact that bronchial irritation could occur, as well as possible penumonia or asthma (T. 106). Another possible effect of vanadium overexposure, depending on the individual, is that such an employee could become "sensitized" meaning that after being exposed on one occasion he might experience more severe symptoms with the next exposure at the same-or even lower-concentration (T. 106-111). Mr. Duran indicated that an incursion of 35 percent over the TLV would be an exposure of a "moderate" level (T. 109-110). Mr. Duran indicated that while symptoms would vary from person to person an employee exposed to vanadium at a certain level "might" develop symptoms (Tr. 110). He said an employee exposed to .0678 milligrams per cubic meter of vanadium "could" develop a cough, sore throat and have trouble breathing and he could also develop symptoms similar to those encountered with the flu (T. 110, 111). Such symptoms "could" result in lost workdays and, in Mr. Duran's opinion on this point, which I credit, these would be relatively serious illnesses (T. 111).

Close scrutiny of Mr. Duran's testimony in connection with the "likelihood" of an injury or illness occurring reveals it to be of the same speculative complexion previously attributed to Mr. Findlay's testimony respect to the possible contamination of the sampling filters.

In contradiction of Mr. Duran's opinion, Respondent's expert witness, Dr. Paul Ferguson, a toxicologist, gave as general opinions that an .0678 exposure to vanadium fume would not cause an injury resulting in lost work days, that there was not a reasonable likelihood that such an exposure would result in an illness, and that there was not a reasonable likelihood that any resulting illness would be of a reasonably serious nature (T. 215-217).

In support of his opinion relating to the probability or likelihood that such (.0678 V fume) exposure would result in an illness Dr. Ferguson provided the following rationale:

"A. Based on the scientific literature, .1 milligrams per cubic meter is the lowest level where we see symptoms. They're not debilitating symptoms, but an individual will have a slight irritation and have some coughing. That can be defined as an illness. We don't want to allow our workers to be exposed to levels -- how minor do cause symptoms. Above that, the symptoms progress severely. the .05 limit includes a safety factor that to the best of our knowledge, would provide no symptoms. There

are no specific scientific literature that tested men and women at .05. That lowest level is really a .1 in a controlled experimental condition by Zenz and Berg is what the TLV is based on and they have that as a safety factor.

Q. So you would attribute the difference then to a margin of safety allowed by the drafters of the TLV's.

A. Yes." (T. 237, 238).

Dr. Ferguson's opinion that there was not a reasonable likelihood of an injury (illness) occuring at the level of exposure detected by Inspector Dennehy is, in view of its positive and convincing tenor and supportive rationale, accepted. Such is deemed to rebut and overcome any presumption to the contrary. See Consolidation Coal Company, 8 FMSHRC 890 (1986). Accordingly, it is concluded that the violation is not S & S.

PENALTY ASSESSMENT

The Secretary proposes a penalty of $112.00 which in his post-hearing brief the Secretary concedes takes into consideration a low degree of gravity. Other mandatory penalty assessment criteria were the subject of stipulation by the parties at the hearing (T. 4), and based thereon it is found that Respondent is a large mine operator, that payment of a penalty at the monetary level urged by the Secretary will not jeopardize Respondent's ability to continue in business, and that Respondent, after notification of the violation, proceeded in good faith to achieve rapid compliance with the subject safety and health standard. The computerized printout submitted by the Secretary as evidence of Respondent's history of prior violations for the 2 year period preceding the issuance of the Citation involved here reflects that Respondent committed 12 violations during such period.

With respect to the remaining mandatory penalty assessment criterion, negligence, the Secretary's apparent theory is that Respondent negligently failed (a) to provide the subject miner with respiratory protective equipment, and (b) turn on an exhaust fan in the area where the welding was being conducted. Would the fan, in the terms of the standard, 30 C.F.R. § 57.5005, have removed the airborne contaminants by "exhaust ventilation" or have controlled employee exposure by "dilution with uncontaminated air"? According to the Inspector, if the fan had been operating, the welders would not have been "exposed whatsoever" (T. 36). The provision specifically requiring protective respiratory equipment is applicable only where the 5005 exception to 30 C.F.R. § 57.5001 is claimed or established by the respondent mine operator. Such is not the case here.

While I am unable to fully fathom the Secretary's theory of negligence, it does appear, insofar as the welders were allowed to conduct welding with the exhaust fan turned off, that respondent was negligent in this regard. According to the Inspector, employment of the exhaust fan would have alleviated

the overexposure. Respondent did not rebut this evidence; nor did it claim or show any reason why the fan could not have been turned on, or otherwise present any justification, such as lack of awareness, for this nonfeasance. I infer from the facts that (1) such an engineering control measure (exhaust fan) was available and (2) that such was in fact operated in the afternoon of the sampling day, that this measure could have been utilized prior thereto on the inspection day to prevent the overexposure documented by the Inspector and that Respondent was negligent in not doing so.

On the basis of the foregoing considerations a penalty of $75.00 is found appropriate and is assessed.

ORDER

1. Citation No. 2355268 is modified to delete that portion thereof alleging that the violation charged is "Significant and Substantial" and affirmed in all other respects.

2. Respondent shall pay the Secretary of Labor within 30 days from the date hereof the sum of $75.00 as and for a civil penalty.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 13 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-288 A. C. No. 36-06289-03513
v.	:	Solar No. 10 Mine
SOLAR FUEL COMPANY, INC., Respondent	:	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
David C. Klementik, Esq., President, Solar Fuel Company, Inc., Friedens, Pennsylvania, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether the Solar Fuel Company (Solar) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations.

The case was heard in Pittsburgh, Pennsylvania, on January 8, 1987. Both parties waived the filing of post-hearing briefs.

STIPULATIONS

The parties stipulated to the following (Tr. 7-8):

1. The Solar No. 10 Mine is owned and operated by the respondent, Solar Fuel Company, Inc.

2. The Solar No. 10 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction pursuant to section 105 of the Act.

4. The citations and their terminations involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits but not to the relevancy of the truth asserted therein.

6. All of the alleged violations have been abated within a timely fashion.

7. The total production of Solar No. 10 Mine is between 50,000 and 100,000 tons of coal per year.

8. The Solar No. 10 Mine began operations in March of 1986. The three violations at issue were the first violations cited at the mine. There are no previous violations.

Citation No. 2694689

The Secretary, by counsel, has moved to vacate this citation and withdraw the civil penalty assessed thereon. I granted this motion on the record at the hearing of this case (Tr. 5).

Citation No. 2694571

At the hearing and on the record, the Secretary moved to modify this citation to remove the "significant and substantial" allegation and the respondent, of course, did not object. I granted the motion (Tr. 9). This section 104(a) citation alleged a violation of 30 C.F.R. § 77.0516 and the respondent later admitted the violation (Tr. 60). Under the circumstances, I conclude that a civil penalty in the amount of $25 is appropriate under the criteria set forth in section 110(i) of the Act.

Citation No. 2694572

This citation alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.1002-1(a) and alleges as follows:

> Two pieces of non-permissible electric equipment were found to be located within 150 feet from pillar workings (cave). A G.E. safety switch manual control on/off breaker box used to supply power to the conveyer head and an Allen Bradley metal control box used to supply power to the JABCO box which is used to start and stop the pan

line and conveyor head automatically were found to be in a non-permissible condition in that openings in excess of .009 of an inch were found in both boxes. Both of these non-permissible boxes were located in the No. 14 room of the 2 right section off of the 1st South mains (003) section. These boxes were found to be located approximately 82 feet from pillar workings. The pillared area was located in the No. 2 room and such measurements were taken from the toe of the fall to the non-permissible boxes. Line brattice was being used to separate the No. 13 room from the No. 14 room.

The cited standard requires as relevant hereto that electrical equipment must be permissible and maintained in a permissible condition when located within 150 feet of pillar workings. The factual testimony of MSHA Inspector Joseph Trybus to the effect that two pieces of nonpermissible electrical equipment were located approximately 82 feet from such pillared workings is not disputed.

The two pieces of equipment cited by the inspector were safety switch control boxes and he testified that the hazard he was concerned with would be methane entering these non-permissible boxes and a random spark causing an explosion. He further testified that although he detected no methane at the time of his inspection, there is always the possibility of the air reversing itself in the mine or the possibility of the air not getting to a certain area which could cause a methane build-up and which could in turn enter the non-permissible equipment.

In the event of a methane explosion, he would expect it to be reasonably likely that serious to fatal injuries would occur to persons working in that area. There were approximately seven men working on this section at the time.

I find that the facts of this violation are not seriously in dispute and the violation is accordingly proven as charged. Within this framework of unrebutted evidence it may also reasonably be inferred that this condition constituted a "significant and substantial" violation of the cited standard. See Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). The violation was accordingly also of a serious nature. Moderate negligence may also reasonably be inferred from the circumstances. The area of the mine is frequently examined and management knew or at least should have known of the non-permissible condition of these boxes and their distance from the pillar workings.

Considering the statutory criteria contained in section 110(i) of the Act, I find that a civil penalty of $126, as proposed, is warranted.

Citation No. 2694573

This citation alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.301 and alleges as follows:

> The quantity of air reaching the last open crosscut between the Nos. 2 and 1 rooms of the 3 right butt off of 1st South (005) section as measured with a Taylor anenometer and watch was found to be only 7,200 cubic feet a minute. The law requires that the minimum quantity of air reaching the last open crosscut in any pair or set of developing rooms shall be 9,000 cubic feet a minute.

Once again, the respondent does not dispute the facts alleged in the citation (Tr. 44) and since those facts, if true, amount to a violation of the cited standard, I find that the violation, as charged, is proven.

The inspector marked this as a "significant and substantial" violation because of the possibility of fumes, gases, respirable dust, methane and smoke entering the intake air and the further possibility of an ignition source from non-permissible equipment operating on the section. The result, he testified, could be an explosion. There were three men working on the section at that time.

The respondent doesn't believe that the violation should be classified "S&S" because their position is that the drop in airflow was of a temporary nature, caused by a displaced line brattice. However, I note Mr. Klementik had no knowledge of when it was dislodged or how long it had been out of place prior to the inspector's writing the citation.

I fully credit the factual and opinion testimony of Inspector Trybus on the significance of this violation and in light of the seriousness of the injuries that could reasonably have been caused by the lack of air reaching the last open crosscut between the rooms cited, I find the violation was "significant and substantial." Mathies, supra.

I have considered the criteria in section 110(i) of the Act and I conclude that the proposed civil penalty of $54 is appropriate.

ORDER

Solar Fuel Company, Inc., is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No.	Amount
2694571	$ 25
2694572	$126
2694573	$ 54
2694689	Vacated
Total:	$205

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEB 13 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

SUPPLEMENTAL DECISION

Before: Judge Weisberger

In my Decision in this matter, issued on January 12, 1987, I directed counsel to submit to me a statement of their agreement as to amounts owed to Complainant by Respondent pursuant to paragraphs 3. and 4. of my Decision.

On January 28, 1987, Complainant filed a statement that the Parties had reached an agreement as to the amounts owed Complainant pursuant to paragraphs 3. and 4. of my Decision.

It is therefore ORDERED that:

1. Within 30 days Respondent shall pay Complainant $775.25 as legal fees and costs and $787.88 as the amount due Complainant pursuant to paragraph 4. of my Decision of January 12, 1987.

2. My Decision of January 12, 1987 is NOW final.

Avarm Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 13 1987

LEONARDO R. LAMAS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 86-99-DM
v.	:	MD 85-45
DUVAL CORPORATION, Respondent	:	Duval Mine

DECISION

Appearances: Leonardo R. Lamas, Tucson, Arizona, pro se;
G. Starr Rounds, Esq., Evans, Kitchell & Jenckes, Phoenix, Arizona, for Respondent.

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by Leonardo R. Lamas (herein "the Complainant") on March 24, 1986, arises under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1982) (herein "the Act").

By letter dated February 28, 1986, the Complainant had been notified that his complaint before the Labor Department's Mine Safety and Health Administration (MSHA), which was filed on an indeterminate date in October, 1985 had been investigated and the determination made that a violation of Section 105(c) of the Act had not occurred. Under the Act, a complaining miner has an independent right to bring a second complaint before this Commission and this proceeding is based on that right.

On August 11, 1986, the Respondent filed a motion for summary judgment alleging inter alia that the complaint was not timely filed since it was filed more than 60 days-approximately 2 years-after the last alleged discriminatory action of Respondent, i.e., the termination of Complainant's employment on August 21, 1983.

A preliminary hearing to determine the issues raised by the motion to dismiss was held on the record in Tucson, Arizona, on

November 19, 1986, at which Complainant 1/ and Harlen Klemetson, a former official of Respondent, testified.

The record herein reflects that on August 21, 1981, Complainant was placed on a disability leave status by Respondent because he was unable to perform his duties and his doctors would not release him for work. Two years later, on August 21, 1983, Complainant was terminated pursuant to Article IV, Section 3(2) of the pertinent collective bargaining agreement. Complainant's complaint with MSHA was filed sometime in October, 1985 (Ex. C-1; T. 17). Thereafter, by letter dated February 28, 1986, Complainant was advised by a Labor Department official that on the basis of MSHA's review "MSHA has determined that the facts disclosed during the investigation do not constitute a violation of Section 105(c)."

After Complainant's termination, Respondent heard nothing further regarding such termination until sometime in about mid-October, 1985 when it was informed by MSHA that Complainant had filed a complainant alleging discrimination (T. 17-20; Ex. R-1).

In early 1986, Respondent sold its Arizona operations. As a result, it retained only three of its employees who have been assisting in the transition but whose relationship with Duval will soon end (T. 24-26). All of the potential witnesses either expressly named by Lamas in his Complaint or necessarily involved in events described by or affecting Lamas are no longer employed by Duval. Aside from outside doctors to whom Lamas was referred, these potential witnesses include a number of his foremen, safety supervisors, individuals involved in decisions regarding massive layoffs, recalls, and the handling and distribution of benefits, the directors of personnel and labor relations, their assistants and others (T. 25-29; Ex. C-1).

Section 105(c) of the Act, 30 U.S.C. § 815(c)(2), states, in pertinent part:

> "Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." (Emphasis added).

1/ Complainant noted at the commencement of the hearing that there was no interpreter present. It appeared, however, that he understood English, understood the questions asked him by readily answering them, was perfectly able to ask questions himself, and that he had a keen grasp of the hearing situation and of the subleties and complexities of the matters involved in the hearing.

The MSHA complaint having been filed in October 1985, there is no question but that it was filed with the Secretary more than 2 years beyond the 60-day period prescribed in section 105(c) of the Act.

The Commission has held that while the purpose of the 60-day time limit is to avoid stale claims, a miner's late filing may be ecused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (emphasis added).

Timeliness questions therefore must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

After considering the testimony, exhibits, and arguments submitted by the parties, it is concluded that the Respondent's position in seeking dismissal is meritorious.

Complainant's attempted justification for the delay is in the form of a barren assertion that he was engaged in a Workmen's Compensation matter and that "the lawyers and the people" from MSHA, and MSHA Inspector Pascoe, had advised him "to wait and see the results" (T. 17). In light of his entire testimony and Respondent's rebuttal evidence, I find Complainant's assertions incredible, vague, and not probative. Thus, Complainant Lamas admits that prior to his termination in August 1983, he had several conversations with MSHA representatives in its Tucson office (T. 18). Further, he concedes that he knew he had 60 or 65 days within which to file a complaint regarding his termination and that this time began to run as of August 21, 1983, the date of his termination and the date Complainant put on the face of the complaint as Respondent's last act of discrimination (See Complainant's deposition, Ex. R-1, at pp. 9-10, 68-69; Attachment No. 1 to R-1; T. 18-19, 36-39).

Although it would appear that a complainant should first be required to establish a recognizable and believable justification for a filing delay beyond the 60-day period before any burden

devolves on a mine operator to show prejudice therefrom, the record nonetheless lends support to Respondent's claim that because of the delay it would be prejudiced in its attempt to defend itself from the allegations made by Complainant. In its brief it alleges: "Duval is barely in existence and soon will not exist. It retains only three employees (Ex. C-1; T. 24, 26). All of the alleged participants in the events cited by Lamas are no longer employed by Duval. Those responsible for the decisions about which he complains and who know the reasons for such decisions, e.g., the investigation of the accident in 1979 or 1980, the transfer request, the payments granted in December, 1981 and March 1982, do not work for Duval; they, and others who could testify about Duval's practices, are no longer its employees (Ex. C-1; T. 24-28). Moreover, the events to which Lamas refers occurred as early as 1979-1980; they are from about four to seven years old (Ex. R-1). Obviously, memories dim with the passage of years and it is Lamas' inexcusable neglect or failure to act that has caused this situation to exist."

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Where, as here, the filing delay is prolonged, 2/ it seems a fair proposition to require (1) a clear justifiable explanation therefor, which (2) is supported in the record by substantial and reliable evidence.

The considerable length of the time lapse here as well as the bald, inherently dubious, unreliable basis asserted for the delay mandate the conclusion that such delay in filing the complaint was not justified.

ORDER

Respondent's motion to dismiss is granted and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

2/ This is not the situation sometimes seen where the complaint was filed a few days, or even a month, late.

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FEB 17 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 86-10
	:	A.C. No. 44-06269-03501
v.	:	
	:	Docket No. VA 86-15
ELK CREEK COAL CORPORATION, Respondent	:	A.C. No. 44-06269-03502
	:	
	:	Docket No. VA 86-37
	:	A.C. No. 44-06269-03505
	:	
	:	No. 1 Mine

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Greg Mullins, President, Elk Creek Coal Corp., Grundy, Virginia, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," for ten alleged violations of regulatory standards. The general issues before me are whether the Elk Creek Coal Corporation (Elk Creek) violated the cited regulatory standards and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violations were "significant and substantial." If violations are found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2763732 charges a violation of the standard at 30 C.F.R. § 77.1001 and reads as follows:

> Loose, heavy material was present on the highwall between the right hand side of the No. 2 portal and the left hand side of the No. 4 portal. The highwall had not been stripped, sloped or benched in

> any manner to correct this condition. This condition was one of the factors that contributed to the issuance of immenent [sic] danger order No. 2763731, dated 12-3-85; therefore no abatement time was set.

The cited standard, 30 C.F.R. § 77.1001, requires that "[l]oose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

The testimony of MSHA Inspector Larry E. Brown in support of the cited violation is, in essential respects, undisputed. During the course of performing an electrical inspection at a new high voltage substation at the subject mine on December 3, 1985, Brown observed loose material on the highwall. The material consisted of different sized rock - from hand size to about one half the size of a chair - beginning some 25 feet up the highwall extending to the top. In particular he observed loose material between the No. 2 and No. 4 entries where the highwall was 80 to 85 feet "straight up." Brown also observed a scoop operating beneath this area of loose material.

In defense, Greg Mullins, President of Elk Creek testified that an inspector had examined the highwall on November 14, 1985, and had "approved it." Even assuming however that the highwall conditions were acceptable on November 14, 1985, that is no defense to violative conditions existing on December 3, 1985. Accordingly the violation is proven as charged. The "significant and substantial" findings, the likelihood of serious injuries and the moderate negligence found by the inspector are substantiated by the record and are not disputed.

Citation No. 2763733 charges a violation of the operator's temporary roof control plan under the standard at 30 C.F.R. § 75.200 and states as follows:

> A cut of coal had been taken from the No. 3 entry and a canopy had not been installed over the portal. The roof control plan requires that canopies be installed prior to the start of mining operations. This condition was one of the factors that contributed to the issuance of imminent danger order No. 2763731, dated 12-3-85; therefore no abatement time was set.

The cited roof control plan then in effect provides in relevant part that: "[m]ining shall commence under a substantially constructed canopy of sufficient size to protect

the workmen from falling material." According to Inspector Brown, work had been performed in the entry,including roof bolting, the installation of supports and the removal of coal. He accordingly surmised that a number of employees must have passed beneath the highwall and would have been exposed to the danger of falling rock.

In defense, Greg Mullins testified that at the time work was being performed in the entry a portable canopy was erected and provided adequate protection for the miners. Mullins noted that no one was seen by the Inspector working in the cited entry and construction material was present from which the portable canopy had been built. Mr. Mullins' testimony in this regard is undisputed and accordingly I cannot find that the violation has been proven as charged. Citation No. 2763733 is therefore dismissed.

Citation No. 2763734 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1005 and charges as follows:

> Coal was being stockpiled against the highwall between Nos. 2 and 3 portals and loose material had not been removed from the highwall. This condition was one of the factors that contributed to the issuance of imminent danger order No. 2763731, dated 12-3-85; therefore no abatement time was set.

The cited standard provides in relevant part as follows:

> Hazardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work.

According to Inspector Brown, work was being performed beneath the highwall between the No. 2 and No. 3 portals and coal was being stockpiled. According to Brown two persons were subject to fatal injuries from rock falls. One was operating an endloader removing coal and another was piling the coal with a scoop. Brown observed that the condition of the highwall could further deteriorate over a short period of time because of weathering, temperature changes and the extraction of coal from the entries beneath.

Mullins again claims that an inspector had examined the cited highwall on November 14, 1985 and had "approved it." This evidence does not however provide a defense for violative conditions existing on December 3, 1985.

Accordingly the undisputed testimony of Inspector Brown amply supports the "significant and substantial" violation as charged. The undisputed evidence also supports a finding of high gravity and moderate negligence. The cited conditions were in plain view. Brown's testimony is also fully corroborated by the testimony of MSHA Inspector Luther Ward who was also present when Brown issued this citation.

Citation No. 2763639 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1001 and reads as follows:

> Loose hazardous material, (rock) was present on the highwall beginning approximately 5 feet to the right of the No. 2 drift opening and extending to the far right side of the No. 4 drift opening. The highwall ranges from approximately 50 feet high to approximately 80 feet high. This violation is a contributing factor to the issuance of 107.A order no. 2763638 dated 2/19/86. Therefore, a termination due date is not given.

MSHA Special Investigator Carl Coleman was performing a spot inspection on February 19, 1986, when he discovered the cited conditions. Based on his observations he opined that the loose material on the highwall could fall and strike miners working below. He observed that wood and rock dust had been stored along the base of the highwall and a trailing cable ran along the base of the highwall, therefore making it highly likely that miners would be exposed to the danger of the rocks falling. According to Coleman a rock falling from 50 to 80 feet could cause fatal injuries. He felt that the dangerous conditions were obvious and should have been discovered during the required daily examination.

In defense, Mullins again observed that the highwall had been inspected on November 14, 1985, and had then been "approved." This evidence is not a defense to the conditions existing more than 3 months later however. In the absence of any contradictory evidence I accept the testimony of Inspector Coleman and find that the "significant and substantial" violation is proven as charged, that the violation was of high gravity and it was the result of operator negligence.

Citation No. 2762857 alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200 and charges as follows:

> The approved roof control plan was not complied with in the No. 2 and No. 4 entries on the 001 active section for installation of the resin grouted roof bolts. The crosswise spacing of the installed roof bolts in several difference [sic]

> locations measured to 53 inches to 66 inches wide. The approved roof control plan requires that roof bolt spacing be 48 inches wide beginning at portal and extending underground the approximate distance of 60 feet.

The charges are based upon the diagram on pages 14 and 15 of the operator's roof control plan (Exhibit G-4) showing a 4-foot by 4-foot crosswise spacing of roof bolts. According to MSHA Inspector Ronald Matney the roof bolts he found on December 10, 1985, were indeed in excess of that requirement.

According to Matney the entry had been driven some 60 feet in the No. 2 and No. 4 headings and approximately 20 rows of roof bolts had been installed with 4 roof bolts in a row. Approximately 20 bolts in each entry exceeded the plan requirement. Matney believed this condition to be particularly hazardous because of the shaley slate roof and because of the nearby outcropping. It is not disputed that with the excess spacing between roof bolts loose rock could fall on miners resulting in very serious injuries. By December 17, the condition had been completely abated.

In defense Mullins testified only that he never "saw" any bolts more than 48 inches apart. The fact that Mullins failed to see the violative conditions is no defense. The undisputed evidence clearly supports this "significant and substantial" violation and the negligence associated therewith.

Citation No. 2762858 alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200 and charges as follows:

> The approved roof control plan was not complied with on the 001 section in the No. 4 entry in that the entry width was measured to be 20 feet wide for the distance of approximately 20 feet beginning at approximately 40 feet inby portal and extending underground the distance of approximately 20 feet. The approved roof control plan requires that width for entry be 16 feet.

The testimony of Inspector Matney in support of this violation is also undisputed. The roof control plan (page 14, Exhibit G-4) requires the entry to be no more than 16 feet wide. Here it is not disputed that the entry was 20 feet wide for a linear distance of 20 feet at a point 40 feet inby the portal. Coleman opined that under the circumstances a roof fall would be reasonably likely and result in serious injuries. The condition was abated by the installation of cribs on December 12.

In defense, Mullins testified that he had placed 8 timbers in the cited area to reduce the entry width to 16 feet. Mullins admitted however that the roof control plan requires cribbing and that timbers are not sufficient. Under the circumstances the "significant and substantial" violation is proven as charged. I find some reduction in the gravity of the offense due to the fact that Mullins had placed some timbers in the entry in some effort to remedy the violation. The violation was the result of gross operator negligence however for knowingly violating a provision of the roof control plan.

Citation No. 2762859 alleges a violation of the standard at 30 C.F.R. § 75.1713-2 and charges as follows:

> A communication system, telephone or other means of prompt communication were not established from the mine to the nearest point of medical assistance for use in an event of an emergency.

The cited standard provides as follows:

> (a) Each operator of an underground coal mine shall establish and maintain a communications system from the mine to the nearest point of medical assistance for use in an emergency. (b) The emergency communications system required to be maintained under paragraph (a) of this section 75.1713.2 may be established by telephone or radio transmission or any other means of prompt communication to any facility (for example, the local sheriff, the state highway patrol, or local hospital) which has available the means of communication with the person or persons providing medical assistance or transportation in accordance with the provisions of section 75.1713.1.

According to Inspector Coleman there indeed was no communication system at Elk Creek meeting the noted requirements. Moreover the on-site Supervisor, George Owens, admitted that he did not have a communications system. According to Coleman there was a telephone within 1-1/2 miles of the mine site and since the mine had not been developed very far, medical assistance could have been obtained "pretty fast."

According to Mullins there was also a "CB" radio in a pickup truck that was always parked at the mine. Mullins did not however establish that the "CB" provided a method of communication to a requisite medical or other emergency facility as required by the cited standard. Mullins disagreed with Matney and claimed that the nearby mine having a telephone was located only 1,000 feet away. Under the circumstances however I believe that the violation is proven as charged but was of minimal gravity and the result of little negligence.

Citation No. 2762860 alleges a violation of the standard at 30 C.F.R. § 75.313 and charges that "the S and S scoop serial No. 482-1567 was being used in the face area of the No. 2 entry without a methane monitor."

The cited standard, 30 C.F.R. § 75.313, requires in essence that an approved methane monitor be installed on any electric face equipment and that such monitor be kept operative, properly maintained and frequently tested. According to Coleman the cited scoop was being used as a loading machine and had no methane monitor. He felt that the violation was not "significant and substantial" because the mine was new (having been developed only 60 feet underground) and there had never been any methane found therein.

In defense Greg Mullins testified that he "didn't think" the scoop was in operation. Under the circumstances this moderately serious violation is proven as charged. Since management had to authorize the use of the cited equipment it clearly knew of the violative condition. Accordingly I find the violation was the result of operator negligence.

Citation No. 2763482 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 48.6 and charges in relevant part as follows: Burl Vires . . . employed underground on the 001 section as a roof bolt operator has not received the newly employed experienced miner training." Citation No. 2763484 similarly charges that employee Blane Owens had not received the newly employed experienced miner training.

According to Inspector Coleman both employees admitted that they had not been given any training. According to Coleman employees not having received such training might not be familiar with the roof control plan, the electrical and other equipment, and the availability of emergency communications systems. He was particularly concerned that the new employees would not be trained in the spacing of roof bolts and the necessity of supplemental support, and felt that this deficiency would reasonably likely lead to serious injuries.

In defense Mullins testified that both employees had received training at previous mining jobs and that in fact they had been given training at Elk Creek. According to Mullins they were merely unable to produce the corresponding training certificates. I do not however find this testimony credible in light of the admissions by both employees that they indeed had not received the requisite training. Accordingly the violations are proven as charged. Based on the undisputed testimony of Inspector Coleman these violations were also "significant and substantial" and of high gravity.

Since Mullins clearly knew of the training requirements I find that the violations were also the result of operator negligence.

In determining the appropriate civil penalties in these cases I have also considered the testimony that the cited mine is not now in operation. According to Mullins however the mine will be reopened as soon as market conditions warrant. I have also considered that the operator is small in size, has a moderate history of violations, and that the violations were abated within the framework of the Secretary's requirements. Accordingly the following civil penalties are deemed appropriate:

Citation No. 2763732 - $400
Citation No. 2763733 - vacated
Citation No. 2763734 - $400
Citation No. 2762857 - $100
Citation No. 2762858 - $ 30
Citation No. 2762859 - $ 20
Citation No. 2762860 - $100
Citation No. 2763482 - $200
Citation No. 2763484 - $200
Citation No. 2763639 - $400

ORDER

The Elk Creek Coal Corporation is hereby directed to pay civil penalties of $1,850 within 30 days of the date of this decison.

Gary Melick
Administrative Law Judge

Distribution:

Sheila Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

Mr. Greg Mullins, President, Elk Creek Coal Corp., P.O. Box 1379, Grundy, VA 24614 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 19 1987

ROY W. JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 86-8-D
TRI-SON MINING, INC., Respondent	:	NORT CD 86-6

ORDER OF DISMISSAL

Before: Judge Melick

Complainant, Roy W. Johnston requests approval to withdraw his Complaint in the captioned case 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 case is therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

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FEB 19 1987

WESTERN FUELS-UTAH, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 86-108-R
v.	:	Citation No. 2832711; 3/1/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-245
	:	A. C. No. 05-03505-03524
v.	:	Deserado Mine
WESTERN FUELS-UTAH, INC., Respondent	:	

DECISION

Appearances: Karl F. Anuta, Esq., Duncan, Weinberg & Miller, P.C., Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Maurer

The hearing in the above-styled contest proceeding was held on July 23, 1986, in Denver, Colorado, before the late Judge Carlson. Subsequently, when the civil penalty proposal was issued, the parties moved to have it consolidated with the contest proceeding. That motion is hereby granted, and I further note that evidence as to the penalty was taken in that hearing.

Due to Judge Carlson's untimely death, these cases were reassigned to me. The parties have agreed to my adjudication of the cases on the basis of the record made before Judge Carlson without additional hearings or briefing. I have considered all of the arguments made by the parties in their respective briefs and I make the following decision.

Both the contest proceeding and the civil penalty case relate to section 104(a) Citation No. 2832711, which was issued on March 1, 1986, alleges a violation of 30 C.F.R. § 75.200, and states as follows:

> A fatal accident occurred February 28, 1986 at about 10:50 A.M. It was revealed that the roof bolting machine operator proceeded about 7 feet inby permanent roof supports for reasons other than to install temporary supports. The accident occurred in the east mains headgate belt entry about 73 feet inby Survey Station 380.

The incident which led up to the fatal accident began when the deceased, Austin Mullens, and his supervisor, one Carson Julius, trammed the roof-bolter into the entry to begin bolting. This particular roof-bolting machine is the type that has an automatic temporary roof support system (ATRS) on the front of the machine. They had set one mat and had moved the machine forward to set a second when Julius' drill stopped because of a loss of water pressure. A water hose had become kinked, so the ATRS system was taken down and the machine backed up to straighten out the hose. When the machine was backed up, the pan fell off on the side Julius was working on. After the hose was straightened out, the bolting machine was again moved forward, and the two men discussed how to retrieve the pan that had fallen out under unsupported roof. Julius attempted to drag the pan back under supported roof using a four foot steel, but it was too short. Julius then went to the back of the machine to get a longer steel, but before he went, he specifically told Mullens not to go out under the unsupported roof. By the time he got to the rear of the machine and turned around, Mullens was in front of the roof-bolting machine, out under unsupported roof, bending over the pan, trying to lift it up. Julius testified he shouted to Mullens to get back. Mullens did not respond. He shouted for Mullens to get out a second time, but at that moment a large rock fell and killed Mullens.

The parties' recitation of the facts of the accident in their respective briefs are fairly close and indeed the parties stipulated that on February 28, 1986, Austin Mullens was seven feet inby permanent roof support for reasons other than installing temporary supports when a rock fell and killed him.

30 C.F.R. § 75.200 states in pertinent part that:

> No person shall proceed beyond the last permanent support unless adequate temporary support is

provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners.

Western Fuels' roof control plan prohibits miners from traveling inby permanent roof support for reasons other than installing temporary roof support. It is undisputed that Mullens was inby the permanent roof support, was not protected by temporary support and was there for reasons other than to install temporary support. Therefore, it would appear to be axiomatic that a violation of 30 C.F.R. § 75.200 occurred, as alleged.

However, the operator asserts that any violation of the cited mandatory safety standard that occurred was due wholly to the negligence of a rank and file miner (Mullens) and that his negligence should not be attributed to the operator. Therefore, it follows that the operator did not violate the regulation and should not be penalized.

The law, however, is otherwise. Assuming, arguendo, that there is absolutely no evidence of operator negligence in this record, the respondent's contention that it should not be held accountable for a violation of the mandatory safety standard by one of its employees is simply not the law as it exists today. This is the case even if I should find, and I do, that Mullens for some reason known perhaps only to himself, ignored his supervisor's instructions to stay out from under the unsupported roof, only seconds before he was killed.

The Commission has consistently and frequently held that an operator is liable, without regard to fault, for violations of the Act or its regulations committed by its employees. Asarco, Inc.-Northwestern Mining Dept., 8 FMSHRC 1632 (1986). An operator's negligence has no bearing on the issue of whether a violation occurred. Rather it is a factor to be considered in assessing a civil penalty. United States Steel Corp., 1 FMSHRC 1306 (1979); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 39 (1981).

Accordingly, I find that the respondent herein is liable for the violation of 30 C.F.R. § 75.200 committed by Austin Mullens and further find that violation to be obviously "significant and substantial" and serious.

CIVIL PENALTY ASSESSMENT

The parties have stipulated that the Deserado Mine is owned by Western Fuels-Utah, Inc., and is a large coal mine. They have further stipulated that the proposed penalty of $1,000 will not affect the operator's ability to remain in business and that the citation herein was abated in good faith.

I have reviewed the operator's violation history for the two year period prior to the issuance of the citation at bar (Exhibit No. R-2), and I have already found the gravity of the violation to be serious. Therefore, the sole remaining issue relevant to the assessment of the penalty amount is operator negligence.

The fact that the violation in this case was committed by a rank and file miner does not necessarily shield the operator from being found negligent. We must look to such considerations as the foreseeability of the miner's conduct, the risk involved, and the operator's supervision, training, and discipline of its employees with regard to the mandatory safety standard at issue. A. H. Smith Stone Co., 5 FMSHRC 13, 15 (1983).

I find that the evidence in this record is undisputed that the decedent, Mullens, walked out under the unsupported roof on his own, contrary to the direct orders of his supervisor. However, the Secretary urges that in this instance, the miner's violative conduct was foreseeable and therefore his negligence should be imputed to the operator in any event. In support of this proposition, the Secretary points out that during the investigation of this fatal accident by MSHA, two miners came forward and told the investigator that they had seen other miners, including Mullens, walking out under unsupported roof on prior occasions. These two miners went on to state, however, that they had never informed anyone in management of this fact. Secondly, the Secretary cites the foreman's warning to Mullens as further evidence of foreseeability on the part of the operator. This argument strikes me as a classic example of the "damned if you do, damned if you don't" school of advocacy. On the one hand the absence of frequent and timely warnings on critical safety issues could be construed as inadequate training and/or supervision while on the other hand, too many warnings, especially right before an accident happens could be an inference that the supervisor knew of the employee's dangerous proclivities and didn't do enough to correct them. In sum, I do not find substantial evidence in this record to support a finding that Mr. Mullens' violation was foreseeable by the operator, or that proper supervision was lacking in this instance.

Furthermore, I have carefully examined the record concerning the operator's training program and its history of disciplining its employees for violations of the mandatory safety standard at issue herein and find both to be adequate.

In my opinion, it was Mr. Mullens' own negligence, not that of the operator, which caused his death. Accordingly, I find this to be a substantial mitigating factor with regard to the penalty to be assessed.

ORDER

Citation No. 2832711 is AFFIRMED and Western Fuels-Utah, Inc., is ordered to pay a civil penalty of $250 within 30 days of the date of this decision for the violation of 30 C.F.R. § 75.200, as alleged.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

February 20, 1987

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 85-253-R
v.	:	Order No. 2403926; 6/11/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 85-254-R
	:	Order No. 2403927; 6/14/85
	:	
	:	Docket No. PENN 85-255-R
	:	Order No. 2403928; 6/17/85
	:	
	:	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. PENN 86-1
	:	A.C. No. 36-00856-03548
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Joseph T. Kosek, Esq., Dennis Govachini, Esq., and Joseph Yuhas, Esq., Ebensburg, Pennsylvania, for Rushton Mining Company (Rushton).

Before: Judge Broderick

STATEMENT OF THE CASE

In the penalty case, the Secretary seeks penalties for five alleged safety standard violations, three of which grew out of orders which are contested in the contest proceedings. Therefore, all of the cases were consolidated for the purposes of hearing and decision. At the commencement of the hearing, the parties submitted, and I stated I would approve, a settlement of one of the alleged violations (that one charged in the order contested in PENN 86-255-R). Following the hearing, the

Secretary filed a motion to withdraw the Petition and vacate the order which is contested in PENN 86-253-R. Three violations remain, including that alleged in the order contested in PENN 86-254-R.

Pursuant to notice, the case was heard in Pittsburgh, Pennsylvania on November 6, 1986. Donald Klemick testified on behalf of the Secretary. Raymond Roeder, Lemmel Hollen and Kenneth Fenush testified on behalf of Rushton. Rushton filed a post hearing brief directed to an evidentiary ruling I made at the hearing. The Secretary did not file a post hearing brief. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS AND CONCLUSIONS

At all times pertinent to this case, Rushton was the owner and operator of an underground coal mine in Centre County, Pennsylvania, known as the Rushton Mine. Rushton is a large operator. The history of previous violations is not such that penalties otherwise appropriate should be increased because of it. There is no evidence that the imposition of penalties will affect Rushton's ability to continue in business.

ORDER NO. 2403926

Order 2403926, issued under section 104(d)(1) of the Act, charged a violation of 30 C.F.R. § 75.326 because an intake trolley haulage secondary escapeway entry was not separated from a parallel belt haulage entry. Testimony was taken at the hearing on the order and alleged violation. On February 5, 1987, the Secretary filed a motion to withdraw its penalty petition insofar as it was based on the order. The motion requested that the order be vacated. Rushton does not object to the motion. Therefore, the motion is GRANTED; the order will be VACATED; the petition will be DISMISSED insofar as it charges a violation of 30 C.F.R. § 75.326 described in Order 2403926, and the Contest proceeding Docket No. PENN 85-253-R will be DISMISSED.

ORDER NO. 2403928

Order 2403928, issued under section 104(d)(1) of the Act,charged an unwarrantable failure violation of 30 C.F.R. § 75.316 because the ventilation plan was not being complied with in that idled rooms were not being travelled and examined weekly. At the commencement of the hearing, the Secretary proposed a settlement of the penalty case related to this violation. The Secretary stated that he could not establish that the violation resulted from Rushton's unwarrantable failure. The violation was originally assessed at $400, and the parties agreed to settle for

$100, on the basis that the negligence was less than originally believed. I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved. Therefore, IT IS ORDERED that the motion is GRANTED; Rushton shall pay $100 within 30 days of the date of this decision; the order is MODIFIED to a 104(a) citation; the contest proceeding Docket No. PENN 85-255-R is DISMISSED.

CITATIONS 2403922 AND 2402923

The above citations were issued on June 4, 1985 at about 10:00 a.m. and 11:40 a.m. respectively, by Mine Inspector Donald J. Klemick. The conditions cited were the factors that led to the issuance of an imminent danger withdrawal order the same day. The imminent danger withdrawal order was not contested, and its validity is not an issue in this case.

At the hearing, Rushton offered testimony of an alleged admission by an MsHA official (no longer with MSHA) at a manager's conference following the issuance of the order and citations that he did not believe an imminent danger existed. I excluded the testimony as irrelevant. Rushton's post hearing brief argues that the testimony should have been received on the ground that "it is certainly relevant to the issue of whether an imminent danger did in fact exist." Unfortunately that "issue" is not an issue in this proceeding. Whether an imminent danger existed or not has no bearing on the issues before me, which are (1) did the violations charged occur, and (2) if so, what are the appropriate penalties based on the criteria in section 110(i) of the Act. If I concluded that an imminent danger did not exist, this conclusion would not in any way affect my determination of the above issues. A fortiori, the opinion of an MSHA official (who was not even present at the mine) that an imminent danger did not exist would not affect my determination.

The citations were issued during a health and ventilation inspection by Inspector Klemick who is a ventilation specialist. I find that the following conditions were present in the W-4, 001 Section of the subject mine: accumulations of loose coal and coal dust were present along each of the five entries for a distance of approximately 90 feet outby the face, and in the first crosscut connecting the entries, and at the section dumping point. The accumulations varied from one to six inches in depth with deeper accumulations against the rib of the Number 1 and 2 entries, and at the dumping point. Equipment tire marks were seen in the travel ways and at the dumping point. One percent methane was detected at the face. Power was energized to the section, but the continuous miner was not operating, nor was the scoop, but the roof bolter was operating in the number 2 entry.

The mine is a wet mine, but the section in question was relatively dry. The loose coal and coal dust cited by the inspector were dry. The accumulation was black in color. The ventilation in the section was good and the section had no significant history of methane liberation. The mine, however, has had prior ignitions. The coal mined at the subject mine contains a substantial percentage of rock. In abating the violation, six shuttle cars of coal, totally about 30 tons were removed from the area. The cleanup took about 4 hours. Because of the extent of the accumulations, I find that substantial accumulations were present in the area for more than one shift, probably for two shifts. The preshift inspection book shows that the section was inspected between 5 a.m. and 7 a.m. and was reported in safe and healthful condition.

Rushton does not dispute the fact that the accumulations existed. It admitted the violations, but contends that the gravity and negligence were exaggerated. I conclude that a violation of 30 C.F.R. § 75.400 occurred. The extent of the accumulations, the presence of energized machinery and the existence of minimal methane make the violation a serious one. Loose coal and coal dust can propagate an explosion or mine fire. I conclude that the accumulations had been present for more than one shift and that Rushton knew of them prior to the preshift inspection and was negligent in failing to clean them up. I further conclude that the failure to record the condition in the preshift examiner's book was a violation of 30 C.F.R. § 75.303(a). I conclude that this violation was serious and resulted from Rushton's negligence. Based on the criteria in section 110(i) of the Act, I conclude that a penalty of $1000 for the violation of 30 C.F.R. § 75.400 and a penalty of $400 for the violation of 30 C.F.R. § 75.303 are appropriate.

ORDER NO. 2403927

On June 14, 1985, Inspector Klemick issued a withdrawal order under section 104(d)(1) of the Act charging an unwarrantable failure violation of 30 C.F.R. § 75.316. The order charged that Rushton failed to comply with its approved ventilation system and methane and dust control, plan because the periphery of certain idle rooms in 2nd left north mains were not being travelled and examined weekly. In fact the rooms were filled with water, the pumps having been pulled and the area intentionally flooded. Rushton intended to use the area as a sump for the mine.

The revised ventilation plan in effect on June 14, 1985, had been approved by MSHA on March 7, 1985 subject to Rushton's complying with certain "items" including the following:

3. Since a method was not established to evaluate the bleeder system for the idled rooms on the right of the 2nd left north mains the periphery of those rooms shall be traveled and examined weekly.

Prior to that Rushton had on September 26, 1984 sent to MSHA a letter and a map of the area in the 2nd left north mains "that we intend to flood" (Rx9). The letter further informed MSHA that ventilation would be maintained by regulators along the edge of water. On October 22, 1984 MSHA "accepted" the "plan" submitted with the September 26 letter "provided inlet and bleeder evaluation stations are established and maintained at the water's edge. . ." (Rx10). On October 26, 1984, Rushton reported the air quantities at the water's edge and this was "accepted" by MSHA on November 7, 1984 (Rx11, 12).

On June 11, 1985, Rushton referred to the March 7, 1985 letter of approval and informed MSHA that all power and equipment have been removed from the 2nd left north mains and the area is being used as a sump. Rushton requested that it be permitted to take weekly ventilation and methane readings "at the edge of the water."

On June 25, 1985, MSHA granted Rushton's request and accepted the plan showing ventilation to the water's edge on the completed 2nd left north mains section. Examinations had in fact been performed at the water's edge on May 30, June 5 and June 12, 1985.

At the hearing Rushton proposed to submit evidence that Earl McMasters, Supervising Inspector, stated at a manager's conference that "he did not see a violation in this case." (Tr. 253). He is said to have stated further that he would not vacate the order because it would cause him a lot of difficulty with the subdistrict and "that's why we have administrative law judges." (id.). I excluded the evidence at the hearing, but will now assume that the evidence contained in the offer of proof is part of the evidence in the case and will consider Mr. McMaster's statements.

I conclude that the conditions contained in the MsHA approval letter of March 7, 1985 were part of the approved ventilation plan in effect on June 14, 1985. Therefore, Rushton was required to travel and examine weekly the periphery of the idled rooms on the right of the 2nd left north mains. As of June 14, 1985, Rushton was not travelling and examining weekly the periphery of those idled rooms, indeed it could not do so, because it had flooded them. Therefore, a violation of the plan and thus of 30 C.F.R. § 75.316 was established. The fact that a change in the plan had been requested does not make it less a

violation. Because the area had been flooded, all power and equipment had been removed, and ventilation was maintained to the water's edge, the violation was not serious. Because of the confusion shown in the correspondence between Rushton and MSHA between September 26, 1984 and June 25, 1985 (Respondents Exhibits 9-13-A and Government's exhibits 1 and 2), I conclude that the Secretary has not established that the violation resulted from Rushton's unwarrantable failure to comply with the standard. The order should be modified to a 104(a) citation. The contest proceeding Docket No. PENN 85-254-R contesting the order will be granted in part insofar as it contests the finding of unwarrantability. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, and on the motion to withdraw and the motion to approve settlement, IT IS ORDERED:

1. Order No. 2403926 is VACATED; no penalty is assessed for the violation charged in the order.

2. Docket No. PENN 85-253-R contesting Order No. 2403926 is DISMISSED because the order is vacated.

3. Order No. 2403928 is MODIFIED to a 104(a) citation.

4. Docket No. PENN 85-255-R contesting Order No. 2403928 is DISMISSED.

5. Order No. 2403927 is MODIFIED to a 104(a) citation.

6. Docket No. PENN 85-254-R is GRANTED in part insofar as it contests the finding of unwarrantability in Order No. 2403927.

7. Rushton shall pay the following civil penalties within 30 days of the date of this decision:

CITATION/ORDER NO.	30 CFR STANDARD	PENALTY
2403928	75.316	$ 100
2403922	75.400	1000
2403923	75.303(a)	400
2403927	75.316	100
	Total	$1600

James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

FEB 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-111-M A.C. No. 42-01014-05504
v.	:	Walker Sand & Gravel Pit
CONCRETE PRODUCTS COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Boyd Nielson, Concrete Products Company, Salt Lake City, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under 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 13, 1986.

The parties waived their right to file post-trial briefs.

Issue

The issue is what penalty is appropriate for failure to provide a back-up alarm.

Citation 2644078

This citation alleges respondent violated 30 C.F.R. § 56.9087 which provides as follows:

> § 56.9087 Audible warning devices and back-up alarm.
>
> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Summary of the Evidence

William W. Wilson is a person experienced in mining as well as an MSHA safety and health inspector (Tr. 4, 5).

On December 10, 1985 Mr. Wilson inspected respondent, a sand and gravel operation (Tr. 5, 6). There were three or four employees at the pit (Tr. 6). While on the site the inspector observed a 35-ton Caterpillar that did not have a backup alarm (Tr. 7; Ex. P1).

The driver of the vehicle, which was in operation, had restricted vision to the rear. This hazard could reasonably cause a fatality or serious injury (Tr. 8, 11). Inspector Wilson believed the negligence was high because the defect had been reported to the mechanical department over a week before the inspection (Tr. 9). But, there had been no repairs made to the equipment (Tr. 10, 11).

The alarm was either replaced or repaired within the specified time (Tr. 11).

Boyd E. Nielsen, general foreman for respondent, testified the company operates eight sand and gravel pits. They are located in Utah, Nevada and Wyoming (Tr. 17).

The maintenance department was advised of the defect four or five days before the inspection (Tr. 18).

Exhibits were received in evidence showing the normal time required to effect repairs (Tr. 18, 19); Ex. R1, R2).

The company abated the instant violation the same day the citation was issued (Tr. 14, 20).

The company has an outstanding safety record and it makes every effort to comply with MSHA regulations.

The proposed penalty will not effect the company's ability to continue in business (Tr. 21).

Discussion

Respondent in this case admits the violation (Tr. 3, 4). Accordingly, the sole issue focuses on the appropriate penalty.

The statutory criteria to assess civil penalties is contained in section 110(i) of the Act. The provision, now 30 U.S.C. § 820(i), provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil

> monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The operator had six violations in the two year period ending December 9, 1985. This is a considerable improvement over the 17 violations that occurred before December 10, 1983. The violations involved in the most recent period indicate that the number of respondent's violations are less than average. The respondent must be considered a small operator inasmuch as it has only three or four employees at this pit. It does, however, have additional pits. The operator was negligent in that it failed to remove the equipment from service. Respondent's evidence established there was a time lag between the time of reporting the defect and its repair. I am not persuaded by such evidence particularly when respondent abated the violation the very day the citation was issued. The parties stipulated that the proposed penalty of $400 would not affect the operator's ability to continue in business. The gravity must be considered high since a fatality could occur. The operator's good faith is apparent since it immediately abated the condition.

On balance, I deem that a penalty of $150 is appropriate.

Conclusions of Law

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

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.9087.

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

ORDER

1. Citation 2644078 is affirmed.

2. A civil penalty of $150 is assessed.

3. Respondent is ordered to pay to the Secretary the sum of $150 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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Concrete Products Company, Mr. Boyd Nielson, 4883 Southridge Drive, P.O. Box 7356, Salt Lake City, UT 84107 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 24 1987

WILFRED BRYANT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-43-D
v.	:	
	:	Dingess Mine No. 2
DINGESS MINE SERVICE, WINCHESTER COALS, INC., MULLINS COAL COMPANY, JOE DINGESS AND JOHNNY DINGESS, Respondents	:	

DECISION

Appearances: Barbara Jo Fleischauer, Esq., Morgantown, West Virginia, and Paul R. Sheridan, Esq., Logan, West Virginia, for Complainant; Robert Q. Sayre, Esq. and Jeffrey Hall, Esq., Goodwin & Goodwin, Charleston, West Virginia, for Respondents, Winchester Coals, Inc., and Mullins Coal Company. No one appeared for Respondents Dingess Mine Service, Joe Dingess or Johnny Dingess.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as shuttle car operator on April 27, 1984, for activities protected under the Federal Mine Safety and Health Act (the Act). He filed a discrimination complaint on May 1, 1984 with the Mine Safety and Health Administration (MSHA). On October 19, 1984, MSHA notified him of its finding that a violation of section 105(c) of the Act had not occurred.

A complaint was filed with the Commission on November 26, 1984, naming Dingess Mine Service, Joe Dingess, Johnny Dingess and Winchester Coals, Inc., as Respondents. The complaint was not served upon Winchester until May 3, 1985, but Winchester had been notified by the Commission on November 27, 1984, that a complaint was filed. On January 17, 1986, Complainant filed a motion to add Mullins Coal Company as a party Respondent. The motion was granted by order of Judge Joseph B. Kennedy on January 27, 1986.

No appearance or answer to the complaint was filed by or on behalf of Dingess Mine Service, Joe Dingess or Johnny Dingess. On October 24, 1985 and October 3, 1986 I issued an order to show cause to Dingess Mine Service, Joe Dingess and Johnny Dingess why they should not be found in default for failure to answer the complaint. Cause was not shown, and I entered an order finding Dingess Mine Service, Joe Dingess and Johnny Dingess in default. I further found that the default was not conclusive on the issue of discrimination as against Winchester, Mullins or any successor employer.

Pursuant to notice, a hearing was held in Charleston, West Virginia on November 12 and 13, 1986. Wilfred Bryant, Reed Peyton, Roger Cook, Donnie Adams, Stanley Wells, Oscar Davis, and Donald Cooper testified on behalf of Complainant; Aaron Browning testified on behalf of Respondents Winchester and Mullins. Both parties have filed post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

OPERATION OF THE SUBJECT MINE

Winchester Coals, Inc. (Winchester) and Mullins Coal Company (Mullins) are both wholly owned subsidiary corporations of Imperial Pacific Investments. Donald Cooper is President of both Winchester and Mullins and Vice-President of Imperial Pacific. In 1981 and 1982, Winchester had contracted with Dingess Mine Service for the latter to construct certain electrical installations and to relocate high voltage power lines. Based in part on Winchester's satisfaction with the work performed under that contract, Mullins contracted with Dingess Mine Service on July 20, 1982 for the latter to mine coal from the subject mine (called Mullins No. 2 Mine in the contract) and deliver it to Mullins for a certain amount per ton. Dingess Mine Service had never operated an underground coal mine previously. The contract made Dingess responsible for hiring, employment, and working conditions. Dingess agreed that the work force should be under the jurisdiction of the United Mine Workers of America (UMWA) and governed by the current wage agreement with UMWA. Dingess is described as an independent contractor and is responsible for construction and maintenance of all facilities. Dingess agreed to diligently mine the coal with modern and approved mining methods and to employ only competent, skilled personnel. Dingess agreed to comply with applicable laws and regulations. On July 20, 1982 (the date of the Mullins-Dingess Mining Contract) Winchester and Dingess entered into a written equipment lease, in which Winchester leased to Dingess certain mining equipment,

including a coal drill, a cutting machine, an underground Power Center, a loading machine and 2 Joy 21-SC shuttle cars. Dingess agreed to pay as rent a certain amount per ton of coal mined under the Mullins-Dingess Mining Contract. Dingess agreed to keep the leased property in good repair.

The mining contract was for one year, and unless terminated in accordance with its terms, provided that it should continue for successive periods of one year until all the mineable coal is mined and delivered. The equipment lease was for four years subject to Winchester's right to terminate on any anniversary date by 30 days written notice.

Mullins participated in the development of the mining plans by Dingess. It hired an engineering firm to prepare maps and perform some of the ventilation calculations.

During 1982 and early 1983 Mullins was satisfied that Dingess was doing "a pretty good job of operating that coal mine." (Tr. 204). In late 1983 and in 1984 problems developed: a number of citations were issued by the State Department of Natural Resources (DNR), and Dingess fell behind in its payments of UMWA royalties, taxes and worker's compensation fund payments. Mullins, which was the permit holder under the DNR, itself corrected certain problems which endangered its permit. In late 1983 or early 1984, Mullins became aware that Joe Dingess had a drinking problem and was drinking on the job. Mullins could have terminated the contract without cause in July 1984, but because of the high demand for coal decided to continue it. During 1984, rental payments due Winchester were regularly deducted from amounts due Dingess from Mullins. Winchester and Mullins also made payments owed to suppliers, trucking companies, and repair companies by Dingess and treated the payments as advances due under the mining contract. On at least one occasion, Winchester made a payment to Aaron Browning, Dingess' mine foreman, apparently for his salary.

In 1984, Mullins had discussions with Dingess concerning the purchase of coal from the Panna Mine, which Dingess contemplated opening. Winchester advanced $25,000 to Joe and Johnny Dingess to open the Panna Mine.

On October 22, 1984, Mullins terminated the mining contract with Dingess on six grounds: (1) the failure of Dingess to comply with P&R regulations; (2) the failure of Dingess to pay its employees; (3) the failure of Dingess to pay money due a trucking company; (4) the failure of Dingess to comply with the UMWA contract; (5) the making by Dingess of unauthorized subcontracts with Aaron Browning; (6) the failure of Dingess to comply with the Mine Health and Safety law and regulations.

Dingess filed suit for breach of contract which is pending in the State Court.

Winchester formally terminated the equipment lease in February 1985.

The license to operate the subject mine was recovered from Dingess in a court proceeding by Mullins or Winchester. It was subsequently transferred to New River Fuels, which is currently operating the mine, apparently under a mining contract with Mullins.

Roger Cook, General Superintendent of Winchester and previously its Manager of Mines, had the responsibility of monitoring the subject mine to insure that Dingess lived up to its contract with Mullins. This indicates the interchangeable nature of Winchester and Mullins. Cook was at the mine site regularly, and went underground to make sure Dingess was following the proper projections and producing coal. On occasion he had problems corrected, including excessive dust and surface drainage. In discussions with Dingess, he suggested the opening of a continuous miner section to increase production. Cook testified that Winchester/Mullins had to "put in overcasts and everything else, and they [Dingess] really didn't understand how to do it." (Tr. 106). Later, he seemed to indicate that Aaron Browning put in the overcasts. (Tr. 110). Production did not increase, and it was decided to cancel the contract. Neither Cook nor anyone at Winchester/Mullins was involved in the hiring or firing of Dingess' miners. No miner complained to Cook about unsafe equipment.

COMPLAINANT'S EMPLOYMENT

Complainant was hired as a shuttle car operator at the subject mine on April 23, 1984. He was paid $110 per day. He was hired by mine foreman Aaron Browning, who told complainant that he worked for Winchester Coal Company. Complainant had previously worked for Amherst Coal Company as a general inside laborer, roof bolter helper, miner helper and shuttle car operator. He left Amherst more than 2 years before he was hired at the subject mine. Complainant was hired with his brother-in-law, Donnie Adams, both to operate shuttle cars. The shuttle car to which complainant was assigned had defective brakes, no lights, a defective tram operation and defective steering. The car to which Adams was assigned had no brakes and no lights. Complainant pointed out the defects to Kevin Atkins, the section foreman and to Browning and was told to do the best he could.

After three days, Complainant told Kevin Atkins, that he refused to continue operating the shuttle car because his arms ached trying to steer the machine. The next day he was assigned by Browning to "shooting coal". The following day Browning called Complainant and told him the mine was flooded, and the second shift was laid off. Complainant went to the mine site to get a layoff slip so that he could go back on welfare, and found that the mine was not flooded, and that employees who had been hired subsequent to Complainant were working. Browning refused to give him a lay off slip and told Complainant he did not have a job anymore. Complainant filed a grievance through his union representative and after 5 days, Browning agreed to rehire Adams and put Complainant on the panel for recall. He "guaranteed" that he would call Complainant back to work within two or three days. Complainant refused the proposed settlement because "he felt he was done wrong" and because he believed there was no panel. Adams refused to return to work unless Complainant was rehired. Neither returned to the mine. Since leaving Dingess, Complainant has sought work without success. He has worked in a State Park in return for his family welfare payments.

Aaron Browning testified that the loading machine operator filed a safety complaint concerning Complainant's operation of his shuttle car. The loader operator refused to run his machine if Complainant continued on the shuttle car. Browning stated that was the reason he laid off Complainant. He intended to call Complainant back in some other position. Complainant refused the offer and on May 9, 1984, formally terminated his employment. (Rx3)

ISSUES

1. Is Complainant's complaint barred by time limitations?

2. Was Complainant discharged or otherwise discriminated against because of activity protected under the Act?

3. If so, is either Mullins or Winchester liable for the discrimination?

4. If so, to what is Complainant entitled, and who is responsible for providing the remedy?

CONCLUSIONS OF LAW

TIME LIMITATIONS

The complaint with MSHA was filed May 1, 1984, naming Dingess Mine Service, Inc. as the person committing the discrimination, and April 25, 1984 as the date of the

discriminatory action. After an investigation, the Secretary determined on October 19, 1984 that a violation had not occurred and notified Complainant by letter received by Complainant on October 24, 1984. On November 26, 1984, the complaint was filed with the Commission, naming Dingess Mine Service, Winchester Coals, Inc., Joe Dingess and Johnny Dingess as Respondents. The certificate of service states that copies of the complaint were mailed to all Respondents on November 23, 1984. Winchester has stated that it was served with a copy of the complaint on May 3, 1985, and a certificate of service with certified mail receipts was filed by Complainant showing service on Winchester May 3, 1985 and on the Dingesses May 8, 1985. However, the Commission by letter of November 27, 1984 notified Dingess and Winchester that a complaint had been filed. By order issued September 24, 1985, Judge Kennedy denied Winchester's defense based on the statute of limitations. By order issued January 27, 1986, Judge Kennedy granted Complainant's motion to add Mullins as a party Respondent.

Thus, the complaint filed with the Secretary was timely filed even though it failed to name Mullins or Winchester. Complainant could not be expected to know the relationship of Mullins or Winchester to the operation of the mine: he worked for Dingess. MSHA's records apparently showed Dingess as the mine operator, and it had no reason to bring Mullins or Winchester into the investigation. Mullins and Winchester assert that they were prejudiced because they were not involved in the investigation. They have not shown, and it is not evident to me, what the prejudice consisted of. I conclude that their claim of prejudice is not well-founded, and I reject it.

The complaint with the Commission was filed 31 days after the Secretary notified Complainant of his finding that discrimination had not occurred. Thus it was filed one day beyond the statutory period. The record does not disclose why service on Respondents took place so long after filing, but it is clear that Winchester, at least, knew of the filing of the complaint within a few days after it was filed.

At any rate, the time limitations contained in section 105(c) of the Act were not intended to be jurisdictional, and dismissal of a complaint for late filing is justified only if the Respondent shows material, legal prejudice attributable to the delay. Cf. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986). No such showing has been made here. In view of the close relationship (virtual identity for our purposes) between Mullins and Winchester, Mullins cannot claim additional prejudice because it was added as a Respondent by an order issued later.

Therefore, I conclude that the claim is not barred because of time limitations, and that Winchester and Mullins are properly before the Commission as Respondents.

PROTECTED ACTIVITY

Complainant contends that the shuttle car to which he was assigned was unsafe: it had no lights, defective brakes, a defective tram mechanism and defective steering. Browning denies that it was unsafe, but the clear weight of the evidence supports Complainant's contention, and I conclude that it was in fact unsafe. Complainant testified that he told Browning and Atkins that it was unsafe, which Browning denied. I conclude that Complainant did tell his supervisors that the vehicle was defective and unsafe. This was protected activity under the Act. On April 26, 1984, Complainant told Atkins that he refused to operate the shuttle car anymore, and at least one of the reasons for his refusal was the unsafe condition of the machine. I conclude that this refusal was therefore protected activity, and that the reason for his refusal was made known to the operator in the person of section foreman Atkins.

ADVERSE ACTION

Complainant was "laid off" on April 27, 1984, following his refusal to continue operating the defective shuttle car. This was adverse action. He filed a grievance, and in the course of the grievance procedure, Browning offered to settle the grievance by placing him on a recall panel and calling him back to work in "a couple of days at the most." (Tr. 278) Complainant refused the offer and formally resigned on May 9, 1984. I conclude that he was not discharged and that the adverse action terminated when he refused the offer to be called back and resigned his job.

MOTIVATION

Under the Act, a miner can establish a prima facie of discrimination by showing that he engaged in protected activity and that the adverse action complained of was motivated in any party by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it may affirmatively defend by showing that it was motivated also by the miner's unprotected activities and would have taken the adverse action for the unprotected activities

alone. Pasula, supra; Simpson v. Kenta Energy, Inc., 7 FMSHRC 1034 (1986).

Direct evidence of a discriminatory motive is, as the Commission has said, "rare." Illegal motive may be established, however, if the facts support a reasonable inference of discriminatory intent. Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (1986). Here the evidence shows serious safety defects on mine equipment and Complainant's refusal to operate the equipment followed almost immediately by his lay off. These facts clearly support an inference that one of the mine operator's motives in laying Complainant off was his protected activities. Browning testified that he laid off Complainant because of a safety complaint from the loader operator who was afraid of the way Complainant was operating the shuttle car. I conclude, however, that this complaint was related to the condition of the shuttle car rather than to Complainant's inability to operate it. The operator has not established that Complainant would have been laid off for unprotected activity alone. Therefore, I conclude that a violation of section 105(c) has been established.

LIABILITY OF MULLINS/WINCHESTER

Section 105(c)(1) of the Act provides that "no person shall . . . discriminate against or otherwise interfere with the statutory rights of any miner . . . ." Liability is thus not restricted to a mine operator or an employer.

The record in this case establishes that Complainant worked for Dingess Mine Service which was the "operator" of the subject mine: Dingess hired him, directed his work activity and laid him off. Mullins/Winchester was not involved in hiring Complainant. The evidence does not show that it directed his work activity, nor does it show that Mullins/Winchester was in any way involved in his lay-off, the adverse action complained of here.

On the other hand, the record shows that Mullins/Winchester had a continuing presence at the mine. Mullins/Winchester knew or should have known that Dingess showed increasing evidence of its incompetence, technically and financially, to operate the mine, and this evidence was very strong at the time of Complainant's employment. Mullins profited from the coal production, and pressured Dingess to increase its output. Winchester owned most of the mining equipment, including the shuttle car operated by Complainant. There is no direct evidence that Mullins/Winchester knew of the defective condition of the car, but I infer from the regular presence of Roger Cook at the mine that it was aware of the shuttle car's condition. The lease agreement, however, required Dingess to keep the leased property

in good repair (RX-6). The difficult question is whether Mullins/Winchester's relationship to the mine was such that it could be deemed "a person" which "discriminated against" Complainant.

Complainant cites a number of courts of Appeals decisions which held that citations for safety violations were properly issued to mine owner-operators even though the violations were committed by independent contractors. Harmon Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981); Cyprus Industrial Minerals v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); BCOA v. Secretary, 547 F.2d 240 (4th Cir. 1977); Brock v. Cathedral Bluffs Shale Co., 796 F.2d 533 (D.C. Cir. 1986). These cases differ substantially from the present case in that they involve holding the production-operator liable for safety violations committed by a contractor performing certain discrete construction activities. In the present case Dingess is the production-operator under a contract with the owner of the coal. It is true that Mullins/Winchester was involved in overseeing Dingess' work, and that it actually performed some of the work involved in the production of coal (engineering projections, installation of overcasts). However, it was not involved in the discriminatory act complained of here. This fact distinguishes the present case from the case of UMWA v. Pine Tree Coal Co., 7 FMSHRC 236 (1985), where the owner of the coal directly supervised and directed the contract operator's activity which led to an imminent danger withdrawal order.

The issue considered here was addressed by Judge Richard C. Steffey in UMWA v. Algonquin Coal Co., 7 FMSHRC 906 (1985). In Algonquin, Judge Steffey held that where the owner of the mine did not "take any kind of action to hire, discipline, or discharge any of the miners employed by" the contract mine operator, it could not be held liable for discrimination under section 105(c) of the Act. I agree with the rationale of the Algonquin decision, and conclude that Mullins/Winchester is not liable under section 105(c) of the Act for the discrimination against Complainant.

REMEDY

Complainant was laid off by Dingess for activity protected under the Act. He is entitled to back pay from April 27, 1984 to May 9, 1984 with interest thereon in accordance with the formula in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1984). He is further entitled to be reimbursed for reasonable attorneys' fees and costs of litigation. Because of my conclusion that the adverse action terminated on Complainant's resignation, the motion to add New River Fuels as a party (successor employer) is DENIED.

ORDER

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

1. That Dingess Mine Service shall pay Complainant back pay from April 27, 1984 to May 9, 1984 with interest thereon in accordance with the Arkansas-Carbona formula.

2. This proceeding is DISMISSED as to Winchester Coals, Inc. and Mullins Coal Company.

3. Complainant shall file a statement within 20 days of the date of this decision, showing the amount he claims as back pay and interest under No. 1 above, and the amount he requests for attorneys' fees and necessary legal expenses. The statement shall be served on Respondents who shall have 20 days from the date service is attempted to reply thereto.

4. The decision is not final until a further order is issued with respect to the amount of Complainant's entitlement to back pay and attorneys' fees.

James A. Broderick
James A. Broderick
Administrative Law Judge

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 24 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROGER NELSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 86-407-D
	:	HOPE CD 86-7
v.	:	Morton Mine
U. S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Complainant
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania for the Respondent

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 185(c) (the Act) alleging that on about January 21, 1986 he was illegally discriminated against when he was intimidated as a result of making a safety complaint to his foreman, and that on or about January 28, 1986 he was discriminated against when he was required to perform additional and strenuous duties as a result of filing a safety complaint with MSHA and speaking with an MSHA inspector.

Pursant to notice the case was heard in Huntington, West Virginia on November 12, 1986. Roger Nelson, Charles Pauley, Danny Meadows, Bernie May, and Samuel Smith testified for Complainant. John Cummings, Bill Wright, Ron Winfrey and David Kirk testified for Respondent. Both Parties filed Post Hearing Briefs and Proposed Findings of Fact. In addition, Parties were granted the right to file Reply Briefs, but none were filed.

Findings of Fact

The Complainant, Roger Nelson, has been employed as a miner by the Respondent, U. S. Steel Corporation, since 1981. On September 9, 1985 Nelson begin working as a shuttle car operator under Foreman David Kirk.

During a daily safety meeting on January 21, 1986 Nelson asked Kirk how far ventilation tubing could be legally kept from the mining face. Kirk told Nelson that the law required ventilation tubing to be kept within 10 feet of the face. At the time the tubing was being kept more than 10 feet from the face. Nelson give his opinon to Kirk that the Respondent was violating the law in its placement of the ventilation tubes. Merle Johnson, a miner operator who was present, stated that keeping the tubing 10 feet from the face was dangerous to the miner operator and the miner helper. Johnson and Nelson argued but there was no physical contact.

After this incident, Nelson said that Kirk ordered him to take the man trip and get some additional ventilation tubing (although Charles Pauley testified that Kirk told him that he did not order Nelson to take the man trip, I have adopted Nelson's version as Kirk did not contradict it in his testimony). As Nelson was leaving the man trip Kirk approached the electrician, Charles Pauley. Pauley testified that Kirk asked who was in the man trip. When Pauley replied that it was Nelson, Kirk stated to Pauley that he did not tell Nelson to take the man trip and that it was against the law for Nelson to take the man trip from the section. When Nelson returned to the section, Kirk informed him that it was illegal to take the man trip off the section and denied that he had told Nelson to take the man trip.

After the argument between Nelson and Johnson, Kirk called Ron Winfrey, the General Mine Foreman, and asked that he come to the section as he (Kirk) had a problem. However, Kirk did not explain to Winfrey the nature of the problem. Winfrey did not have any tranportation available but advised Kirk that he told Bill Wright, Shift Foreman, and John Cummings, Assistant to the Mine Foreman, to come to the section. Cummings and Wright asked Kirk what the problem was and they testified that they were told by Kirk that Nelson was the problem. I note that Kirk denied that he told Wright and Cummings that Nelson was the problem. I adoped the verison testified to by Wright and Cummings based upon observations of their demeanor and also considering the fact that their testimony corroborates each other.

According to Cummings, Kirk told them that Nelson and Johnson "just about got into a fight" over placement of the tubing (Tr. 177). According to Wright, Kirk told him that Nelson and Johnson had a fist fight. Kirk did not ask Cumming or Wright

to talk to Nelson. On his own initiative Wright told Kirk to have Nelson to come to the dinner hall to talk to him and Cummings. Wright explained he wanted to talk to Nelson in order to "try to solve the problem before it got out of hand" (Tr. 197).

At the dinner hall Nelson admitted to Wright and Cummings that there had been an argument about placement of the ventilation tube. Wright and Cummings explained to Nelson the hazards involved in maintaining the ventilation tube within 10 feet of the face. Wright and Cummings asked Nelson if he would like to be transferred from the section to another job elsewhere in the mine running a supply motor. Cummings stated that there is a difference in pay between a suttle car operator, (Nelson's job on January 21) and that of a supply motor operator. He said that he was not sure what the difference was but that he "would imagine" that the suttle car operator job pays more (Tr. 183). There is no other evidence in the record regarding the pay of these two jobs. Accordingly, I conclude that Cummings' testimony is insufficient to establish positively that the job that Wright and Cummings asked Nelson if he wanted to transfer to, would have involved a cut in pay.

Nelson testified that Cummings said that if he stayed on the section he "would end up with the short end of the stick." (Tr. 24). Nelson told Wright and Cummings that he would like another job, but that he did not want people to think that Kirk had run him off the section.

Wright and Cummings did not threaten Nelson nor did they take any disciplinary action against him or remove him from the section.

Wright testified that he had decided to speak to Nelson and not Johnson because he felt that the latter was the problem as Kirk had so indicated. Also he said that he could speak to Johnson any time as he operated a miner, whereas Nelson operated a suttle car and thus did not stay in one place.

At about 11:00 a.m. Winfrey arrived at the section. He testified that Kirk had said that there was almost a fight between Johnson and Nelson concerning the distance ventilation tubing is to be kept from the face. Kirk did not ask Winfrey to speak to anyone. Winfrey then went to talk to Johnson who said that he and Nelson "about came to blows" in the dinner hall that morning arguing placement of the ventilation tube (Tr. 220). Johnson asked Winfrey to be transferred from the section. Winfrey did not grant this request. After Winfrey talked to Johnson, Winfrey asked Nelson to leave his suttle car and talk to him. According to Winfrey, he asked Nelson, just as he had asked Johnson, to tell

him what happen earlier in the day. Winfrey and Nelson had a discussion with regard to placement of the ventilation tube, and Winfrey explained why they were placed beyond 10 feet from the face. According to Nelson, Winfrey told him that he thought he (Nelson) had an attitude problem. Winfrey said there seem to be "turmoil" between Nelson and Kirk and he asked Nelson if he wanted to transfer to another section. Winfrey said that Kirk had not asked him to transfer Nelson, and that he was unaware that earlier in the day Wright and Cummings had offered Nelson work in another section. Winfrey said that he asked Nelson if he wanted a transfer but turned down Johnson's request for transfer, as Nelson was calm and Johnson was "belligerent." Winfrey did not take any action to have Nelson transferred.

The following day Danny Meadows, the scoop operator, inspected the face area and noted that it was not rock dusted within 40 feet of the face. He testified that there was no rock dust available to correct the problem. Meadows brought the problem to Kirk's attention and Kirk told Meadows that he would order some rock dust. Nelson asked Kirk if he was going to get some rock dust. Meadows testified that Kirk told that him "(Nelson) was crying about the place not being rock dust(ed)." (Tr. 114). Nelson reported the violation to the Safety Committee and another Section 103(g) complaint was filed.

On January 28, 1986 MSHA Mine Safety and Health Inspectors Martin Copley and Karl Jenkins came to the mine to investigate the Section 103(g) complaints filed by the Union at Nelson's request. Nelson and Danny Meadows told the Inspectors in the presence of Kirk about the failure to properly rock dust the face area. Meadows also told Inspector Jenkins that it had taken 16 bags of rock dust to dust the area that had been in violation. Three citations were issued by Inspector Copley and paid by the Respondent. They were for failure to maintain ventilation tubing within 10 feet of the face, failure to rock dust within 40 feet of the face on January 22, 1986, and for allowing work to continue on the section without ventilation.

According to the testimony of Meadows there was an occasion when a State Mine Inspector looked at a scoop after Meadows said "how about coming over there and looking at it?," as the battery plugs were loose on the scoop. Meadows testified that after the mine inspector looked at the scoop, Kirk said that if the scoop would have been put out of operation then Meadows "would have been shoveling ribs out the rest of the day." (Tr. 123). Kirk, in essence, testified that he did not remember that incident nor in essence did he remember making such a statement to Meadows. I adopt the testimony of Meadows in this regard based upon my observations of the witnesses' demeanor, and in as much as this testimony was corroborated by May (Tr. 153).

On January 29, 1986, when Meadows arrived on the section the scoop was broken. He testified that Kirk told him to get two shovels and get Nelson as the two of them would be shoveling to clear the face area and remove coal from the ribs. It was the testimony of Nelson that only he and Meadows shoveled. They shoveled for approximately 20 minutes before Kirk told them to stop.

Nelson also testified that, in the section, prior to this incident whenever the scoop broke down the miner would be used to clean up the coal and that there was never any shoveling done before in the section when the skoop broke down. Kirk's testimony was at variance to that testified to by Nelson. I adopt the testimony of Nelson, after having observed and evaluated the demeanor of both witnesses, and also due to the fact that Nelson's testimony was corroborated by May and Meadows.

Issues

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

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

3. If so to what relief is he entitled.

Conclusions of Law

Complainant and Respondent are protected by and subject to the provisions of the Act, the Complainant as a miner, and Respondent as operator of the Morton Mine. I have jurisdiction to hear and decide this matter.

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff supra at 1863, stated as follow:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected

activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. MSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected Activity

On January 21, 1986 the Complainant questioned Kirk concerning the placement of ventilation tubing. On January 22, 1986 the Compainant asked Kirk if he was going to get some rock dust. On January 28, 1986 the Complainant told MSHA Inspectors Mark Copley and Carl Jenkins about the failure to properly rock dust the face area. I conclude that all of the these activities were safety related and are protected by the Act.

Adverse Action

In his Post Hearing Brief, Complainant complains of three separate actions by Respondent:

1. After Complainant questioned Kirk about the position of ventilation tubing on January 21 he was "set up" for possible disciplinary action.

I accepted Complainant's testimony that Kirk had told him to take the man trip to get additional ventilation tubing I also accepted Complainant's testimony that when he returned to the section Kirt informed him that it was illegal to take the man trip off the section and denied that he had told Complainant to take the man trip. I also accepted Pauley's testimony that Kirk told that he did not tell Complainant to take the man trip and that it was against the law for Nelson to take the man trip from the section. In this context, I find that Kirk's statement to Complainant and Pauley could reasonably tend to intimidate Complainant and cause fear of reprisal. As such, I find Kirk's statements to constitute an adverse action [See Moses v. Whitley Developement Corporation, 4 FMSHRC 1475, 1478 (August 1982)].

2. Cummings, Wright, and Winfrey discussed with the Complainant the possibility of transfering him off the section.

Neither Wright, nor Cummings, nor Winfrey did discipline, demote, or transfer Complainant subsequent to his engaging in protected activities on January 21, 1986. The only overt actions were discussions that Cummings, Wright and Winfrey had with the Complainant at which time they raised the possibilty with Complainant of him transfering off the section to another section. These discussions, by management officials, coming soon after Complainant engaged in protected activities, surely tended, in some degree to cause the Complainant to feel intimidated. As such, I conclude that they constitute an adverse action.

3. On July 29 1986 Kirk required Complainant to shovel the face area for approximately 20 minutes.

Ron Winfrey, Respondent's Shift Foreman, testified that shoveling coal is part of coal mining and that the only crew member he would exempt would be an electrian. He further testified, in essence, that shoveling is required when a scoop is down. It was also his testimony that normally a suttle car operator shovels coal around a feeder on an average of three to five times a shift, and that nine times out of ten the shovel car man normally cleans the spillage around the tail piece. These statements might be true with regard to Winfrey's general experence, but in order to ascertain the specific working conditions in Kirk's crew, I adopted the testimony of Nelson, May and Meadows, as being crew members, they would have personal knowledge of the work conditions in the crew. As such, I found that prior to January 29, 1986 no crew members had been required to shovel coal upon the breakdown of the scoop. Accordingly, I find that an adverse action occured when Kirk required Compainant to shovel coal.

Motivation

I have concluded, infra, that the discussions of Cummings, Wright, and Winfrey with Complainant on January 21, 1986, concerning a transfer out of Kirk's section, constituted an adverse action. In as much as Kirk did not tell them to speak to Nelson in this regard, and they acted soley on their own initative, the inquiry must focus on their motivation rather than on Kirk's motivation. These discussions took place a short time after Complainant had engaged in protected activities. Also, although Johnson and Nelson had an agrument over the placement of the ventilation tubing, Wright, Cummings, and Winfrey initiated a discussion about a transfer only with Nelson. However, Winfrey indicated that Johnson had initiated with him a discussion of a tranfer, and he considered talking about a transfer with Nelson and not Johnson, as the latter was still belligerent. Winfrey indicated that he wanted to transfer Complainant as there was "turmoil" between him and Kirk. Kirk had told Wright and Cummings that Complainant was the problem and Wright testified that he wanted to talk to the Complainant in order to try to solve the problem before it got out of hand. After the discussions that Wright, Cummings, and Winfrey had with the Complainant, with regard to a transfer out of the section, no futher action was taken by them to transfer Complainant. I thus find that their motivation in offering to transfer Complainant from the section was not related to safety complaints.

The adverse action against the Complainant by Kirk on January 21, 1986 in falsely accusing him of illegally using a man trip was committed almost immediately after Complainant had engaged in a protected activity. It establishes, prima facie, that this adverse action on Kirk's part was motivated by Complainant's protected activity. Respondent has not offered any evidence to rebut this prima facie finding. Accordingly, it is concluded, that this adverse action on Kirk's part was motivated solely by Complainant's protected activity.

On January 29, 1986, one day after Complainant engaged in a protected activity in the presence of Kirk, Kirk had him shovel coal. Further, I adopted the testimony of Meadows that on one other occasion Kirk had told Meadows that he "would have been shoveling ribs all day", if a piece of equipment would have been taken out of service by a State Inspector as a result of comments that Meadows had made. Also, I have adopted the testimony of Meadows that after Complainant asked Kirk if he was going to get some rock dust, that Kirk told Meadows that Nelson was "crying about the place not being rock dust(ed)". Also, I have adopted the version testified to by Nelson, May and Meadows that in Kirk's section miners in the past had not done any shoveling when the scoop had broken, and that only Complainant and Meadows, who also had complained to Kirk about the lack of rock dust on January 28, were singled out by Kirk to shovel coal on January 29.

I thus find, based on the above, that the Complainant established a prima facie case that Kirk's action, in having him shovel coal for 20 minutes on January 29, was motivated by the former's protected activity. I further find that Respondent has not rebuted this finding.

I therefore find that Complainant has met his burdon in establishing that his being required to shovel coal for 20 minutes on January 29, 1986 constitutes a violation of Section 105(c) of the Act. I also find that Kirk's action on January 21, 1986, accusing Complainant of illegally using a man trip constitutes a violation of Section 105(c) of the Act. The balance of the allegations in the complaint do not establish a violation of Seciton 105(c) of the Act.

I have considered the size of Respondent's mining operation and history of violations, as contained in figures submitted by Complainant and stipulated to by the Respondent. It is significant to note that no previous Section 105(c) violations have been assessed. I futher find that the adverse actions taken by Kirk against the Complainant to have been intentional. Based on these factors as well as the nature of the adverse actions established, I find that a penalty of $400 is appropriate.

Order

It is ORDERED that:

1. Respondent shall within 15 days from the date of this decision post a copy of this decision at the Morton Mine where notices to miners are normally placed and shall keep it posted there for a period of 60 days.

2. Respondent shall pay a penalty of $400 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 25 1987

MANALAPAN MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 86-119-R
	:	Citation No. 2596792-04; 6/5/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Harlan No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 86-130
	:	A.C. No. 15-05423-03563
v.	:	Harlan No. 1 Mine
MANALAPAN MINING COMPANY, Respondent	:	

DECISION

Appearances: Karl S. Forester, Esq., Forester, Forester, Buttermore & Turner, P.S.C., Harlan, Kentucky for Manalapan Mining Company;
Theresa Ball, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge the issuance by the Secretary of Labor of one citation and two withdrawal orders charging the Manalapan Mining Company (Manalapan) with violations of regulatory standards. The general issues before me are whether Manalapan violated the cited standards and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial". If violations are found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

During the course of an investigation of a June 4, 1985, fatal rib fall accident at the Harlan No. 1 Mine several withdrawal orders and citations were issued, three of which

are before me in these proceedings. At hearings the parties agreed to settle Order No. 2594901 for the $1,000 penalty proposed by the Secretary. I have considered the representations and documentation submitted in support of the proposed settlement and find that it meets the criteria set forth in section 110(i) of the Act. Accordingly the proposed settlement of Order No. 2594901 is approved.

Citation No. 2596792 alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200 and charges as follows:

> Dangerous loose overhanging ribs were present in all active workings of the 004-0 section, and also the supply track from the subject section to the No. 4 cross entry belt outby. This condition was the contributing factor which led to the issuance of imminent danger order issued during a fatal accident investigation; order No. 2596791 issued 6-5-85.

The citation was subsequently modified on May 14, 1986 as follows:

> This violation is hereby modified to read item (20) negligence as being (e) (Reckless Disregard) because the operator had been warned prior to the fatal accident by two (2) other persons being injured and by previous citations issued that the ribs were dangerous and also memo written concerning rib controls and no action was taken until after the fatal to control ribs in high coal bed. Also modified to read item (21) Gravity (A) as being (occurred) because (1) man was killed as a direct result of no measures taken to control ribs in the high coal bed.

The cited standard, 30 C.F.R. § 75.200, provides in part that "the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

There is indeed no dispute that on June 5, 1985, the date of the violation alleged in the citation at bar, loose and overhanging ribs were present in the active workings of the 004-0 section of the Harlan No. 1 Mine. Indeed Mine Superintendant Ralph Napier admitted that there were a "pretty lot" of loose and overhanging ribs in the section on June 5. The violation is accordingly proven as charged.

The evidence is also undisputed that such loose and overhanging ribs existing in active workings constitute a serious

hazard. In of the absence of any rib control in this section of the mine where the extracted height was 12 feet, where they were retreat mining (and not all of the pillars were being extracted during the process thereby creating excess pressure on the ribs), and where there existed a rockband some 2 feet from the mine roof thereby placing additional pressure on the 2 feet of coal between the roof and rockband, the violation was also "significant and substantial." Secretary v. Mathies Coal Company, FMSHRC 1 (1984).

Whether this violation was caused by Manalapan's negligence depends on whether Manalapan officials knew or should have known of the violative conditions, or regardless of whether they knew or should have known of those conditions whether they nevertheless failed to follow safe industry practice in providing additional rib support under the circumstances as they existed on June 5, 1985.

The Secretary argues that the dangerous loose and overhanging ribs cited on June 5, 1985, had existed since before the fatal rib fall at around 2:45 p.m. on June 4, 1985. According to Inspector Ronny Russell of the Federal Mine Safety and Health Administration (MSHA) the overhanging rib conditions in the 004 section were about the same on June 5 as they were on the date of the fatality June 4. Russell was in the 004 section on June 4 after the fatal accident and testified that he then saw dangerous, loose overhanging ribs throughout the active working section. Russell was however the only witness to claim that he actually saw such dangerous loose and overhanging ribs on June 4. Moreover Russell never did issue an order or citation for these alleged conditions on June 4. It is also interesting that although Russell had been the regular MSHA inspector at the Manalapan Mine and had in fact inspected it on the preceding May 22nd and May 30th 1985, he had never issued any citations for roof or rib violations. All of the remaining witnesses who were present in the cited section on June 4, disagreed moreover with Russell's observations.

Frank Curry a Manalapan roof bolter was working in the vicinity of the fatal accident before it occurred. While he thought there may have been some loose ribs behind them none were overhanging. According to Curry the deceased had tested the rib that fell with a steel drill. Moreover the rib was "straight up and down" with no cracks or fractures to be seen.

Richard Cohelia, the Manalapan Safety Director, did not remember seeing any loose or overhanging ribs in the 004 section after the accident. According to Cohelia the conditions had significantly deteriorated overnight so that on June 5, 1985, several loose ribs had slabbed out from the permanent rib.

Johnny Helton the Manalapan General Mine Foreman, and Ralph Napier both went into the 004 section shortly after the accident on June 4 and neither saw any loose or overhanging ribs in that section. They both returned on June 5, and found that some of the ribs had since rolled out from the weight of the roof and there were loose and overhanging ribs at that time.

Gary Cochran the 004 Section Foreman on June 4th testified that the section was being retreated in an area of 12 foot coal. Cochran entered the mine at around 6:45 that morning to perform his on-shift examination. They began cutting coal at around 11:30 that morning and were in the second cut when they saw some loose ribs. The continuous miner was then moved in. According to Cochran the ribs were then trimmed back to an angle of 45 degrees and they "looked good" when the miner was backed out. Cochran also saw the deceased and Curry each take down some loose coal with an 11 foot drill steel bar. Cochran testified that he then checked both the right and left side visually before he left. 15 minutes later he heard that Boggs had been killed in the heading. According to Cochran there was only 1 overhanging rib in his section which was taken down prior to Bogg's accident.

Raymond Gross, Jr. was working on June 4, 1985, in the 004 section for Foreman Cochran. According to Gross the ribs were "in good shape" at that time although there had been some sloughing.

Within this framework of evidence I do not find that the Secretary has proven his claim that the loose overhanging ribs found on June 5, 1985, had existed since before the fatal accident on June 4th. The Secretary also maintains however that the operator was negligent because it had been warned of the dangerous rib conditions on June 5th by the fact that two other persons had previously been injured by rib rolls, by previous citations issued for dangerous ribs, and also "from a memo written concerning rib controls and no action was taken until after the fatal to control ribs in high coal bed."

The record shows that citations had been issued to Manalapan on September 4, 1984, for a violation of loose and overhanging ribs in another section of the mine and again on October 17, and November 9, 1984, for similar problems. I cannot find however that these violations constituted any notice of the rib conditions more than 6 months later on June 5, 1985, in another section of the mine. The mere existence of these prior violations without more, does not suggest that the operator was negligent on this occasion.

In addition, while MSHA Inspector Paul Helton noted on the citation issued September 4, 1984, that the operator needed a modification to his roof and rib control plan to take care of sloughing ribs, this was not made a condition of abatement nor was the operator subsequently required by MSHA to so modify its plan. Indeed the evidence shows that Inspector Helton's supervisor thought it would be "fruitless to pursue" such a requirement. Since MSHA itself therefore apparently did not deem such a modification to be sufficiently important to compel the operator to make such changes, either as a condition of abatement or as a condition in its roof and rib control plan, I find its argument now that the operator was negligent solely for failing to adopt such changes to be unpersuasive.

Manalapan is not totally without negligence however in light of its history of rib problems. The evidence is undisputed that in a 10 to 12 foot coal seam as here there is an increased danger of bursting ribs. Here there was also a history of rib rolls particularly during retreat mining and only partial pillar recovery. Moreoever based on the credible expert testimony of MSHA Special Investigator, Lawrence Layne, it is clear that the additional stresses placed upon the roof and ribs under such conditions clearly warranted additional safeguards to protect the miners from rib rolls. This evidence establishes that safe and accepted industry practice warranted such measures. The fact that Manalapan took no additional precautions, which were shown to be feasible, supports a finding of operator negligence.

Citation No. 2596793 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.304 and charges as follows:

> Sufficient and adequate on shift examinations had not been conducted in the 004-0 section, in that on 6-4-85 loose overhanging ribs were present, also the approved roof control plan was not being fully complied with in that turnposts were not set going into the pillar split, and only (3) roadway posts were set on 1 block outby the block being mined, and the power center for subject section was within 150 feet of the pillar being mined.

The cited standard provides in relevant part as follows:

> At least once during each coal-producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so. Any such conditions shall be corrected immediately.

As noted, the Secretary's evidence has been found insufficient to sustain a finding that loose overhanging ribs were present on the 004-0 section on June 4, 1985. Manalapan acknowledges however that it was in violation of the approved roof control plan as cited in that turnposts were in fact not set into the pillar split and that only 3 roadway posts were set for 1 block outby the block being mined. The foreman in charge of the section, Gary Cochran, said that he was not even aware of the requirement to have line posts set before the second cut into the pillar. Manalapan also admits that the power center for the section was indeed within 150 feet of the pillar being mined. The existence of these violative conditions either through ignorance or by intent clearly supports the violation.

The Secretary concedes that these conditions were not the causative factors in the fatal rib fall on June 4, 1985, however it nevertheless maintains that the violation was "significant and substantial." I must agree. It may reasonably be inferred from the fact that inadequate on-shift examinations were being conducted in the 004-0 section that any number of hazardous conditions were not being detected. It may also reasonably be inferred from the failure to have corrected the two admitted violations that reasonably serious injuries would result. The violation is accordingly serious and "significant and substantial." Mathies, supra.

In determining the appropriate civil penalties in this case I have also considered that Manalapan is of moderate size and has a moderate history of violations. There is no dispute that the violative conditions cited in this case were abated as required by the Secretary. Accordingly I find that civil penalties of $500 for Citation No. 2596792 and $500 for Order No. 2596793 are appropriate.

ORDER

Manalapan Mining Company is hereby ordered to pay civil penalties of $2,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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FEB 25 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-120-M A.C. No. 42-01452-05513
v.	:	Staker-Beck Street Mine
STAKER PAVING & CONSTRUCTION COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Orval D. Gillen, Staker Paving Construction Company, Inc., Salt Lake City, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under 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 13, 1986.

The parties waived their right to file post-trial briefs.

Issues

The issues are whether an allegation of unwarrantable failure can be contested in a civil penalty proceeding. Further, whether the violation was of a significant and substantial nature. Finally, what penalty is appropriate under the circumstances in this case.

Citation 2644141

This citation alleges respondent violated 30 C.F.R. § 56.9087 which provides as follows:

> § 56.9087 Audible warning devices and back-up alarms. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has

an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Admission

At the commencement of the hearing respondent admitted the violation (Tr. 4, 5).

Summary of the Evidence

William W. Wilson, a duly authorized representative of the Secretary and experienced in mining, inspected respondent on December 16, 1985 (Tr. 9, 10).

During the inspection he issued Citation 2644141 when he observed a Michigan 275C front-end loader without an audible alarm (Tr. 11; Ex. P1). McCoy Evans was operating the vehicle. During the course of two days the inspector observed a laborer and a mechanic in the general area of the loader (Tr. 11). The inspector also did not see anyone spotting for the loader when it backed up (Tr. 11). The back-up alarm was not audible (Tr. 12). In the previous week the operator had turned in several daily reports to the pit foreman (Tr. 13).

The inspector evaluated the operator's negligence as moderate when he wrote the citation (Tr. 14). The following day he confirmed that maintenance reports on the defective vehicle had been written on December 9, 10, 11 and 13 (Tr. 15, 16). On the final citation the inspector accordingly marked the negligence as high and further indicated that the circumstances showed a careless disregard by the operator since no repairs had been made (Tr. 16, 17).

The hazard involved here could reasonably kill or maim a miner (Tr. 17, 18). Respondent abated the condition in six days. It was necessary to obtain a part (Tr. 18).

The inspector indicated he has had some problems with respondent's employee Van Dyke concerning compliance with safety regulations (Tr. 19). But there has been a decline in the number of citations issued against respondent. This has been attributed to the company's efforts (Tr. 20). Apparently a communication problem caused the delay in the repair of the alarm (Tr. 21).

Respondent has, on the average, 12 employees (Tr. 24).

Orval D. Gillen, testifying for respondent, indicated he is the company's safety and training engineer (Tr. 28, 29). The witness identified the various employees on the site at the time of the inspection (Tr. 20, 29).

Mr. Gillen believed the equipment operator, as they normally do, should have immediately notified the shop people of the defect (Tr. 30, 31). The notification can be by telephone or radio, located at the crusher (Tr. 31). The instructions to the operators to proceed in this fashion are verbal and were given during training (Tr. 32).

The pit's size is about 100 by 300. When the citation was issued there were six people at the site (Tr. 32, 34).

After this citation the operators involved were again verbally instructed as to the proper procedure (Tr. 33).

The company employs as many as 500 people but most of them are under OSHA's jurisdiction (Tr. 34).

Payment of the proposed penalty would not affect the company's ability to continue in business (Tr. 25, 37).

Discussion

Since the operator admits the violation the citation should be affirmed.

An additional issue concerns respondent's contest of the allegations of unwarrantable failure. The ruling at the hearing is reiterated at this time: unwarrantable failure cannot be litigated in a civil penalty proceedings, Clinchfield Coal Company, 2 FMSHRC 290 (1980).

A further issue concerns whether the violation was of a significant and substantial nature.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

In this case the facts fail to establish that was a reasonable likelihood that an injury of a reasonable serious nature would result from the violative condition. The evidence es-

tablishes there were workers in the 100 by 300 pit. But, it is impossible to ascertain if the described measurements are in feet or yards. Further, no evidence indicates any workers were directly in danger due to the defective back-up alarm on the loader.

For the foregoing reasons the S & S allegations should be stricken from the citation.

The final issue concerns the appropriate penalty to be assessed.

The statutory criteria to assess a civil penalty is contained in Section 110(i) of the Act. The provision, now codified as 30 U.S.C.A. § 820(i), provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In relation to the criteria the computer print-out shows that respondent incurred 19 violations for the two year period ending December 15, 1985. This showed an improvement over the 28 violations assessed before December 16, 1983. The penalty hereafter assessed appears appropriate in relation to the size of the business of this small operator. While the operator at times has as many as 500 employees, the majority of them are not under MSHA's jurisdiction. In fact, there were apparently only six employees at this site. The operator was negligent since four maintenance reports had mentioned the defect. The operator has indicated that the imposition of the proposed penalty of $700 would not affect the company's ability to continue in business. The gravity of the violation should be considered as high because a serious injury or a fatality could result. Under the broad umbrella of good faith it is to respondent's credit that it abated the violation. Further, the respondent at this point has demonstrated a certain dedication to the safety of its workers.

On balance, I deem that a civil penalty of $250 is an appropriate penalty.

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 30 C.F.R. § 56.9087.

3. The allegations that the violation was significant and substantial should be stricken.

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

ORDER

1. The allegations that the violation was significant and substantial are stricken.

2. Citation 2644141, as amended, is affirmed.

3. A civil penalty of $250 is assessed.

4. Respondent is ordered to pay the sum of $250 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

February 26, 1987

DANNY JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 87-68-D
	:	BARB CD 87-04
LAMAR MINING COMPANY AND LARRY WILLIAMS, GRAHAM MARTIN AND WILLIAMS & MARTIN COAL CO., Respondent	:	Lotts Creek Strip Mine

ORDER APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Merlin

The Complainant has filed a motion to withdraw his complaint and dismiss this proceeding on the grounds that a settlement has been reached with the operator. The settlement agreement requires the operator to pay $5,000 to the Complainant in four equal installments, the final payment to be made May 18, 1987.

The settlement is Approved as it is in accord with the purposes of the Federal Mine Safety and Health Act of 1977.

Accordingly, the motion to withdraw is GRANTED and this case is DISMISSED.

Paul Merlin
Chief 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
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FEB 27 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-179-M A.C. No. 50-01315-05503
v.	:	Denali Mine
VALDEZ CREEK MINING COMPANY, Respondent	:	

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Mr. Don H. Schultz, Valdez Creek Mining Company, Anchorage, Alaska, pro se.

Before: Judge Lasher

This proceeding was initiated by the filing of a proposal for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) on November 5, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a)(1977)(herein the Act). A hearing on the merits was held in Anchorage, Alaska on September 8, 1986.

In this matter, the Respondent admits that the violations charged actually occurred but questions the amount of MSHA's administrative penalty assessments. 1/

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number and nature of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in abating violative conditions and the fact that a significantly adverse effect on the operator's ability to continue in business would result by assessment of penalties at a particular monetary level. Factors other than the above-mentioned six criteria which are expressly provided in the Act are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

1/ One of the 17 Citations involved, No. 2394378, was vacated on the record by the Secretary at the instance of the undersigned since it appeared that the pertinent standard had not been infracted.

The Respondent concedes that payment of penalties will not jeopardize its ability to continue in business. At the outset of the hearing, it was determined that Respondent has no history of violations occurring prior to the issuance of the Citations here involved.

The Respondent is the largest placer gold mine in the State of Alaska and had 100 employees on its payroll at the time of the violations. Respondent pointed out, however, that compared to gold mines in the lower 48 states it was not a particularly large gold mine, and on the basis of all the evidence it is concluded that Respondent is a medium-sized mine operator.

No challenge to the so-called "significant and substantial" charges contained on various of the Citations was made by Respondent. The Secretary alleged that several of the violations, which were issued during the period July 10 through August 9, 1985, by MSHA Inspector James B. Hudgins, were not abated promptly and in good faith and such contention will be determined where appropriate in the discussion of the 16 remaining violations which follows. Unless specifically discussed and determined otherwise, the Respondent is found to have proceeded in good faith to promptly abate the violations in question upon notification thereof by the Inspector.

FINDINGS, CONCLUSIONS AND DISCUSSION

Citation No. 2393637

The standard infracted, 30 C.F.R. § 56.9087 provides:

> "Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

MSHA Inspector James B. Hudgins, who issued all 17 Citations involved in this matter on two different inspections, testified that he commenced the first of the two inspections on July 10, 1985, and the second inspection on August 8, 1985 (T. 17).

The violative condition (or practice) involved is described in the subject Citation as follows:

> "The 988 CAT Front-end loader equipment No. 203 loading trucks in the B channel section of the pit did not have a operable reverse signal alarm nor was an observer being used. The equipment operator has an obstructed view to the rear (blind spot)"

The Secretary established that Respondent's mine superintendent at the time, Dennis Babcock, "didn't believe" in the automatic back-up alarm requirement and that the loader operator had turned the equipment in for repair several times without success. This is a willful violation which was also serious since a fatality could have resulted had a miner been run over by the loader while it was backing up. Since there was no "foot traffic", that is miners working in the area on foot, the probability of such an accident was not likely, and thus a low or moderate degree of seriousness is attributed.

Based on these findings as to negligence (willfulness), gravity, and the other 4 assessment criteria required by the Act, a penalty of $30.00 is found appropriate.

Citation No. 2393638

The standard infracted, 30 C.F.R. § 56.9087 is set forth above in connection with the discussion of Citation No. 2393637.

The violative condition (or practice) is described as follows:

> "The 35 ton DJB CAT haul truck equipment No. 307 operating in the pit did not have a operable reverse signal alarm nor was an observer being used. The truck driver has an obstructed view to the rear (blind spot)."

While there was no evidence as to the length of time this violation existed, such is nevertheless found to be willful in view of the mine superintendent's statement to the Inspector that he "did not believe" in such automatic back-up alarms and that such alarms were a "nuisance".

There were no miners working foot around the equipment. However, had the equipment backed over a miner a serious (injury) or fatality could have occurred. Because the occurrence of such an accident was unlikely, a penalty of $30.00 is assessed.

Citation No. 2393639

The standard infracted, 30 C.F.R. § 56.9087 is the same as that involved in the first two citations herein discussed.

The violative condition (or practice) is described in the Citation as follows:

> "The Galion Road Grader operating at the mine did not have a operable reverse signal alarm nor was an observer being used. The operator has an obstructed view to the rear. Equipment No. 502."

This violation is found to be of a low degree of gravity since the Inspector testified that there was no foot traffic in the area where the grader was operating and that the hazard envisioned was "not likely" to occur. Based on my prior findings concerning this operator's intransigence with respect to installing automatic backup alarms, this violation is found to be willful. The violation was not abated in good faith within the time established by the Inspector, and the cavalier attitude of the mine operator with respect to this mine safety standard was again in evidence in this respect. A penalty of $50.00 is found to be appropriate.

Citation No. 2393640

The standard infracted, 30 C.F.R. § 56.9022 provides:

> "Berms or guards shall be provided on the outer bank of elevated roadways."

The violative condition (or practice) is described as follows:

> "The elevated roadway from the plant to the slurry tank with a drop off on both sides upto approximately 50 feet was not bermed. The road was being used daily by various pieces of equipment."

The evidence adduced with respect to this violation indicated that the dropoff on one side of this 175-foot long roadway was approximately 50 feet and was from 10-15 feet on the other side. The roadway appeared to have been used for approximately one month-from the time it was built-and the Inspector indicated that had a vehicle gone over the side, the resultant injury could "very likely" be expected to be fatal. This is found to be a very serious and obvious violation which resulted from the negligence of the mine operator. The violative condition described in the Citation was not abated in good faith by the operator since berms were not installed until approximately three weeks after the period for abatement had run and only after the Inspector had returned to the mine site. This violation is thus found to have not been promptly abated in good faith by the mine operator after being notified thereof. Respondent presented no rebuttal to the Secretary's allegation that this was a "serious and substantial" violation. In view of the deteriorating condition of the roadway, the severity of the hazard posed by the violation, and the operator's apparent lack of concern for compliance with mine safety standards, it is concluded that the Secretary established the prerequisite elements of proof for "significant and substantial" violations mandated by the Federal Mine Safety and Health Review Commission in its decision in Mathies Coal Co., 6 FMSHRC 1 (1984) to wit:

> "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure

of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be a reasonably serious nature."

In the premises, the Citation is affirmed in all respects and a penalty of $150.00 is assessed.

Citation No. 2393643

The standard infracted, 30 C.F.R. § 56.9011 provides:

"Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

The violative condition (or practice) is described as follows:

"The windshield on the Teres 72-61 front-end loader (equipment No. 201) was severlly (sic) fractured through out the viewing area of the operator. The front-end loader was used daily at the plant stockpile area."

According to the Inspector, the windshield was severely fractured, visibility was very poor, the loader's driver had complained about it for "some time", and the condition could "reasonably likely" result in an accident which "could very well be fatal." It also appears that the windshield became in such condition as a result of sun heat or some trauma-not gradually-and that the Respondent had ordered a new windshield which had not arrived by the time the inspection was conducted. The violative condition was abated promptly and in good faith. The Inspector, upon observing the windshield, determined not to remove the vehicle from use. While this was a serious, and "significant and substantial" violation, I find no evidence it resulted from Respondent's negligence. A penalty of $75.00 is assessed therefor.

Citation No. 2393544

The standard infracted, 30 C.F.R. § 56.9011 provides:

"Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

The violative condition (or practice) is described as follows:

"The front windshield on the 988 B Caterpillar front-end (equipment No. 203) was fractured through out the operations viewing area. The loader was operated in the pit area."

While the entire windshield was fractured, visibility through this windshield-unlike that involved in the preceding violation- was, according to Inspector Hudgins, "still fairly decent" and the fractures would not increase the possibility of an accident. No evidence of negligence was proferred. Since this was not a serious violation, the penalty sought by the Secretary, $20.00, is found appropriate and is assessed.

Citation No. 2394341

The standard infracted, 30 C.F.R. § 56.12025 provides:

> "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."

The violative condition (or practice) is described as follows:

> "The 110 volt power cable from wash plant control box to the outside lights was not grounded. The green ground wire was not connected."

The Inspector testified that while it was unlikely that an accident would occur as a result of this violation, the hazard contemplated by the Inspector was "shock" which the Inspector noted on the Citation could be "fatal." The condition had existed "a few days or a few shifts" before the inspection and was due to an electrician's failure to tape up and finish the connection in question. I find no basis in the record for attributing the electrician's negligence to Respondent's management. The violation is found to be but moderately serious and the penalty sought by the Secretary, $20.00, is assessed.

Citation No. 2394342

The standard infracted, 30 C.F.R. § 56.12032 provides:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

The violative condition (or practice) is described as follows:

> "The door for the 220 volt distribution box in the wash plant electrical control room was not in place. (The box was energized)."

This violation could have resulted in a fatal electrical shock hazard. Several employees were exposed to the hazard and it was very likely such could come to fruition. This serious

violation is thus found to be "serious and substantial", Mathies Coal Co., supra. There was no evidence of specific negligence on the part of the mine operator. A penalty of $100.00 is assessed.

Citation No. 2394344

The standard infracted, 30 C.F.R. § 56.9087 provides:

> "Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

The violative condition (or practice) is described as follows:

> "The D-8K Cat dozer equipment No. 402 operating in the pit did not have a reverse signal alarm nor was a spotter in use at this time. The operator has an obstructed view to the rear. The Ripper screen and size of machine create a blind spot to the rear from the operator's."

The hazard envisioned by the Inspector was that the dozer "could back over someone entering the area" and cause fatal injuries. However, the Inspector also concluded that it was not likely that such an accident would occur. As in the case of the 30 C.F.R. § 56.9087 violations previously discussed, this violation is found to be willful in view of the mine superintendent's lack of belief in back up alarms (T. 99). A penalty of $30.00 is assessed for this moderately serious violation.

Citation No. 2394378

As previously noted, this Citation was vacated at the hearing and my bench order approving such (T. 107) is here affirmed.

Citation No. 2394379

The standard infracted, 30 C.F.R. § 56.11001 provides:

> Safe means of access shall be provided and maintained to all working places.

The violative condition (or practice) is described as follows:

> "Safe means of access was not provided to the work area in back of the feed hopper where the operator stands to control the amount of material the trucks dump when dumping in the hopper."

The employee directing the dumping could have fallen 35 feet since there was no ladder or work platform for him to stand on. This practice occurred continually during the shift and had been going on for one or two months. Had the employee lost his balance it was reasonably likely that he would fall backwards and sustain injuries which could have been fatal (T. 121). The mine superintendent admitted to the Inspector that he should have noticed the hazard and conceded that it was very likely that someone could have fallen and sustained very serious injuries. Accordingly, this serious violation is also found to be "significant and substantial" and to have resulted from Respondent's negligence. A penalty of $125.00 is assessed.

Citation No. 2394561

The standard infracted, 30 C.F.R. § 56.15003 provides:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

The violative condition (or practice) is described as follows:

> "The warehouse person was wearing tennis shoes in the warehouse storage and shop area. This person is required to lift and store various heavy items that could injure a persons feet."

The warehouseman, who customarily handled heavy objects, had been issued steel-toed safety shoes by Respondent which he had available at the mine. However, mine supervision had not required him to wear the safety shoes even though the warehouseman regularly wore the tennis shoes (T. 124). This is found to be a moderately serious violation jeopardizing but one miner which resulted from supervisorial negligence. A penalty of $30.00 is assessed.

Citation No. 2394562

The standard infracted, 30 C.F.R. § 56.9054 provides:

> Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The violative condition (or practice) is described as follows:

> "The bumper block at the main feed hopper was covered with material and no longer effective to prevent overtravel and overturning at this dumping location. This dumping location was used on a daily basic [sic] by 25 ton and 35 ton haul trucks."

The Inspector testified that it was likely that a truck might back into the hopper. A remote possibility existed that an employee who regularly works on a shaker screen in back of the hopper might become apprehensive and fall or leap from his position to the ground- a 25-30 foot drop. There was no specific evidence as to negligence. The violation was abated approximately two hours after the abatement period expired. I find that the Respondent was not negligent in the commission of this violation and that Respondent, in a relatively reasonable manner, abated the same. The $20.00 penalty urged by the Secretary is assessed.

Citation No. 2394564

The standard infracted, 30 C.F.R. § 56.11002 provides:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

The violative condition (or practice) is described as follows:

> "The walkway from the wash plant control booth to the walkway around the dump hopper has the middle section of handrail missing and no toeboards were provided. Falling rock was observed falling from the trucks when dumping on this walkway and rolling over the edge approximately 25 feet below where clean up work is required."

The purpose of a toeboard is to prevent rocks, tools and other materials from falling on miners working 25 feet below the walkway; the purpose of handrails (midrails) is to prevent persons from falling off the walkway. The record does not permit a finding of negligence on the part of Respondent in the commission of this serious violation. A penalty of $50.00 is assessed.

Citation No. 2394565

The standard infracted, 30 C.F.R. § 56.16005 provides:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

The violative condition (or practice) is described as follows:

> "One compressed gas cylinder located in the shop at the welding station was not secured."

The Inspector testified that the unsecured 80-lb cylinder could have fallen on someone's foot with the possible result of a bruised foot or broken toe. This violation is found to have a

low degree of gravity due to the remoteness of the hazard and the type of injuries which might have resulted therefrom. The violation is solely attributable to the unforeseen negligence of an employee who apparently went on a break without first securing the cylinder. Accordingly, I find no negligence imputable to Respondent for this violation. A penalty of $10.00 is assessed.

Citation No. 2394566

The standard infracted, 30 C.F.R. § 56.18006 provides:

> New employees shall be indoctrinated in safety rules and safe work procedures.

The violative condition (or practice) is described in the Citation as follows:

> "A employee was observed standing on the top handrail of the railing around the main feed hooper. It is approximately 30 feet to the ground behind where the employee was standing. Also there is steel beams, electric motors and pumps located at the bottom. The employee was not properly trained in safe work procedures for this job."

The record indicates that the employee in question advised the Inspector that he engaged in the unsafe practice "frequently," that he had not been trained in this aspect of his job, and that he had never been told not to stand on the handrail. The Inspector indicated that it was very likely that the employee could have fallen because of the vibration and the employee's wet shoes. Respondent is found to have been negligent with respect to this violation which also is found to have created a serious safety hazard. In view of the likelihood of the accident contemplated actually happening, this violation is found to be significant and substantial. The Citation is affirmed in all respects and a penalty of $200.00 is assessed.

Citation No. 2394567

The standard infracted, 30 C.F.R. § 56.12016 provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The violative condition (or practice) is described as follows:

"Lock out measures was not done by the wash plant operator when cleaning the water nozzels (sic) from the shaker screen. The power switch was in the energized position. Employee was observed standing in the screen plant."

This Citation was issued on August 9, 1985, the final day of Inspector Hudgins' second inspection. The hazard contemplated by the Inspector was the shaker screen becoming energized-which could have thrown the miner in question off balance leading to a fall of some 6 to 15 feet. The Respondent had not instructed the miner to lock out the main control switch and Respondent's superintendent, Babcock, admitted it had not been policy to lock out in such circumstances. There is no specific evidence in the record from which to gauge the likelihood that the hazard contributed to would result in an injury. However, Respondent did not challenge this allegation and accordingly, it is concluded that this violation was significant and substantial. The violation, otherwise, is found to be but moderately serious and to have resulted from Respondent's negligence. A penalty of $50.00 is assessed.

ORDER

1. Citation No. 2394378 is vacated.

2. The remaining 16 Citations hereinabove discussed are affirmed in all respects.

3. Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof the penalties hereinabove individually assessed in the total sum of $990.00.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrtive Law Judge

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