

FEBRUARY 1996

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FEBRUARY 1996

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

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 95-140.
(Judge Hodgdon, January 16, 1996)

No cases were filed in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 12, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 93-343
	:	PENN 93-431
RNS SERVICES, INC.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	
	:	Docket Nos. PENN 93-479
MASE TRANSPORTATION CO., INC.	:	PENN 94-30

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

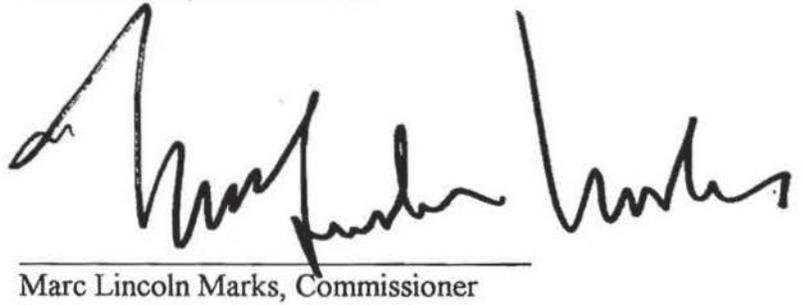
On January 29, 1996, respondents RNS Services, Inc. and Mase Transportation Co., Inc. filed a motion to withdraw their petition for discretionary review in this matter. The Secretary of Labor has indicated that he does not oppose the motion.

Upon consideration of the motion, it is granted and the petition for discretionary review is dismissed.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 13, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 93-15
	:	
v.	:	
	:	
L & J ENERGY COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves citations and orders issued by the Department of Labor's Mine Safety and Health Administration to L & J Energy Company, Inc. ("L & J"). Following an evidentiary hearing, Administrative Law Judge Avram Weisberger issued his decision sustaining six of the seven violations charged. 16 FMSHRC 424 (February 1994) (ALJ). L & J filed a petition for discretionary review of that decision, arguing that a stipulation as to certain testimony recounted in the judge's decision did not reflect the parties' agreement. The Commission granted the petition and remanded the matter to the judge to determine whether the stipulation accurately reflected the parties' agreement. 16 FMSHRC 667, 667-68 (April 1994). The Commission also directed that the judge, upon so doing, reconsider his decision if necessary. *Id.* at 668.

The judge determined on remand that L & J was correct in its assertion that the stipulation did not reflect the parties' agreement, which provided that the judge "would utilize the fact testimony from witnesses, other than [expert witnesses] Wu and Scovazzo, who observed the condition of the highwall." 16 FMSHRC 796 (April 1994) (ALJ). The judge declined to reconsider his decision because "the decision takes cognizance of, and discusses, the testimony of witness (sic) other than Scovazzo and Wu, who had observed the highwall." *Id.* The Commission denied L & J's petition for review of the judge's decision on remand.

L & J appealed the judge's decision on remand to the U.S. Court of Appeals for the District of Columbia Circuit. The court remanded the case to the Commission "for a new determination based on the full record." *L & J Energy Co. v. Secretary of Labor*, 57 F.3d 1086, 1088 (1995). The court determined that the judge's legal conclusion "disclaim[ing] reliance on anything but expert testimony" rendered "irrelevant" his statement that he had reviewed the testimony of other witnesses. *Id.* at 1087. The court further stated that if, on remand, the Commission reaches the same conclusion, "it must simply explain why the eyewitness [i.e., non-expert] testimony is discredited or discounted in whole or in part." *Id.* The court also held that the Commission should address each of the six statutory criteria for determining civil penalties "before assessing a fine." *Id.* at 1088, citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (March 1983); 30 U.S.C. § 820(i). On September 5, 1995, the Commission remanded the case to the judge "for a new determination based on the entire record." 17 FMSHRC 1515, 1517 (September 1995).

In his second decision on remand, issued on November 30, 1995, the judge stated with respect to his evaluation of the non-expert testimony:

In evaluating the issue of whether dangerous conditions existed on the highwall prior to the accident, I discount the testimony of the eyewitnesses who testified on behalf of L & J, and instead rely upon the expert testimony due to the experience and expertise of the experts who testified. An evaluation of the experts' testimony is set forth in my initial decision, 16 FMSHRC *supra*, at 443. In addition, as set forth in my initial decision, 16 FMSHRC, *supra*, at 443, the testimony of L & J's witnesses is discredited because the inspector's testimony that on February 6, loose material covered at least 75 percent of the highwall, was not contradicted or impeached. Also, L & J's expert witness Scovazzo, and lay witnesses Todd and Woods recognized the depiction of some loose materials in photographs taken the morning of February 6.

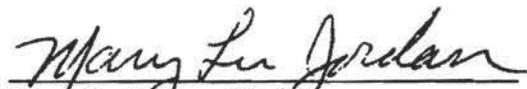
17 FMSHRC 2133, 2134 (November 1995) (ALJ).

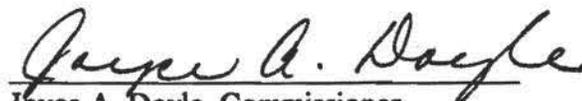
L & J again petitioned for review. The Secretary supported L & J's petition to the extent that it challenged the judge's failure to explain his decision to credit the testimony of the expert witnesses over that of the eyewitnesses. Review of that issue was granted by the Commission and briefing was stayed.

We conclude that the judge has not adequately explained his reasons for discrediting or discounting the eyewitness testimony. The "experience" and "expertise" of the experts upon whose testimony the judge relies do not explain why he discredited the eyewitness testimony. Further, the judge's reliance on the discussion of testimony in his earlier decision, which the court of appeals found to be insufficient, does not fulfill the remand instructions set forth by the court

and this Commission that he explain the basis for his treatment of testimony. In addition, if the judge is of the view that the inspector's testimony regarding loose material on the highwall on February 6 renders the eyewitness testimony not credible, he must explain why. The judge must also explain the significance, in terms of his evaluation of the eyewitness testimony, of his reference to lay and expert witnesses' recognition of loose materials in photographs taken on February 6. 17 FMSHRC at 2134. Finally, the judge must reach a determination on the record in light of his explanations.

For the foregoing reasons, we remand this matter to the judge for further consideration consistent with this opinion.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner


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The issues on review are whether the judge erred (1) in determining that two violations were not the result of Doss Fork's unwarrantable failure, (2) in vacating the third order based on his determination that the underlying regulation was no longer in effect, and (3) in failing to address the Secretary's assertion that one of the cited violations resulted from the operator's reckless disregard. For the reasons that follow, we vacate and remand for further analysis the judge's determination that two violations were not the result of unwarrantable failure. We reverse the judge's determination that the regulation giving rise to the third alleged violation was not in effect at the time of the order, vacate his order of dismissal, and remand for analysis of the evidence as to that violation. We affirm the judge's finding of high negligence as to the last cited violation.

I.

Order No. 3554292

On October 26, 1992, MSHA Inspector James Graham, accompanied by MSHA Supervisor Clyde Ratcliff, observed that loose coal, mixed with pieces of rock, had been pushed into ten crosscuts in the right return air course of Doss Fork's Seminole Mine in McDowell County, West Virginia. 16 FMSHRC at 809-810; Tr. I-194-97.² Inspector Graham issued Order No. 3554292³ under section 104(d)(1) of the Act alleging a "significant and substantial" ("S&S")⁴

² The hearing was conducted over a period of five days. A separate transcript volume was prepared for each day.

³ Order No. 3554292 stated in part:

Loose coal and coal dust was stored at spot locations in the left and right cross-cuts in the right return air course starting one cross-cut inby survey station No. 375 and extended inby this point to within ten crosscuts of the face on the 002-0 section, a distance of approximately 1,200 feet. The loose coal and coal dust ranged in depth of up to 26 inches.

16 FMSHRC at 809.

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard"

violation of 30 C.F.R. § 75.400.⁵ 16 FMSHRC at 809. He also charged that the violation was the result of Doss Fork's "unwarrantable failure." *Id.*

The judge concluded that the cited material constituted a violation but determined that the Secretary had not proven the violation was S&S, finding that "[t]here is insufficient evidence of the combustibility of this admitted mix of rock, mud and coal and of the likelihood of an ignition source." 16 FMSHRC at 810. The judge also found that section foreman Carl Dalton had a "good faith belief that the material was not a violative 'accumulation,'" and that "[t]he testimony of Dalton that the material had only recently been pushed into the crosscuts is also undisputed." *Id.* On those bases, he concluded that the violation was not the result of Doss Fork's unwarrantable failure. *Id.*

The Secretary seeks review of the judge's determination that the violation was not unwarrantable, arguing that the violation was obvious and extensive. S. Br. at 10-11. Contrary to the judge's finding that the accumulation had "only recently" occurred, the Secretary asserts that the accumulations had existed for more than three weeks. *Id.* at 13; *see* 16 FMSHRC at 810. The Secretary also asserts that the judge failed to consider that, during a previous inspection on June 3, 1992, the operator had been cited three times for storing coal in crosscuts. S. Br. at 14. The Secretary further argues that the judge erred in concluding that the violation was not unwarrantable based on the operator's "good faith" belief that the accumulations were not violative. *Id.* at 15-20. The Secretary urges that a good faith belief must also be "reasonable." *Id.*

Doss Fork argues that it believed the accumulation was non-violative because it consisted primarily of mud and rock; the entries were extremely wet and contained "shaley clod-rock," which, when exposed to water, turns to mud. D.F. Br. at 5-6. Doss Fork also argues that, prior to the issuance of the subject order, two other inspectors had traveled through the same return without issuing a warning or taking enforcement action. *Id.* at 6-7. The operator further states that the "good faith" defense to unwarrantable failure should not include an additional requirement of "reasonableness." *Id.* at 9-12.

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct,"

⁵ 30 C.F.R. § 75.400 provides:

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.

“indifference” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

The Commission has identified several factors to be considered in analyzing whether a violation resulted from unwarrantable failure: among these are “the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994).

As to extensiveness of the violation, the judge found that there were accumulations of up to 26 inches in depth in ten crosscuts. 16 FMSHRC at 809. As to the length of time the violative condition had existed, the record does not support the judge’s finding that the violative accumulation was a recent occurrence. Section foreman Dalton testified that the material was pushed into the crosscuts during the last week of September or the first week of October, thereby conceding that the accumulation had existed for at least three weeks. Tr. IV-119.

The judge did not discuss the operator’s efforts to eliminate the violative condition or whether Doss Fork had been placed on notice that greater efforts were necessary for compliance. Concerning the latter factor, the Commission has examined, inter alia, whether an operator has been previously cited for a similar violation. *See, e.g., Youghioghny and Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987). Here, the record indicates that the operator was on notice that the storing of coal, mixed with rock and mud, was violative. Prior to issuance of the subject order, the operator was cited on June 3 and October 21, 1992, for three violations of the same standard. 16 FMSHRC 802-03. In addition, MSHA warned the operator on October 15 about similar accumulations. *Id.* There is no indication that the judge considered this evidence in his analysis.

The Commission has held that, to serve as a defense to a finding of unwarrantable failure, an operator’s good faith belief that his actions were not violative must also be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994) (holding that the judge erred in failing to consider the reasonableness of an operator’s belief). Although the judge concluded that the operator maintained a good faith belief that the cited condition was not violative, he did not analyze whether that belief was reasonable. On remand, the judge shall provide such analysis.

In addition, the judge’s determination that this violation was not unwarrantable is inconsistent with his disposition of another accumulation violation (Order No. 3554286, issued five days earlier on October 21, 1992), decided by the judge at the same time but not challenged before the Commission. 16 FMSHRC at 801-05. In determining that that violation resulted from an unwarrantable failure to abate, the judge considered very similar factual circumstances relating to accumulations in the mine where damp conditions existed and where the operator also asserted that it believed the cited material was non-violative rock and mud. The judge rejected the operator’s defense and concluded that the violation was unwarrantable. This apparent

inconsistency must be reconciled by the judge. *See Drummond Co.*, 13 FMSHRC 1362, 1369 (September 1991).

Accordingly, we vacate the judge's determination and remand for further analysis consistent with this opinion.

II.

Order No. 3554293

On October 26, 1992, Inspector Graham, accompanied by MSHA Supervisor Ratcliff, issued a section 104(d)(1) order⁶ alleging an S&S violation of 30 C.F.R. § 75.202(a),⁷ based on his observation of inadequate roof support in the left return air course of the mine. 16 FMSHRC at 810-11. Inspector Graham charged that the violation was the result of Doss Fork's unwarrantable failure. *Id.* at 811.

The judge concluded that the cited condition constituted an S&S violation but determined that the Secretary had not proven unwarrantable failure. 16 FMSHRC at 812. Relying on the testimony of section foreman Dalton that he "had performed the weekly examination in the return air courses on October 17, 1992, and at that time did not observe any hazardous roof conditions," and the fact that "the mine roof in this area of the mine could deteriorate rapidly," the judge concluded that the Secretary had not proven that the "deteriorated conditions found on October 26 had existed at the time of the previous weekly examination." *Id.*

The Secretary seeks review of the judge's finding and argues that the judge's conclusion is based on erroneous facts. S. Br. at 20-21. The Secretary maintains that, according to the record,

⁶ Order No. 3554293 stated in part:

The mine roof in the left return air course is not adequately supported at spot locations starting at cross-cuts outby survey station no. 65 and extended outby this point to within 3 cross-cuts of the surface portal. There were several roof bolts at each location that were damaged to a point they no longer adequately supported the roof.

16 FMSHRC at 810.

⁷ 30 C.F.R. § 75.202(a) provides:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

the cited area was examined on October 21, not October 17, as found by the judge. *Id.* The Secretary also maintains that section foreman Webb, not Dalton, performed the relevant weekly examination. *Id.* at 20. Doss Fork agrees with the Secretary that Webb conducted the weekly examination on October 21, but argues that the judge's error is not relevant because no roof defects were observed during Webb's examination. D.F. Br. at 14-15.

In support of his conclusion that the roof conditions were violative, the judge credited the testimony of both MSHA inspectors, and stated that "Graham's testimony is corroborated in essential respects by the testimony of . . . Ratcliff." 16 FMSHRC at 811. Inspector Graham testified that, during his inspection of the left return air course, "several places existed where roof bolts were hanging down and exposing 24 inches between the roof and the plate." *Id.*; Tr. II-6-7. Graham also described three particular areas where groups of 6, 10, and 12 adjacent defective bolts were observed. *Id.*; Tr. II-10-12. Additionally, Graham testified that there were many other damaged bolts throughout the area "with cracked and loose rock in the roof with much of the loose roof left hanging." *Id.*; Tr. II-14. The judge also noted Graham's conclusion that the condition had existed for at least several weeks because of the state of deterioration. *Id.*; Tr. II-18. Indeed, Graham disputed that the deterioration could have occurred within the five days since the last weekly examination. Tr. II-27. MSHA Supervisor Ratcliff testified that the conditions he observed were similar to an earthquake, with "fallen material in any direction you looked." Tr. II-132. He observed areas of major roof falls that he believed had existed for weeks because "[r]oof transition that excessive doesn't occur in a matter of days." Tr. II-135-37.

Section foreman Webb testified that he made the last weekly examination on October 21, five days before the conditions were observed and cited by MSHA, and that he did not observe any violative conditions at that time. Tr. V-4-5.

The parties agree that the judge erroneously based his finding of no unwarrantable failure on a weekly inspection date of October 17, instead of October 21, and on testimony from section foreman Dalton rather than section foreman Webb. Because the judge failed to consider the correct testimony regarding this violation and because the elapsed time between the weekly examination and the day of inspection and citation appears to be relevant, we vacate the judge's negative conclusion as to unwarrantability and remand for his consideration of the appropriate testimony.

III.

Order No. 3554294

On October 26, 1992, after concluding from the weekly examination book that adequate

examinations had not been conducted, Inspector Graham issued a section 104(d)(1) order⁸ alleging an S&S violation of 30 C.F.R. § 75.305.⁹ The judge concluded that the cited standard was no longer in effect on the day the order was issued and vacated the order. 16 FMSHRC at 812.

The Secretary asserts that the judge erred in determining that section 75.305 was not in effect on the day of citation. PDR at 9-10. The Secretary states that the regulation remained in effect until November 16, 1992, the effective date of its final rule revising section 75.305. *Id.*, citing 57 Fed. Reg. 34,683 (August 6, 1992). He urges that the order be remanded to the judge for disposition on the merits. *Id.* Doss Fork, without commenting on whether the standard was in effect at the time of citation, also urges remand to the judge. D.F. Br. at 17.

As maintained by the Secretary, section 75.305 was among the standards that were revised in the final rule, which did not become effective until November 16, 1992. Thus, the cited standard was in effect on October 26, 1992, the date the order was issued. Accordingly, we vacate the judge's order dismissing this violation and remand for analysis of the record evidence as to this alleged violation.

IV.

Citation No. 3981551

On November 23, 1992, after observing Doss Fork's roof bolter James Wright move under unsupported roof while installing a roof support strap, Inspector Graham issued an

⁸ Order No. 3554294 stated in part:

Adequate weekly examinations for hazardous conditions in the return air courses of this coal mine are not being conducted. There were obvious violations that were observed and there was no report made of these violations in the weekly examination book.

⁹ 30 C.F.R. § 75.305 (1991) provided in part:

[E]xaminations for hazardous conditions . . . shall be made at least once each week [I]f any hazardous condition is found, such condition shall be reported . . . promptly. . . . A record of these examinations . . . shall be recorded . . . in a book . . . and the record shall be open for inspection

imminent danger order and the subject section 104(a) citation¹⁰ alleging an S&S violation of 30 C.F.R. § 75.202(b).¹¹ 16 FMSHRC at 812-13. He also charged that the violation was the result of Doss Fork's high negligence. *Id.* at 813.

In his post-hearing brief, the Secretary urged the judge to assess the proposed civil penalty of \$3,000, asserting that it was "consistent with the criteria set forth in the Act." S. Post Hearing Br. at 91. He also urged "the Court to modify the citation to conform to the evidence establishing that a negligence finding of 'reckless disregard' is appropriate in this case, and to adjust the penalty accordingly." *Id.* at 96.

The judge found that an S&S violation was proved as charged, and that the violation was "the result of high operator negligence." 16 FMSHRC at 813. The judge assessed the \$3000 penalty proposed by the Secretary. *Id.* at 814.

In his PDR, the Secretary asserts that the judge erred because he failed to address the Secretary's request that the citation be modified to reflect a finding of reckless disregard. PDR at 11. The Secretary notes that, notwithstanding his post-hearing request for modification of the citation by the judge, the Secretary was merely requesting that the judge consider the record evidence and "make his own determination as to whether the operator's violation should be considered 'reckless disregard.'" S. Br. at 23 n.11.¹² Doss Fork defends the judge's finding of

¹⁰ Citation No. 3981551 states in part:

A roof bolt machine operator was observed traveling inby permanent roof supports in the face of the No. 3 cross-cut on the 001-0 section. The roof bolting machine had been moved into the face of the No. 3 cross-cut and the machine operator traveled inby permanent roof supports to position a metal roof support strap before the T.R.S. [temporary roof support] had been installed against the roof.

16 FMSHRC at 812-13.

¹¹ 30 C.F.R. § 75.202(b) provides:

No person shall work or travel under unsupported roof unless in accordance with this subpart.

¹² The Secretary also states, however, "[I]n sum, the evidence fully supports the Secretary's request that [the citation] be modified to reflect a finding of 'reckless disregard' and that the penalty be adjusted accordingly." S. Br. at 24-25.

high negligence on both procedural and substantive grounds, arguing that the Secretary's attempt to seek modification of the citation only after completion of the evidentiary hearing was untimely and prejudicial. D.F. Br. at 18-19.

The Commission has de novo authority in assessing civil penalties and is not bound by the Secretary's proposed penalties under section 110(i) of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-93 (March 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). Thus, the issue before the Commission is whether the level of negligence found by the judge is supported by substantial evidence and whether the penalty he assessed is consistent with the six penalty criteria set forth in section 110(i), one of which is the operator's negligence, *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992), not whether the judge expressly responded to the Secretary's request for a finding of reckless disregard.¹³

In reaching his conclusion of high negligence, the judge credited the testimony of MSHA Inspectors Graham and Ratcliff over that of former superintendent Dillon as to Dillon's prior knowledge that miners were going inby permanent roof support when installing roof support straps. Graham's testimony was accurately summarized by the judge: "Dillon told him en route to the section that the straps could not safely be installed and that it was causing workers to go inby permanent supports." 16 FMSHRC at 813; Tr. II-74-75. Ratcliff's testimony was similarly summarized by the judge: on November 16, 1992, Ratcliff received a call from Dillon, who "complained about the necessity of miners to go inby the last row of permanent support in order to install the straps." 16 FMSHRC at 813; Tr. II-163-164. The judge rejected Dillon's denial that he had spoken to the inspectors about miners' exposure to unsupported roof before the cited condition occurred. 16 FMSHRC at 813-14. The judge also relied upon the testimony of James Wright, who admitted that, for two or three weeks prior to the instant citation, he had reached inby permanent roof support to install the roof straps. *Id.* at 813; Tr. V-50-52. Thus, the record evidence on which the judge relied is substantial and supports his conclusion of high negligence.

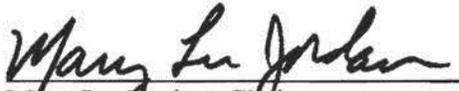
Accordingly, we affirm the judge's determination of high negligence.

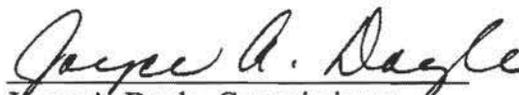
¹³ Commissioners Doyle, Holen and Marks are of the opinion that the judge did not err in failing to respond to the Secretary's request for modification of the citation, which was set forth in his post-hearing brief. They believe that a request for modification is in the nature of an appeal for an order and therefore is properly made on motion. *See Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992) (citing *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990)) (footnote omitted) ("The Commission has previously analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a)"). Chairman Jordan would treat the Secretary's request as one for modification of the penalty in light of the record evidence. *See S. Br.* at 23 n.11. She believes that such a request need not be presented by motion.

V.

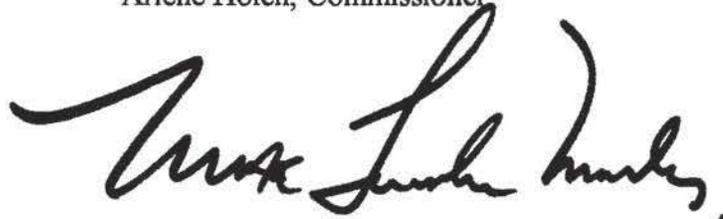
Conclusion

For the foregoing reasons, we vacate and remand the judge's determination as to unwarrantable failure regarding Order Nos. 3554292 and 3554293 and his dismissal of Order No. 3554294. We affirm the judge's determination of negligence with respect to Citation No. 3981551.


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Arlene Holen, Commissioner


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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 1 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 95-219
Petitioner : A. C. No. 46-03374-03837
v. :
 : Maple Meadow Mine
MAPLE MEADOW MINING COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Caryl L. Casden, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
John Bonham, Esq., Jackson & Kelly, Charleston,
West Virginia, for Respondent.

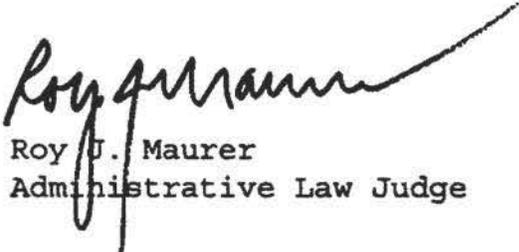
Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act).

At the hearing, the parties proposed a settlement wherein section 104(d)(1) Citation No. 3964584 would be modified to a section 104(a) citation and the penalty reduced from \$600 to \$200. Also with regard to the negligence factor on that citation which was originally marked as "high," the proposal is that it be changed to "moderate." With regard to section 104(d)(1) Order No. 3964585, it would be modified to a section 104(d)(1) citation and the proposed penalty of \$1800 would be reduced to \$900. Also with regard to the gravity assessment, which was originally marked as "highly likely," the proposal is that it be changed to "reasonably likely."

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of \$1100 within 30 days of this decision. Upon payment in full, this case **IS DISMISSED**.



Roy J. Maurer
Administrative Law Judge

Distribution:

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John Bonham, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 5 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. SE 93-119
Petitioner : A.C. No. 40-01977-03619
v. :
 : Mine No. 3-2
U.S. COAL, INCORPORATED, :
Respondent :

DECISION ON REMAND

This is an action for civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

After a hearing I entered a decision on March 29, 1994, holding that Respondent violated the regulations cited in the two citations involved. I also held that the violations were significant and substantial and that gross negligence of Respondent's electrician was imputable to Respondent. I assessed civil penalties of \$4,000 for each violation.

In review of my decision, on October 30, 1995, the Commission held that the electrician was not an agent of the operator and his negligence was therefore not imputable to the operator. It reversed my determination that the electrician's gross negligence was imputable to the operator, and remanded the case to me for assessment of appropriate civil penalties.

This decision will reassess civil penalties without imputation of negligence.

The electrician was called to repair an electrical malfunction in a continuous mining machine. He opened the electrical panel cover and began work with a screwdriver without de-energizing the power circuits and without locking out and tagging disconnecting devices for the 480-volt circuit he was working on.

While trying to repair the energized circuit, the electrician received a severe electrical shock. Other miners saw him shaking, and cut the power off. He continued to shake so badly that it took five miners to hold him down and transport him to the surface. At the hospital he was treated for electrical shock and burns to his hand.

Because of his injuries, the electrician was absent from work for two to three months. When he returned, he showed signs of memory loss and impaired mental condition that were not present before the electrical shock. Because of his deteriorated mental condition, which included an inability to understand, remember and follow work rules and safety standards, the company terminated his employment.

The electrician violated the two cited safety standards. Section 75.509 of 30 C.F.R. requires that all power circuits and electrical equipment be de-energized before doing electrical work. Section 75.511 provides that no electrical work shall be performed on circuits or equipment without locking out the circuits and tagging the disconnecting devices. The violations, as found previously, were significant and substantial.

Under the Mine Act, the operator is liable without fault for the electrician's violations. Since the Commission has ruled that the electrician's negligence is not to imputable to the operator, the civil penalties will be reassessed on the basis of the other five statutory criteria, i.e., omitting the factor of fault or negligence. ¹

¹ The statutory standards for assessing civil penalties for violations are set forth in § 110(i) of the Act, as follows:

"The Commission shall have authority to assess all civil penalties provided in this chapter. 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 violation. * * *."

Respondent is a relatively small operator. There is no issue with respect to its financial condition or its compliance history. Those factors are therefore neither a plus or a minus. Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the two violations.² This is a plus.

The remaining factor is the gravity of the violations. The violations were very serious and could have resulted in death. As found in my original decision, the electrician not only endangered himself, but put other miners at risk. The high degree of gravity warrants a substantial civil penalty.

On balance, I find that civil penalties of \$2,000 for each violation are appropriate. This is a reduction of 50 percent from my original assessment of penalties.

ORDER

Respondent shall pay civil penalties of \$4,000 within 30 days of the date of this decision.


William Fauver
Administrative Law Judge

² Inspector McDaniel testified that the practices cited were corrected by the company holding a safety meeting, at which Inspector McDaniel again cautioned management and the electricians as to the rules for de-energizing circuits and locking and tagging them out before doing electrical work.

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FEB 8 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
v. :
: :
: :
ALAN FOX, : Docket No. LAKE 95-298
Employed by AMAX COAL CO., : A.C. No. 11-00877-4105 A
Respondent :
: :
: :
GARY W. BENNETT, : Docket No. LAKE 95-299
Employed by AMAX COAL CO., : A.C. No. 11-00877-04104 A
Respondent :
: :
: :
CHARLES BURGGRAF, : Docket No. LAKE 95-300
Employed by AMAX COAL CO., : A.C. No. 11-00877-04102 A
Respondent :
: :
: :
ELDON RAY EVANS, : Docket No. LAKE 95-338
Employed by AMAX COAL CO., : A.C. NO. 11-00877-04103 A
Respondent :
: Wabash Mine

DECISION

Appearances: Christine M. Kassak, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll,
Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the named Respondents as agents of corporate mine operator, Amax Coal Company (Amax), with knowingly authorizing, ordering or carrying out a violation of the mandatory standard at 30 C.F.R. § 75.400, on

August 3, 1993. The Secretary seeks civil penalties of \$2,600 each against Amax Shift Managers, Bennett, Evans and Fox and a civil penalty of \$3,000 against Mine Manager Charles Burggraf.

Motion to Dismiss

In a preliminary motion, Respondents claim that these proceedings should be dismissed because the Secretary "unduly delayed the special investigation and the issuance of the proposed assessment of civil penalties and that delay has prejudiced their ability to defend themselves". The undisputed facts related to this claim are set forth below:

1. On August 3, 1993, MSHA inspector Arthur D. Wooten inspected the Wabash Mine and issued Order No. 4054387 to Amax Coal Company alleging a violation of 30 C.F.R. § 75.400, on the Main West No. 1 conveyor belt, pursuant to Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 ("the Act"). The Order described the condition as follows:

Accumulation of fine coal dust and loose coal was allowed to accumulate on the mine floor between the bottom belt and takeup pulleys of The Main West No. 1 conveyor belt drive. The accumulation of combustible material measured 18 inches in depth - 4 foot wide and 10 feet in length. The belt was running when this condition was observed with smoke coming from the friction areas.

AMAX did not contest the Order and paid the penalty it was assessed.

2. Mr. Burggraf was the mine manager for the North Portal or No. 1 of the Wabash Mine on the day when Inspector Wooten issued the Order.

3. Messrs. Fox, Bennett and Evans were shift mine managers at the Wabash Mine in and around the time of the issuance of the Order.

4. On August 12, 1993, MSHA District Manager Rexford Music recommended a preliminary special investigation be conducted into a possible willful or knowing violation under Section 110(c) and (d) of the Act be conducted, with respect to Order No. 4054387. No such investigation was conducted. [reference omitted]

5. On April 28, 1994, Acting MSHA District Manager Fred Casteel recommended that a special investigation be conducted under Section 110(c) and (d) of the Act, with respect to Order No. 4054387.

6. On June 14-15, 1994, MSHA Special Investigator Curtis Haile first visited the mine to review record books. [reference omitted] He began to conduct interviews on July 12, 1994, but did not interview Respondents until July 29, 1994.

7. Special Investigator Haile submitted his report on August 3, 1994, to Lawrence M. Beeman, Chief, Technical Compliance and Investigation Division.

8. On January 19, 1995, the MSHA Solicitor's Office wrote Mr. Beeman indicating that it agreed with the recommendation to assess individual civil penalties against Respondents. [reference omitted]

9. On January 31, 1995, Mr. Beeman indicated in a memorandum from District Manager Music that a determination was made to propose a civil penalty against Respondents, pursuant to Section 110(c) of the Act. He noted that 18 months had elapsed since the Order was issued and suggested Mr. Music notify Respondents of MSHA's intention to assess individual penalties by telephone. [reference omitted]

10. On March 14, 1995, after a Health and Safety conference was conducted, Marvin W. Nichols, Jr., MSHA's Administrator for Coal Mine Safety and Health, directed Richard G. High, Jr. to assess civil penalties against the Respondents. [reference omitted] The proposed assessment of such penalties were [sic] issued on March 22, 1995. All Respondents, except Mr. Evans, contested such penalties on or about April 4, 1995. Mr. Evans contested such penalty on June 3, 1995, because of confusion over service of the proposed assessment.

11. On May 15, 1995, the Secretary filed the Petition for Assessment of Civil Penalty against all Respondents except Mr. Evans. The Petition against him was filed on July 11, 1995.

Respondents argue that under Section 105(a) of the Act the delay that occurred before the Secretary proposed a civil penalty in these cases was unreasonable. In particular Respondents cite the following part of Section 105(a):

If, after an inspection or an investigation, the Secretary issues a citation or order under Section 104, he shall,

within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under Section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

Clearly, however, by its plain language, Section 105(a) is inapplicable to proceedings such as these initiated under Section 110(c) of the Act. Section 105(a) is precisely limited to penalty cases arising from citations or orders issued to mine operators under Section 104 and it refers specifically to notification only to the "mine operator". I further find inapposite the cases cited by Respondents regarding delays on the part of the Secretary in filing petitions for assessment of civil penalty under former Commission Rule 27(a), 29 C.F.R. § 2700.27(a) (now Rule 28, 29 C.F.R. § 2700.28). The issues in those cases arose from the failure of the Secretary to have filed petitions for assessment of civil penalty within 45 days of receipt of a timely contest of a proposed penalty assessment.

There is in fact no specific statute or regulatory time limitation for prosecuting violations under Section 110(c) of the Act. Moreover, it is the generally established law that unless a period of limitation is fixed by statute or regulation or unless there exist unusual circumstances of high prejudice, the prosecution of even criminal offenses is not barred by lapse of time. See 21 Am Jur 2d *Criminal Law* § 223. While the Respondents herein claim prejudice because of the Secretary's delay and, indeed, they have demonstrated some degree of prejudice, that prejudice was not to such a high degree as to have precluded viable defenses or to warrant dismissal.

Even assuming, *arguendo*, that the same factors the Commission considers in the context of Secretarial delays in filing penalty proposals under Section 105(a) are examined in relation to Section 110(c) cases, i.e. the reason for the delay and prejudice to the operator, the Respondents' motion would nevertheless fail. This Commission has generally accepted Secretarial delays caused by his heavy caseloads and the lack of budgetary resources and manpower to handle those caseloads. See *Steele Branch Mining*, 18 FMSHRC ____, Docket No. WEVA 92-953, slip op. January 25, 1996; *Salt Lake County Road Dept.*, 3 FMSHRC 1714 (July 1981) and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). The Secretary has evidentiary support for such reasons in these cases. In addition, as noted, while Respondents have demonstrated some degree of prejudice from the delay herein it is not of the severity warranting dismissal.

Under the circumstances the Respondents' motion to dismiss is denied.

The Merits

Section 110(c) of the Act subjects certain individuals to civil penalties if the Secretary can sustain his burden of proving that: (1) a corporate operator committed a violation of a mandatory health or safety standard (or an order issued under the Act); (2) the individual was an officer, director, or agent of the corporate operator; and (3) the individual "knowingly authorized, ordered, or carried out" the violation.

A violation by the corporate operator must be established and such violation must be proved in the proceeding against the individuals. *Kenny Richardson*, 3 FMSHRC 8, 10 (January, 1981), aff'd sub nom. *Richardson v. Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The Secretary also has the burden of proving that the person charged is an agent of the corporate operator. Under Section 3(e) of the Act "agent" is defined as "any person charged with responsibility for the operation of all or part of a coal or other mine, or the supervision of miners in a coal or other mine."

Finally, the Secretary must prove that the agent "knowingly authorized, ordered or carried out" the violation. The appropriate legal inquiry in this regard is whether the corporate agent "knew or had reason to know" of the violative condition. *Secretary v. Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984), citing *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981). In *Kenny Richardson*, the Commission stated:

If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

3 FMSHRC at 16. In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted, not that the individuals knowingly violated the law. *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August, 1992). In *Roy Glenn*, 6 FMSHRC 1583 (July, 1984), the Commission held, however, that something more than the possibility of an underlying violation must be shown to establish "reason to know". 6 FMSHRC at 1587-8. Moreover, a "knowing" violation requires proof of aggravated conduct and not merely ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August, 1994)

The underlying violation in these cases as charged in Order No. 4054387 does not appear to be in dispute. As noted, the order was issued on August 3, 1993, at 9:25 a.m., about five minutes after the issuing inspector arrived at the belt entry and discovered the described condition. The order charges as follows:

Accumulations of fine coal dust and loose coal was allowed to accumulate on the mine floor between the bottom belt and takeup pulleys of the Main West No.1 conveyor belt drive. The accumulation of combustible material measured 18 inches in depth - 4 foot wide and 10 feet in length. The belt was running when this condition was observed with smoke coming [sic] from the friction areas.

The cited standard, 30 C.F.R. § 75.400, provides that [c]oal 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."

Neither the dimensions, the location nor the content of the cited accumulation appear to be disputed. Moreover, it is not disputed that the belt, in close proximity to the accumulations, was found rubbing on the belt frame resulting in friction heat. The issuing inspector speculated that both the accumulations and the belt frame were so hot that they could not be touched. There is no dispute that coal was then being produced and transported on the belt. The uncontradicted evidence is clearly sufficient to establish that the violation existed as charged. However, even assuming, *arguendo*, that each of the Respondents was an "agent" of the corporate operator during relevant times, I do not find that the Secretary has met his burden of proving that any of them "knowingly" authorized, ordered, or carried out the violation.

In these cases the Secretary claims that Respondents "knew or had reason to know" of the cited violation based on an inference from prior pre-shift examiners' reports that conditions at the cited takeup "needed cleaning". For several reasons I find that no such inference can properly be drawn. First, the Secretary would necessarily have to prove that such earlier conditions had not been cleaned.¹ In this regard, contrary to

¹ It is also significant that the Secretary has never proven that any of the conditions noted in those prior pre-shift examiners' reports, to the effect that the areas "needed cleaning" or words to that effect, were actually in themselves violative conditions. The Commission has held that whether coal spillage constitutes an accumulation depends on the amount and

the Secretary's position, I do not find that the absence of on-shift report entries prior the last pre-shift report filed at 7:00 a.m. on August 3, 1993, established that the noted conditions had not been cleaned up. The Secretary argues that from the absence of such entries corresponding to pre-shift entries showing the need to clean the cited area (at least following the last reported cleanup in the on-shift report for the day shift on August 1, 1993) it may reasonably be inferred that those conditions had not, in fact, been cleaned. However, in light of the credible and undisputed evidence that it was not then the practice at the Wabash Mine to always report in the on shift books when such conditions were cleaned no such inference may properly be drawn.² It is noted, moreover, that corrective action following a report by a pre-shift examiner is not required to be recorded in the on-shift books by the Secretary's regulations. Thus, the pre-shift reports indicating that certain areas "needed cleaning" supports neither the inference that violative conditions then existed nor that such conditions had not thereafter been cleaned up.

The credible evidence shows, moreover, that it was the accepted practice at the Wabash Mine for pre-shift examiners to verbally notify the shift manager of any hazardous condition if it was deemed necessary. The fact that none of the pre-shift reports indicating that cleaning was needed were apparently brought to the attention of the shift managers in this manner further suggests that the areas noted as needing cleaning were

Footnote 1 Continued

size of the spillage. *Old Ben Coal Company*, 1 FMSHRC 1954 (December, 1979). The Commission has also held that a violative "accumulation" exists where the quantity of combustible materials is such that, in the judgement of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source is present. *Old Ben Coal Company*, 2 FMSHRC 2806, 2808 (October 1980). In none of the pre-shift examiners' reports where areas were noted as "needing cleaning" was an evaluation made that could be reviewed to determine whether a reasonably prudent person familiar with the industry and purposes of the regulation would have recognized the conditions as hazardous. See *Utah Power and Light Company*, 12 FMSHRC 965, 968 (May 1990). Thus the pre-shift reports themselves cannot and did not establish that violative accumulations had existed at any time prior to the issuance of the order at bar.

² It is noted that the practice at the Wabash Mine has been since changed so that reports are apparently now made in the on-shift books when such reported conditions have been cleaned.

neither violative "accumulations" within the meaning of the *Old Ben* decisions nor that they needed immediate attention.

Finally, the credible record and undisputed evidence establishes that, following the pre-shift report filed at 7:00 a.m. on August 3, 1993, and before the order at bar was issued, outby Foreman Mike Baize, an assistant to Respondent Evans, directed a miner to clean the specific takeup area noted in that pre-shift report. Evans testified that Baize was also delegated the responsibility to countersign the pre-shift report that morning because he (Evans) was scheduled to attend a meeting with Mine Foreman Burggraf at the beginning of the shift. Baize, who has since become employed "somewhere" in Arizona and was presumably, therefore, unavailable to testify, told Evans that he had assigned miner Mike Riley to clean the cited takeup area before the order was issued. It was later observed that a protective guard had been removed from the takeup, presumably in preparation for the cleanup, but apparently either no one completed the job or additional spillage occurred before 9:25 that morning when the order was issued.

It is also apparent that the conditions cited by the MSHA inspector at 9:25 a.m. on August 3 were considerably more serious than when the same area was inspected by the pre-shift examiner between 5:00 and 6:45 that morning (Exhibit R-11, page 160). It was later discovered that defective pillow bearings had caused the belt to become misaligned. It may reasonably be inferred that such misalignment could have rapidly caused the cited accumulation as well as the heat and smoke generated by the belt rubbing on its frame. It may also reasonably be inferred that these severe conditions had not existed at the time of the pre-shift examination, because, in accordance with mine procedures and common sense, the examiner would no doubt have taken immediate action and have reported such serious conditions in the pre-shift report. Significantly, the belt had previously been aligned (trained) only shortly before, on the August 2 midnight shift. Consistent with this evidence it is noted that Burggraf testified that he had no notice of the severity of conditions found by the inspector at 9:25 a.m. on August 3, 1993.

It is also significant that pre-shift mine examiner Robert Orr, who was familiar with the cited area on a daily basis, stated that he was not concerned in late July and early August 1993 about the takeup and the material he found there. He was, in fact, apparently surprised that the order was issued because he had not observed, in the two weeks before this, anything suggesting that the takeup area warranted an order.

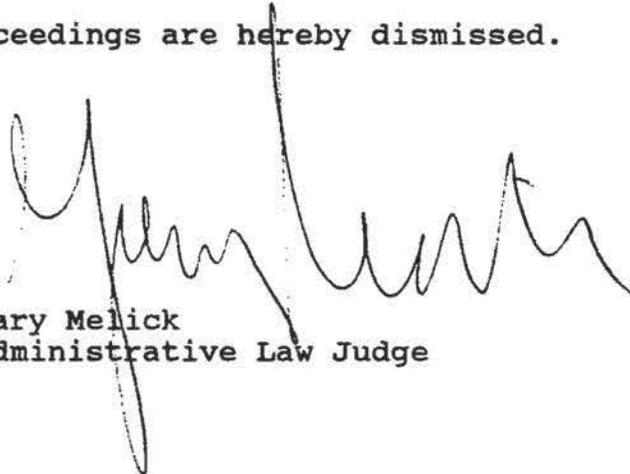
Under all the circumstances, I do not find that any of the Respondents "knew or had reason to know" of the violative condition cited in Order No. 4054387.

In reaching this conclusion, I have not disregarded the Secretary's other argument that the purported statements by MSHA personnel to Evans and Burggraf on July 12 and July 2, respectively, regarding cleanup problems at the mine, established that Respondents "knew or should have known" of the specific violation on August 3. However, the alleged statements were not at all specific to the belt at issue and there were 20 miles of belt at this mine nor to the specific problem identified as causing the violation herein, i.e. the misalignment of the belt caused by a defective bearing. In addition, these statements were not sufficiently time related to the incident at bar to bear any compelling weight on the issue. Moreover, in light of the totality of credible evidence previously discussed, I can give but little weight to the speculation of the issuing inspector that the cited accumulation had been present for more than a day.

Under the circumstances, the charges against the Respondents herein under Section 110(c) of the Act must be dismissed.

ORDER

These civil penalty proceedings are hereby dismissed.

A handwritten signature in black ink, appearing to read 'Gary Mellick', is written over the typed name and title below.

Gary Mellick
Administrative Law Judge

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/jff

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 9 1996

APG LIME CORP., : CONTEST PROCEEDING
Contestant :
v. : Docket No. VA 94-5-RM
: Citation No. 4288981; 9/12/93
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Kimballton Mine
ADMINISTRATION (MSHA), : Mine ID 44-00082
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 95-8-M
Petitioner : A. C. No. 44-00082-05552
v. :
: Kimballton Mine
APG LIME CORP., :
Respondent :

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for Petitioner;
Timothy M. Biddle, Esq., and Thomas A. Stock,
Esq., Crowell & Moring, Washington, D.C., for
Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on a notice of contest and a petition for assessment of civil penalty filed by APG Lime Corp. (APG) against the Secretary of Labor, and by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against APG, respectively, pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests Citation No. 4288981 issued on September 12, 1993. The Secretary seeks a penalty of

\$50,000.00 for the violation of his mandatory health and safety standards set out in the citation. For the reasons set forth below, I grant the contest, vacate the citation and dismiss the petition.

A hearing was held on September 19 and 20, 1995, in Pearisburg, Virginia. MSHA officials Richard L. Duncan, Joseph M. Denk, Michael A. Evanto and Joseph A. Cybulski, and APG employees Chester J. Tabor, David T. Epperly, Stacey E. Lucas, Lawrence B. Hayes and Ivan L. Blevins testified for the Secretary. Former Mine Superintendent Walter H. Paulson and Dr. James J. Scott testified on behalf of APG. The parties also submitted briefs which I have considered in my disposition of these cases.

FACTUAL SETTING

APG's Kimballton Mine is a medium-size, underground limestone mine in Giles County, Virginia. Limestone from the mine is kilned to produce lime. Entries are developed and limestone is mined by blasting. The entries are approximately 26 feet high and 42 feet wide and are connected by crosscuts and vertical ventilation tunnels called "raises." In addition, entries called "windows" are driven off the main heading until the "hanging wall" (the limestone formation overlying the formation being mined) is contacted.

Ground is controlled by manual scaling of the roof, face and ribs in the face area after each round of blasting. Roof bolts are used only in the underground mine shop area.

On September 9, 1993, a slab of rock, measuring approximately 122 feet long by 22 feet wide by 9.5 feet thick, fell from the roof in the 14 East Main entry near the No. 11 crosscut and crushed two miners operating a Tamrock twin boom jumbo drill. The accident was investigated by Richard Duncan, at the time a supervisory inspector, and Joseph Denk, a mine safety and health specialist.

As a result of their inquiries, the investigators issued Citation No. 4288981 on September 12, 1993. The citation alleges a violation of Section 57.3360 of the Regulations, 30 C.F.R. § 57.3360, stating that:

On Thursday, September 9, 1993, at approximately 4:00 p.m., an accident occurred underground at the mine in which two employees (Timothy Wayne Francis and Brian Ratcliffe) were fatally injured. The two men were operating a Tamrock Supermatic HS205T twin boom jumbo drill in the 14th level east main heading when a slab of rock fell from the roof and crushed the machine. At that time, an effective ground support system was not being utilized at the mine.

(Govt. Ex. 5.) On October 7, the citation was modified to increase the level of negligence alleged from "moderate" to "high" and to allege an "unwarrantable failure" on the part of APG by changing the section of the Act under which the citation was issued from 104(a), 30 U.S.C. § 814(a), to 104(d)(1), 30 U.S.C. § 814(d)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 57.3360 provides, in pertinent part, that: "Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary." It is the Secretary's position that ground conditions prior to the roof fall should have indicated that ground support was necessary.

The Secretary argues that a calcite¹ seam in the roof, approximately one-eighth to a quarter of an inch wide, running from where the No. 11 window intersected the main heading to about halfway across the main heading should have put the company on notice that further action was necessary. Specifically, "[t]he Secretary contends that mine management deliberately failed to properly assess the above conditions in the 14 East entry between September 7, 1993 and September 9, 1993, and as a

¹ Calcite is "[a] mineral . . . , CaCO₃, [That] is the essential constituent of limestone, chalk, and marble, and a minor constituent of many other rocks." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 163 (1968).

result, failed to implement appropriate action to support or remove the ground after hand scaling proved ineffective." (Sec. Br. at 9.)

The evidence, however, does not support this position. The calcite seam was first noticed by the roof scalers on September 7. After scaling away all of the removable pieces of rock from the seam, they attempted to insert their pry bars into the seam to determine if they could pry anything further down. They were unable to. Still concerned, they advised their foreman of the situation at lunch.

Ivan Blevins, the foreman, examined the seam and he and five scalers, together, attempted to pry something down with their bars. In all, the scalers worked on this seam for about three hours without being able to scale it any further. Since the roof showed no signs of water or mud seepage, was not "drummy"² or making any sounds of shifting, manifestations normally associated with a dangerous roof, Blevins and the scalers concluded that the roof was safe as it was. Accordingly, the scalers painted their initials on the roof to indicate that it was safe to go under.

Blevins visually examined the entry on the eighth and ninth and foreman Chester Tabor examined it on the ninth and neither observed anything to indicate to them that the situation with the seam had changed. There was no evidence that anyone else noticed anything out of the ordinary either.

It was determined that the fall occurred because the calcite seam was not solid between the rocks, but had gaps in it. (Govt. Ex. 2, Resp. Ex. L, Tr. 550.) The gaps were not visible before the fall.

I conclude that nothing in the ground conditions should have indicated to APG that ground support was necessary. In reaching this conclusion, I have evaluated the company's actions in terms of what a reasonably prudent person, familiar with the mining

² Drummy is "[l]oose . . . rock that produces a hollow, loose, open, weak, or dangerous sound when tapped with any hard substance to test condition of strata; said especially of a mine roof." *Id.* at 356.

industry and the protective purpose of Section 57.3360, would have done in order to meet the protection intended by the regulation. See *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987).

It is significant that the only people who observed the calcite seam, the miners, were unanimous in their opinion that it was safe. It is undisputed that calcite seams are numerous throughout the mine and do not, by themselves, indicate an unstable roof. The Secretary has not presented any evidence that there was anything about this particular calcite seam that should have put the company on notice that the ground condition required different actions than those it had followed in 45 years of mining.³ In this regard, the opinion of the inspectors, who never saw the seam, given after the accident, is unpersuasive.⁴

Furthermore, the company's mining experience in similar ground conditions in the mine, contrary to the position of the Secretary, would have indicated, as it apparently did to the scalers, that if there were no visible gaps in the calcite seam, and no other indications of unstable roof, ground control was not necessary. In 45 years of operation, the company had never experienced a fall of this nature or magnitude.

I find that a reasonably prudent person, familiar with the mining industry and the purpose of Section 57.3360 would not have concluded that either the ground condition encountered or mining experience in similar ground conditions indicated the necessity

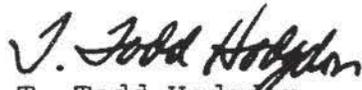
³ Needless to say, there is absolutely no evidence to support the Secretary's proposition that APG deliberately, that is purposefully, failed to properly assess the calcite seam.

⁴ The inspectors seemed to place great weight on general statements by some of the miners who they interviewed that in the past some areas of suspected bad roof had been blasted down. The evidence at trial indicated that such instances were rare and did not involve the same situation encountered on September 7. (See e.g. Tr. 316.) Cf. *Asarco Mining Co.*, 15 FMSHRC 1303, 1307-08 (July 1993) (the testimony of the inspectors was credited where they actually observed the conditions cited).

for ground support.⁵ Accordingly, I conclude that APG did not violate Section 57.3360.

ORDER

It is **ORDERED** that APG Limestone's contest of Citation No. 4288981 is **GRANTED**, Citation No. 4288981 is **VACATED** and the civil penalty petition is **DISMISSED**.



T. Todd Hodgson
Administrative Law Judge

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⁵ Obviously, this roof fall becomes part of APG's mining experience. Consequently, the actions found reasonable in this case may not be reasonable in future cases. See *Tennessee Chemical, Inc.*, 11 FMSHRC 783, 788 (May 1989).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 14 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-590
Petitioner : A.C. No. 15-17164-03549
v. :
 : Mine No. 1
NARROWS BRANCH COAL INC., :
Respondent :

DECISION

Appearances: Joseph B. Lockett, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee, for
the Petitioner;
Ms. Deborah Childers, Narrows Branch Coal Co. Inc.,
Hardy, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

The above-captioned case was brought by the Secretary of Labor (Secretary) seeking a civil penalty for an alleged violation of 30 C.F.R. § 75.203(a) by Narrows Branch Coal Inc. (Narrows Branch). A hearing was held on November 9, 1995, in Charleston, West Virginia. The Secretary filed a Brief on December 15, 1995. Narrows Branch did not file any brief.

Narrows Branch indicated in a set of stipulations filed at the onset of the hearing, that it does not contest the existence of the cited violation, nor does it contest the cited gravity and negligence. Narrows Branch raised as the only issue the question of whether the penalties should be reduced pursuant to one of the six criteria set forth in section 110(i) of the Act, i.e., the effect of the penalty on the operator's ability to continue in business.

Deborah Childers, Narrow Branch's bookkeeper, testified on its behalf. She opined that Narrows Branch might be about to go out of business. In support of her opinion she indicated that Darrell Williams, it's sole corporate officer and sole stockholder, was attempting to obtain new financing. Childers was not aware of the type of financing that was being sought.

Narrows Branch only leased one mine, and owned no real property. It was running two production shifts and one maintenance shift at the time of the hearing, and employed approximately 28 people.

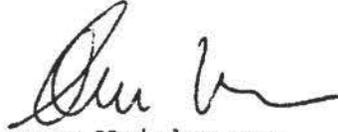
Narrows Branch entered into evidence documents showing a balance due of over \$250,000 on loans from three banks, and past due debts totaling \$301,316.05, including a total of over \$45,000 to the states of Kentucky and West Virginia (Resp Exs. 1-8). Childers testified that Narrows Branch was paid for coal on a per-ton basis, but was not aware of its current income. Narrows Branch currently owes over \$122,000 in unpaid civil penalties (Gov't. Ex. 4).

Narrows Branch did not offer any financial audits in evidence. It did not adduce any reliable evidence as to its assets, liabilities, revenue or expenses. I find that it accordingly did not adduce sufficient reliable evidence to establish its present financial situation. Nor has it adduced reliable evidence to establish that it has gone out of business, and definitely will never resume business. I do not place any probative value on the testimony of Childress that Narrows Branch might go out of business, as such an opinion is mere speculation.

For all the above reasons, I find that there is no basis to mitigate a penalty based on its effect on Narrows Branch's ability to remain in business. Considering the history of Narrows Branch's violations (Gov't. Ex. 3), the degree of its negligence, and gravity of the violations as set forth in the order at issue, and the remaining factors set for in Section 110(i) of the Act as stipulated to by the parties, I find that a penalty of \$3,000 is appropriate.

ORDER

It is ORDERED that Narrows Branch pay a penalty of \$3,000 within 30 days of this decision.



Avram Weisberger
Administrative Law Judge

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Darrell Williams, President, Deborah Childers, Bookkeeper, Narrows Branch Coal Inc., P.O. Box 428, Hardy, KY 41543 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 15 1996

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
On behalf of ANDY HOWARD, JR., : Docket No. KENT 96-95-D
Complainant : MSHA Case No. PIKE CD 95-21
v. :
 : Martiki Surface Mine
BRUCE YOUNG AND YOGO, INC., : Mine I.D. No. 15-07295 BLH
Respondent :

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee;
Tony Oppgaard, Esq., Mine Safety Project of the
Appalachian Research and Defense Fund, Inc.,
Lexington, Kentucky; for Complainant;
Billy R. Shelton, Esq., Baird, Baird, Baird &
Jones, P.S.C., Pikeville, Kentucky, for
Respondent.

Before: Judge Amchan

Facts and Contentions of the Parties

Complainant, Andy Howard, Jr., began working as a haul truck driver for Respondent, Yogo, Inc., in late February or early March, 1995 (Tr. 13-17, 70). Yogo transports coal for Martiki Coal Company at its surface mine in Martin County, Kentucky (Tr. 114-16). Howard's duties entailed the transportation of coal over private dirt roads on Martiki's property (Tr. 18-19, 70-71).

The week prior to working for Yogo, Howard drove a green Mack truck for BNA Trucking, a company owned by the wife of Bruce Young (Tr. 15-17). Mr. Young owns 50 percent of Yogo, Inc. (Tr. 114). This green truck had defective brakes and was

the subject of a section 105(c) discrimination complaint filed by William Delong, who drove the truck just before Mr. Howard was hired (Tr. 15-16, 41-45). In July 1995, Howard was interviewed by MSHA special investigator Nancy Bartley. In Mr. Young's presence, he told Ms. Bartley that the brakes on the green Mack truck were defective and would not stop the truck on a hill. According to Howard, Mr. Young's face turned red during Howard's conversation with the investigator (Tr. 41-46).

In March 1995, when Howard started to work for Yogo, he drove an orange Mack truck. He continued to drive this vehicle for approximately three months when he was transferred to a black Mack truck, model RD-600. The air conditioning unit on this truck did not work (Tr. 17, 23).

Due to the summer heat, Mr. Howard operated this truck with the windows rolled down. The haul roads were often very dusty and the dust coming into his cab made it difficult for Howard to breathe, gave him headaches, and sometimes upset his stomach. Howard complained to Bruce Young, who promised he would have the air conditioning fixed (Tr. 18-25).

Employees of Yogo, Inc. were on vacation from June 24, 1995 to July 10, 1995 (Tr. 118). When Mr. Howard returned to work he discovered that the air conditioning unit of his truck was still non-functional (Tr. 27-28). Mr. Young contends that he arranged to have the air conditioning repaired on Howard's truck and others, but that the person with whom he made these arrangements unexpectedly failed to do the work (Tr. 118-20, 148-49, 175).

On the morning of July 11, 1995, Howard and four other drivers refused to drive their trucks (Tr. 28-29). Two of the other drivers, one who worked for Yogo and the other who worked for another company owned by Larry Goble, the other partner in Yogo, also had non-functioning air conditioners (Tr. 151-52). The five drivers demanded that the air conditioning be repaired on the three trucks. They also demanded that Yogo provide them with medical insurance, and Howard asked or demanded an increase in his salary (Tr. 31).

Mr. Howard contends that Mr. Young's response was that the drivers could go back to work or be fired (Tr. 29). Young says he merely told them that if they refused to work, everybody at

Yogo would lose their jobs, and that he would try to get the air conditioners fixed. Young was apparently inferring that if the drivers refused to work that Martiki might replace Yogo with another contractor (Tr. 120-21).

Mr. Young says he contacted Worldwide Equipment Company the day before when he discovered that the air conditioners had not been fixed over the vacation. Worldwide was not able to repair the vehicles until July 14. The repairs performed on that date cost Yogo \$1,020 (Tr. 123-24, Exh. R-1).

Mr. Howard claims that Bruce Young never indicated that he would fix the air conditioners. He states that the five drivers continued their strike against Yogo for 13 hours. Then, on the morning of July 12, Larry Goble promised them he would get the vehicles fixed if they returned to work (Tr. 30-31). Howard also claims that after this incident Bruce Young would not speak to him (Tr. 29-32, 35)¹.

The air conditioner on Complainant's truck worked for about two weeks following the July 14 repairs. Howard drove the truck for a few weeks after it broke again. The dust entering his cab made him feel ill. Howard's headaches got worse. At the beginning of his shift on August 15, 1995, he informed Bruce Young that he would not drive the truck until the air conditioner had been repaired (Tr. 33-35).

Mr. Young assigned Howard to a truck usually used to transport mud and other debris. Howard transported coal in the mud truck while a Yogo mechanic repaired the air conditioner on his truck. On August 16, Howard drove his own truck until about noon when the air conditioner stopped working again (Tr. 36-39, 127-29).

When Howard told Young that his truck's air conditioner was broken, Howard claims that Young became angry and told him that he had stabbed Young in the back ever since he had come to work

¹Other than Howard, the three drivers who worked for Yogo are still employed by Respondent (Tr. 73-74).

for him². Then Young told Howard to go home and that he either would call him when he needed him, or when the air conditioner was fixed (Tr. 39-41, 48-49, 64, 85).

Young denies making the "stab in the back" remark. He says he merely sent Howard home because the mud truck was being used by another miner and therefore he had no vehicles for Howard to drive that had operational air conditioning (Tr. 129).

Respondent contends that Mr. Howard called Larry Goble on August 21, 1995. Goble told him that his truck's air conditioner was not fixed yet. Howard asked Goble if he could come in to wash the truck so that he could earn some money. Goble told Howard that he could not use the vehicle until the air conditioner was fixed (Tr. 198-99).

The next day Howard, who lives close to the Martiki mine, heard on his CB radio that another miner was driving his truck. He called Goble again and was told he could return to work. Howard claims that Goble said to him that somebody had called the Mine Safety and Health Administration and indicated that this would hurt Yogo (Tr. 49-53).

Respondent claims it intended to recall Howard as soon as the air conditioning was fixed (Tr. 130). Goble states that on August 22 he became tired of waiting for a contractor and repaired the air conditioning compressor himself. He was then able to get the contractor to come to the site simply to add freon, which neither he nor any other Yogo employee was licensed to do (Tr. 199, 211, Exh. R-3).

Respondent further contends that the truck was driven by another miner on the afternoon of August 22, only to make sure that the air conditioner worked before recalling Howard. On August 23, Howard returned to work and his air conditioner functioned properly (Tr. 53, 130).

²It is not clear from Howard's testimony whether he claims these statements were made on August 15 or 16, or on both days (Tr. 39, 64).

On or about August 29, 1995, Howard encountered Mr. Young at the scale house where Yogo's trucks were weighed by Martiki. According to Howard, Young begged him to quit, told him again that Howard had stabbed him in the back and hurt him (Tr. 55-56). Young denies having any heated discussions with Howard. He states that he had been told by two people that Howard was planning to quit and merely asked if this was true and told Howard he would appreciate being given notice. Both men agree that Howard told Young that he planned to quit as soon as he found another job (Tr. 92, 133-36, 168).

On August 30, the radiator hose on Howard's truck broke. He took his truck to Respondent's repair shop to fix it. There he encountered Mr. Young again. Howard says Young became very angry. With his face only four or five inches from Mr. Howard's, Young asked Howard if he thought he "owned the place." He then told Howard not to get out of the truck until Young told him to get out (Tr. 56-59).

Young claims that he merely asked Howard to move his truck because it was in the way of Yogo's mechanics. Young also claims that Howard refused to move the truck. He denies that he was four to five inches from Howard and says the distance between them was two to three feet (Tr. 170-72).

The radiator hose was fixed and Howard resumed driving. Later on August 30, Howard returned to the shop area to get oil. He claims Young opened the door to the truck cab and told him he was either going to fire him or force him to quit. Howard believed that Young was trying to provoke him into starting a fist fight (Tr. 60-61, 95-97).

Young says he merely told Howard that he should have called the shop on his CB radio and had the oil brought out to him. This apparently would have taken Howard's truck out of production for significantly less time. Young denies that he slammed the door to Howard's truck, as claimed by Howard (Tr. 173-75).

On August 31, 1995, despite the fact that he had not found another job, Howard did not report for work. He did not call Respondent to inform it that he was quitting. He picked up his last pay check on September 1, and filed a discrimination complaint with MSHA on September 5. On September 13, Respondent

sent Howard a letter formally discharging him (Tr. 57, 97-99, 136-38, 142-43, 220).

Howard's complaint was investigated by MSHA and an application for temporary reinstatement was received by the Commission on January 16, 1996. Respondent requested a hearing on the application. This hearing was held on February 8, 1996, in Prestonsburg, Kentucky.

Evaluation of the Evidence

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. 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 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

In a temporary reinstatement proceeding, the Secretary need not establish that it will, or is even likely to, prevail in the discrimination proceeding. Pursuant to the procedural rules of the Commission, 29 C.F.R. § 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miner's complaint was frivolously brought. The Secretary of Labor has the burden of proving that the complaint was not frivolous.

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement, "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit, in Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990), concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9.

In the instant case the primary question is whether the Secretary and Mr. Howard have established that it is not frivolous to contend that adverse action was taken against Mr. Howard. More specifically, the issue is whether the Secretary's claim that Mr. Howard was constructively discharged in August 1995 is clearly without merit. It is uncontroverted that Howard quit and was not fired by Respondent.

It determining whether the Secretary and Mr. Howard have met this burden, I conclude it would be inappropriate for me to make the ultimate credibility resolutions that I would make in a discrimination proceeding. Commission Rule 45(d) allows the Secretary to limit his presentation to the testimony of the Complainant. Thus, unless I find there is no conceivable way

that I could credit the complainant's version of events in a discrimination proceeding, I believe I must take his testimony at face value in a temporary reinstatement proceeding³.

For example, there are sharp differences in the accounts of Mr. Howard and Mr. Young regarding their conversations in August, 1995. It is quite conceivable that there may be corroborative evidence presented in a discrimination hearing that would allow a far more reliable resolution of the credibility of these witnesses than I am able to make at the present time.

The Secretary has established that his claim that Mr. Howard was constructively discharged is "not frivolous."

Under Commission law, a constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign, Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2210 (November 1994); Also see, Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988); Yates v. Avco Corp., 819 F. 2d 630, 636-8 (6th Cir. 1987) [a similar test is applied by the 6th Circuit under the Civil Rights Act].

Mr. Howard's testimony indicates that Mr. Young, half-owner of the operator, became upset at him when he insisted that his air conditioner be repaired on July 11 and on August 15 and 16. Howard claims Young approached him in an extremely hostile manner on August 29 and 30, 1995, to the point of provoking a fight.

At this juncture, I conclude that it is not frivolous for the Secretary to argue that Howard's insistence of having his air conditioner repaired and his conversation with MSHA special investigator Nancy Bartley constituted activities protected by

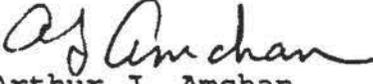
³ This is analogous to determinations made in deciding a motion for summary decision under Commission rule 69(b) and (c). Such motions can only be granted if there is no genuine issue as to any material fact and the moving party is entitled to summary decision as a matter of law.

section 105(c) of the Act. Further, I find the Secretary's allegations of animus on the part of Mr. Young towards these activities to be not clearly without foundation. This alleged animus may establish a nexus between Howard's protected activities and the termination of his employment with Respondent.

Finally, I conclude that it is at least arguable that Mr. Young's alleged behavior in July and August 1995 with respect to Mr. Howard created conditions so intolerable that a reasonable miner would have felt compelled to quit. Therefore, I conclude that the Secretary's decision to seek the temporary reinstatement of Mr. Howard is not frivolous.

ORDER

Respondent is hereby **ORDERED** to reinstate Andy Howard, Jr., immediately. The purpose of temporary reinstatement is to render Complainant financially secure during the pendency of his discrimination case, Legislative History of the Federal Mine Safety and Health Act of 1977, at page 625. Respondent may satisfy this order through the means of "economic reinstatement." Complainant's position, including financial compensation and benefits, must be no worse than it would have been had he returned to work on August 31, 1995, and continued to work for Respondent up to the present date⁴.


Arthur J. Amchan
Administrative Law Judge

⁴This refers to current payments and working conditions, it does not require Respondent to give Complainant back pay, which he would be entitled to only if he prevailed in a discrimination proceeding.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 15 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 95-411
Petitioner : A. C. No. 36-07558-03543
v. :
: No. 11 Vein Slope
ROTHERMEL COAL COMPANY , :
Respondent :

DECISION

Before: Judge Weisberger

Appearances: John J. Podgurski, U.S. Department of Labor, Mine Safety and Health Administration, Arlington, Virginia, and Linda Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner;
Randy Rothermel, Owner, Rothermel Coal Company, Klingerstown, Pennsylvania, for the Respondent.

Statement of the Case

At issue in this civil penalty proceeding are three citations issued by the Secretary of Labor (Petitioner) allegation violations by Rothermel Coal Company (Respondent) of mandatory safety regulations set forth in Title 30 in the Code of Federal Regulations. Pursuant to notice, the case was heard in Harrisburg, Pennsylvania on December 14, 1995. Harold Glandon and Mark Mott testified for the Petitioner, and Randy Rothermel, testified for the Respondent.

Findings of Fact and Discussion

Citation No. 41517689.

On April 20, 1995, Harold Glandon, an MSHA inspector, inspected the No. 11 Vein Slope Mine, an underground coal mine operated by Respondent. A 440 volt cable supplied electricity to an energized power box that controlled the main surface fan. The cable was secured within approximately 6 inches from where it entered the box, and a piece of conduit was wrapped around the cable where it entered the box. However, there were no restraining clips to prevent the cable from moving at the point where it entered the box. Glandon opined that inasmuch as the cable could have moved, as it was not rigidly attached to the box, the cable could have become worn at the point of contact with the box. He issued citation alleging a violation of 30 C.F.R. § 77.505.

Section 77.505 supra provides, as pertinent, as follows: "Cables shall enter metal frames of ... electric compartments only through proper fittings."

Randy Rothermel testified for Rothermel Coal Company and indicated that on February 1995, a fire had occurred on the property burning all switch boxes. New switch boxes were then installed and Rothermel contacted MSHA to arrange for technical assistance concerning the installation of the new switch boxes. According to Rothermel, a Mr. Hagy, the electrical inspector for MSHA working out of the Wilkes-Barre office, told him that his boss, Larry Brown, had indicated that no violations would be written "on electricity" if technical assistance would be asked for (Tr. 37).

Glandon's testimony was not rebutted, contradicted, or impeached by Respondent. I thus find, based upon his testimony, that inasmuch as the cable that entered the box at issue was not restrained at the point of entry, it could have moved causing it to rub against the entry to the box. This condition could have led to loss of the cable's insulation. I find that the cable did not enter "through proper fittings". I conclude that Respondent did violate Section 77.505 supra.

Rothermel's testimony that he had been informed by MSHA officials that no electrical violations would be issued if he were to call for technical assistance, does not negate the fact, as testified to by Glandon, that a violation of Section 77.505 supra had occurred. However, I do find Rothermel testimony to be trustworthy, and I conclude that Respondent's negligence herein was low. I find that a penalty of \$50 is appropriate for this violation.

Citation Nos. 4151770 and 4151771.

On March 14, 1994, Respondent was advised in writing by W. R. Compton, the MSHA district manager, that the mine ventilation map for the subject mine was received on January 27, 1994, and that the next map was due for submission to the District manager on March 14, 1995. On about February 1, 1995, the building containing Respondent's bulletin board, office, and hoist serving the underground mine, burned down. Production at the mine ceased until the first or second week in March 1995, when use of the hoist was resumed. Rothermel subsequently obtained a survey of the mine. On April 26, 1995, he personally filed the mine map with the Wilkes-Barre MSHA office, placed a copy of the map in his truck which was kept on the premises, and so informed his one employee. Glandon indicated that when he was on the premises on April 27, 1995, a map had not been filed by March 14, and there was no updated map on the mine's bulletin board. He issued two citations, one alleging a violation of 30 C.F.R. § 75.372(a)(1) which, as pertinent, provides that an operator shall submit to the district manager three copies of a mine map "at intervals not exceeding 12 months." He also issued a citation alleging a violation of 30 C.F.R. § 75.1203, which as pertinent, provides that the mine map " . . . shall be available for inspection by the Secretary or his authorized representative."

The uncontroverted evidence indicates that the mine map in question was first filed on April 26, 1995, an interval which exceeded 12 months from the last filing. I thus find that Respondent did violate Section 75.372(a)(1), supra. However, due to the difficulties encountered by Respondent as a consequence of the fire and lack of access to the underground area, I conclude that the Respondent's negligence was extremely low. I find that a penalty of \$20 is appropriate.

I find Rothermel's testimony credible, having observed his demeanor, that the map at issue was in his truck on the premises on April 27. Hence I find that it was "available" for inspection by Glandon or other miners. I thus find that it has not been established that Respondent violated Section 75.1203 supra. Hence citation no. 4151770 shall be dismissed.

ORDER

It is ORDERED that Respondent shall, within 30 days of this decision, pay a penalty of \$70. It is further ORDERED that citation no. 4151770 be DISMISSED.


Avram Weisberger
Administrative Law Judge

Distribution:

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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FEB 16 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-642
Petitioner : A.C. No. 05-03455-03626
: :
v. : Docket No. WEST 93-643
: A.C. No. 05-03455-03627
ENERGY FUELS COAL INC., :
Respondent : Southfield Mine

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Phillip D. Barber, Esq., Dufford & Brown, P.C.,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

I

These consolidated cases are before me upon petitions for assessment of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The Secretary of Labor (Secretary) seeks civil penalties from Respondent, Energy Fuels Coal Inc. (Energy Fuels), pursuant to section 105(d) of the Act for the alleged violation of three regulatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations.

STIPULATIONS

1. Energy Fuels is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. Energy Fuels is the owner and operator of Southfield Mine, MSHA I.D. No. 05-03455.

3. Energy Fuels is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Energy Fuels is a mine operator with 330,568 tons of production in 1993.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 3589183

Ned Zamarripa, a federal mine inspector, issued this 104(a) citation following his inspection of the mine site. The citation reads as follows:

No guard was provided for the conveyor head pulley that is located on the top floor of the coal preparation plant. The conveyor transports coal from the row coal storage area to the prep plant.

The citation charges Energy Fuel with the violation of a mandatory safety standard 30 C.F.R. § 77.400(c). That standard reads as follows:

(c) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

Thus the standard not only requires a guard for the conveyor head-pulley but specifically requires that the guard must "extend a (sufficient) distance" that a person cannot reach behind the guard and become caught between the contact or pinch-point between the belt to the pulley.

The guard observed by the inspector was, at best, in the nature of a perimeter or area guard rather than one that extended a sufficient distance to guard the specific contact points that a person could contact by reaching behind the guard.

It is undisputed that the purported guard consisted of a single short length of chain with a hook at the end of the chain. This unlocked chain was hooked across the 9-foot high access ladder leading to the platform where the head-pulley is located. The pulley-head is located four or five feet above the walkway of the platform and four or five feet away from the chain that was hooked across the access ladder. Wired at the middle of the chain was a "Danger" sign.

On cross-examination, Mr. Acre, the mine manager, testified that the duties of some employees requires that they get up into the area of the head-pulley to adjust the pulley, lubricate bearings and inspect or clean the area. The mine manager on cross-examination also testified as follows:

Q. And there's nothing preventing someone from moving the chain that's between the ladder and the pulley?

A. That is correct.

Q. There's not a lock on that, or anything like that?

A. There is not.

Q. Approximately how high is that chain?

A. The chain is approximately three feet high.

Q. So it would be possible for someone to even step over that chain very easily?

A. Certainly would be

Q. It would be possible for someone to stub their toe while they were stepping over that chain and come close to the pulley, wouldn't it?

A. That's a possibility.

Thus it is clear from the record that to access the head-pulley a person could simply unhook the chain or just step over it or under it without even bothering to unhook the chain.

Respondent asserted (and also presented some evidence) that it complied with a mandated lock-out procedure in its maintenance of the head-pulley.

Even assuming full compliance with mandated lock-out procedures when work of any kind is done on the head-pulley, such compliance does not relieve an operator from full compliance with the provision of the cited guarding standard. Compliance with both safety standards is required.

On review and evaluation of the evidence presented and the provisions of the cited standard, I find that the unlocked chain, with a cautionary danger sign strung across the access ladder, is insufficient to meet the requirements of the cited safety standard.

The mitigating factors, such as the remote location of the head-pulley, the chain with a danger sign strung across the access ladder, and the asserted compliance with lock out procedures have been taken into consideration by MSHA by its modification of the citation. Prior to the hearing, MSHA modified the citation by changing the injury finding "reasonably likely" to "unlikely", and deleting the significant and substantial finding. MSHA also reduced the proposed penalty to a single assessment penalty of \$50.00.

I conclude that a violation of the cited safety standard was established. Upon taking into consideration the statutory criteria in section 110(i) of the Act, I find the MSHA proposed \$50.00 penalty is appropriate for this violation.

Citation No. 2930830

This citation is the first of three citations issued concerning the preshift examinations of the mine. This citation was issued on June 22, the first day of the inspection. It alleges a non-significant and substantial 104(a) violation of 30 C.F.R. § 75.360(a). MSHA proposed a \$50.00 civil penalty. The cited safety standard reads as follows:

Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a pre-shift examination.
(Emphasis added).

Clearly and plainly this regulatory safety standard requires a certified person to make the preshift examination within three hours "preceding the beginning of any shift".

Upon evaluation of the conflicting evidence, I find that at the Southfield Mine on June 22, the beginning of the day shift was 5 a.m. and at that time the men entered the mine. (Tr. 139). The preponderance of the evidence also established that the pre-shift examination required by 30 C.F.R. § 75.360(a) was not completed until 6:20 a.m. (Resp. Ex. 2A, Tr. 138-139).

I do not question the fact that the pre-shift examination was performed by John Gribben, a certified person, nor the fact that a certified person is permitted to perform a supplemental examination of his own working areas after the beginning of a shift, as long as no other person is scheduled to enter that area before this supplemental examination occurs. One difference between the two types of examinations is that a preshift examination, unlike a supplemental examination, must be recorded in a book on the mine surface before a non-certified person may enter the inspected underground area. [75.360(g)]. It is also undisputed that there is no need to require inspections of areas of the mine where persons are not scheduled to work or travel.

In this case I am persuaded by the documentary evidence, Resp. Ex. 2A, and my evaluation of the testimony of the certified examiner, that on the day the citation was issued the preshift examination required by 30 C.F.R. § 75.360(a), was not completed before the "beginning of the shift".

The 104(a) non-S&S violation of the cited safety standard was established. Taking into consideration the criteria of section 110(i) of the Act, I find the \$50.00 civil penalty proposed by MSHA is appropriate for this violation and it is affirmed.

Citation No. 2930831

This citation was vacated by MSHA at the beginning of the hearing. (Tr. 6).

Docket No. WEST 93-643

Citation No. 3077128

This 104(a) S&S citation charges the operator with inadequate preshift examination of the mine on June 23, the second day of the inspection. It alleges that the examiner performing the preshift examination on June 23 should have "detected" an improper direction of an air current.

The citation reads as follows:

An inadequate pre-shift examination was conducted for the day shift of 6-23-93, on the 2-North "d" east working section. The

air current (coursed) through the belt haulage entry was being used to ventilate the working faces at a rate of 9000 cfm. This violation was obvious in the area of the feeder breaker and should have been detected and immediately corrected, prior to mining coal at the working faces. (See also citation no. 3077127).¹

The cited safety standard 30 C.F.R. § 75.360(b) reads as follows:

The person conducting the pre-shift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

There is no dispute that the time the air current reversal was first detected by the inspector and mine management was just after midday on June 23. At that time a citation was issued for an obvious air current flowing in the wrong direction. The operator agreed, accepted and paid the MSHA penalty assessment for that violation. That citation was never contested. The instant citation that the operator is contesting is the additional citation issued for the alleged failure to detect the obvious wrong direction of the air current at the time of the June 23 preshift examination.

As I will discuss in more detail below, I find the preponderance of the evidence failed to establish that the air current in question was moving in the wrong direction at the time of the preshift examination which was conducted 4 a.m. to 5 a.m. on June 23.

On June 23 the second day of his inspection, the inspector arrived at feeder-box area about 12:30 p.m. He testified that "as soon as I got there, it was immediately obvious" that the air current (9000 cfm) was moving in the wrong direction (belt air going inby to the face). The inspector testified "The air was coming at me. It was in my face and I could feel the air current." The inspector assumed that this obvious wrong direction of air current had existed for several days. (Tr. 175, 183).

On cross examination the inspector admitted that on the day before (June 22) he and others stood at the same place for 10 to 20 minutes where on June 23, he "immediately" noticed the "quite

¹ Citation No. 3077127 (Govt. Ex. 6B) issued for air not moving in its proper direction was accepted by Energy Fuels and never contested.

obvious" air current reversal. (Tr. 188). With the inspector on his earlier inspection of June 22 at the same identical location was MSHA's Bill Reitze, the supervisor in charge of the ventilation group in the MSHA district office, and Andy Franklin, production superintendent. Neither the inspector, Reitze nor Franklin noticed any air reversal at that time. (Tr. 183, line 16-19).

The preshift examination on June 23 was conducted by Mr. Randy Acre, mine manager of the Southfield Mine. Mr. Acre has had "boss papers" continuously since 1978 which allows him to make preshift examinations. On June 23 he conducted the preshift examination between 4 a.m. and 5 a.m. He traveled to the Feeder Breaker area and did not detect any air current traveling in the wrong direction. Air traveling at 9000 cubic feet per minute is a significant volume of air. Mr. Acre testified, if the air had been traveling in a reverse direction at that time, he would have noticed it just as Inspector Zamarripa and others immediately noticed it later that same day. Inspector Zamarripa conceded on cross-examination that Mr. Acre was a prudent, competent miner, who takes his job seriously.

Andrew Franklin, production superintendent, has fire boss papers. He was with Inspector Zamarripa and Mr. Acre at the feeder box on June 22 and again on June 23. He testified there was no air reversal on June 22 but on June 23 at the time of further inspection of the area, it was obvious there was an air reversal. He stated, "You could feel it on your face."

I credit the testimony of the mine manager, Randy Acre. On the basis of his testimony, I find that the cited "obvious" air reversal of 9000 cubic feet of air did not exist at the time of the preshift examination conducted by Mr. Acre at 4 a.m. to 5 a.m. on June 23.

I find the air reversal was indeed obvious and would have been detected by Mr. Acre during his preshift examination if it had existed at that time. I credit Mr. Acre's testimony and vacate the citation.

Conclusion

In view of the foregoing, I affirm the two 104(a) Citation Nos. 3589183 and 2930830. Upon consideration of the statutory criteria in section 110(i) of the Act, I find that the MSHA proposed penalty of \$50.00 is the appropriate penalty for each of the affirmed citations.

ORDER

It is **ORDERED** that:

Docket No. WEST 93-642

Citation No. 2930831 be **VACATED** as requested by Petitioner at the hearing.

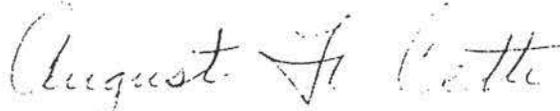
Citation No. 3589183 and its related \$50.00 proposed civil penalty are **AFFIRMED**.

Citation No. 2930830 and its related \$50.00 proposed civil penalty are **AFFIRMED**.

It is further **ORDERED** that the **RESPONDENT SHALL PAY** a civil penalty assessment of \$100.00 to MSHA within 30 days of the date of this decision and order, in satisfaction of the two established violations in this docket, and upon receipt of payment, Docket No. WEST 93-642 is dismissed.

Docket No. WEST 93-643

Citation No. 3077128 and its related proposed penalty are **VACATED** and Docket No. WEST 93-643 is **DISMISSED**.



August F. Cetti
Administrative Law Judge

Distribution:

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FEB 20 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-226-M
Petitioner	:	A.C. No. 26-02007-05512
	:	
v.	:	Docket No. WEST 94-681-M
	:	A.C. No. 26-02007-05515
T.E. BERTAGNOLLI & ASSOCIATES,	:	
Respondent	:	Bertagnolli Aggregates

**DECISION APPROVING SETTLEMENT
ORDER CANCELING HEARING**

Before: Judge Cetti

The above-captioned cases are consolidated for evaluation and disposition. Docket No. WEST 94-681-M was assigned to the Judge on remand.

These consolidated cases are before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss these cases.

In Docket No. WEST 94-226-M, under the proffered settlement, there is a reduction of the original proposed penalties as follows:

Docket No. WEST 94-226-M

<u>Citation No.</u>	<u>Alleged Safety Standard Violated (CFR Title 30)</u>	<u>Initial Proposed Penalty</u>	<u>Settlement Disposition</u>
4138636	56.11001	\$3,500.00	\$1,750.00
4139102	56.14109(a)	1,500.00	1,000.00
4139103	56.14109(a)	1,500.00	1,000.00
4139105	56.11001	3,500.00	<u>1,750.00</u>
		TOTAL	\$5,500.00

In Docket No. WEST 94-681-M there is a reduction of original penalties as follows:

Docket No. WEST 94-681-M

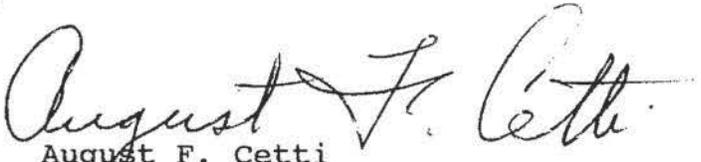
<u>Citation No.</u>	<u>Alleged Safety Standard Violated (CFR Title 30)</u>	<u>Initial Proposed Penalty</u>	<u>Settlement Disposition</u>
4139741	56.12016	\$5,200.00	\$3,500.00
4139747	56.15002	4,600.00	<u>Vacate</u>
		TOTAL	\$3,500.00

I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

WHEREFORE, the motion for approval of settlement is **GRANTED** and Citation No. 4139747 and its proposed civil penalty are **VACATED**.

It is further **ORDERED THAT THE OPERATOR PAY** the approved penalties totaling \$9,000.00 to the Office of Assessments, Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, Pennsylvania 15251 within 30 days of the date of this decision. Upon such payment these cases are dismissed. In view of the approved settlement, the hearing previously scheduled for February 20, 1996, is **CANCELED**.


August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 22 1996

LANCE A. PAUL, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 95-228-DM
: MSHA Case No. WE MD 95-04
NEWMONT GOLD COMPANY, :
Respondent : Gold Quarry
: Mine ID 26-00500

DECISION

Appearances: Lance A. Paul, pro se, Elko, Nevada, for the
Complainant;
Charles W. Newcom, Esq., Sherman & Howard L.L.C.,
Denver, Colorado, for the Respondent.

Before: Judge Feldman

This case was heard on November 28 and 29, 1995, in Elko, Nevada. This matter is before me based upon a discrimination complaint filed on March 1, 1995, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3) by the complainant, Lance A. Paul, against the respondent, Newmont Gold Company (Newmont). Section 105(c) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine

Paul alleges his November 10, 1994, discharge for alleged insubordination was motivated by his protected activity associated with his radio transmission to control room management during a November 3, 1994, fire at the respondent's Refractory Ore Treatment Plant (ROTP). The purpose of Paul's radio communication was to express concern for the safety of a fellow

employee, who, unlike other employees, had not been sent to the designated evacuation area during the fire emergency.

In response to Paul's complaint, the respondent asserts that Paul, who had been working under a last chance agreement, was discharged because:

Mr. Paul committed two violations of company policies leading to his termination. The first involved his violation of company lock out procedures by his failure to remove his locks from equipment before he left work. This is a clear violation of written company policy. The second, and far more significant, violation of company policy, which occurred the day after the first violation by Mr. Paul, involved his breaking radio silence, again in violation of company policy, during a mine emergency (Emphasis added). (Respondent's Prehearing Br. at p.2)

Although the prehearing information and the testimony adduced at trial reveals the respondent relied heavily on Paul's November 3, 1994, breaking of radio silence as a basis for his termination, Newmont relies upon an alternative defense. Namely, Newmont argues, even if Paul's November 3, 1994, radio communication was protected, Paul would have been terminated regardless of his use of the radio because of his failure to follow lock out procedures before leaving mine property on November 2, 1994.

For the reasons discussed below, the evidence reflects Paul's November 3, 1994, radio communication was protected activity that significantly and substantially motivated the adverse action complained of. Consequently, Lance Paul's discrimination complaint shall be granted.

Preliminary Findings Of Fact

The respondent, Newmont Gold Company, operates a refractory ore treatment plant located approximately six miles north of Carlin and 25 miles east of Elko, Nevada. (Tr. 130). The plant separates iron from iron ore and produced approximately 1.7 million ounces of gold in 1994. (Tr. 204).

Lance Paul was employed by Newmont as a laborer, utility man and mill operator since 1988 until his discharge on November 10, 1994. From August 1994 until his termination, Paul served as the Chief Union Steward for Operating Engineers Local 3. During his tenure as Chief Steward, Paul was involved in safety-related activities serving on the safety and health, and grievance committees. The company/union contract specifies that safety is everyone's responsibility. (Tr. 308-09).

On October 6, 1992, Paul was disciplined after he was overheard complaining to a fellow employee that there were too many "scabs" (non-union members) working in the mill department. Paul was suspended without pay for five days as a result of his conduct.

Shortly thereafter, on or about November 15, 1992, Paul was found "loafing" in a janitorial closet during his work shift. Paul alleged he had sat down to rest after he had gone into the closet to get supplies. Newmont alleged Paul was sleeping on the job. Paul admitted on cross-examination that the door of the closet was closed and the lights were out. (Tr. 98-99).

Newmont was contemplating terminating Paul as a result of the October 1992 "scab" and November 1992 "resting" incidents. However, the union intervened on Paul's behalf. The company agreed to place Paul under the terms of a "Last Chance" Agreement on November 25, 1992. Under this agreement, Paul acknowledged that his violation of any Company rules or regulations during the next 24 months "may subject [him] to immediate discharge." (Ex. R-1, p.1).

The Last Chance Agreement remained in effect despite an October 15, 1993, settlement of a union grievance proceeding that resulted in the repayment of Paul's wages for his October 1992 five day suspension and the removal of the "scab" incident disciplinary action from Paul's records. (Ex. R-1, p.2). During the period November 25, 1992, when the Last Chance Agreement was executed, until November 1, 1994, Paul had no intervening disciplinary problems. (Tr. 319).

The November 2, 1994 Failure to Remove Locks

On November 1, 1994, at approximately 7:30 p.m., shift foreman Peter Pacini telephoned Paul at home to request that he come to the plant on his day off to clean the nozzle in the preheater vessel on the roaster circuit because the preheater was buried in iron ore. (Tr. 205). Paul arrived at the plant at approximately 9:00 p.m., whereupon Pacini issued Paul six padlocks to lock out breakers and valves to ensure the equipment remained stationary while Paul serviced the roaster.

Paul stated he worked on the equipment from 9:00 p.m. on November 1 until approximately 3:00 a.m. on November 2, 1994. Paul stated he was tired and had not slept all day. Paul testified that he then showered and left the plant at approximately 3:30 a.m., forgetting to remove the locks from the breakers and valves used to access the equipment. (Tr. 50-56).

Pacini admitted Paul told him that he was very tired. However, Pacini estimated that Paul completed his work at approximately midnight. Pacini testified that he reminded Paul to remove his locks before he left the plant. (Tr. 206). However, Paul did not remember being specifically reminded. (Tr. 107-08). The evidence does not reflect, and Newmont does not allege, that Paul's failure to remove the locks was intentional. In fact, Newmont's Manager of Employee Relations, Cindy Rider, testified she attributed Paul's failure to remove his locks to negligence, rather than an intentional act. (Tr. 316-17). Moreover, it is not uncommon for personnel to forget to remove locks. (Tr. 154-60; Exs. C9-C18). Generally, a verbal warning is the only discipline imposed for failure to remove locks as a first offense. (Tr. 160, 229-30, 334-35).

Later that same morning on November 2, 1994, at approximately 5:30 a.m., Pacini phoned Paul at home. Pacini advised Paul that, although Newmont wanted to energize the roaster, Paul had forgotten to remove his locks. Pacini testified, "I said to him he could come out and remove his locks or seeing as how he was home, we could remove them for him, according to our procedure." (Tr. 207). Paul told Pacini to go ahead and remove the locks. Paul testified that he did not refuse to return to the plant and that he was not ordered by

Pacini to return. (Tr. 108-09). Significantly, Pacini was specifically asked to clarify this issue:

Q. Mr. Pacini, did you ever, during the course of your conversation with Mr. Paul at home, did you order or require him to come back to work to remove the locks?

A. No. I just said that he could come out and remove them or I could remove them.¹ (Tr.209).

The November 3, 1994, Breaking of Radio Silence

Paul had the day off and did not report to work for the evening shift on November 2, 1994. The plant operates on two 12 hour shifts from 7:30 a.m until 7:30 p.m., and, from 7:30 p.m. until 7:30 a.m. The day shift foreman on November 3, 1994, was Tony Gunder. Gunder was scheduled to be relieved on that day at 7:30 p.m. by evening shift foreman Ronald D. Wooden (R.D.), at which time Wooden's crew would replace Gunder's crew.

On November 3, 1994, at approximately 6:20 p.m., prior to Wooden's arrival, a fire broke out at the gas cleaning area of the Electostatic Percipitator which is made of plastic, fiberglass and lead. (Tr. 202-03, 253, 242-43, 246). This area contains toxic chemicals, including mercuric chloride and other mercury compounds. (Tr. 209). There was a concern regarding the hazards of smoke inhalation. (Tr. 185-89, 194-95, 209, 228, 297-98, See Ex. C-3). At 6:40 p.m., Gunder sounded the evacuation horn for the purpose of evacuating all contractor personnel not engaged in fighting the fire. (Tr. 253). Gunder ordered his crew to man fire hoses until company fire fighters and fire

¹ Pacini's demeanor at the time of this testimony was revealing. Based on my observations, Pacini appeared to experience an anxiety attack. His face became flushed, he began coughing uncontrollably, and he had difficulty breathing. As discussed infra, the absence of insubordination in this lockout incident is damaging to the respondent's case. The evidence reflects the "insubordination" referenced as a factor in Paul's termination relates to his breaking of radio silence which was safety related activity protected by section 105(c) of the Mine Act. (See Exs. C-2, R-10).

fighters from outside agencies could arrive. The Nevada Division of Forestry and the Elko and Carlin Fire Departments ultimately were called because the fire was out of control. (Tr. 191, 246).

Wooden arrived at the plant at 7:10 p.m., approximately 40 minutes after the fire had begun. Upon arriving, Wooden observed the smoke from the fire. Wooden reported to the control room and then proceeded to locate Gunder. Wooden and Gunder discussed the evening shift relieving the day shift at the fire. (Tr.242).

Wooden gathered his crew in the break room (lunchroom) at approximately 7:15 p.m. With the exception of Lance Paul, who had not yet arrived at work, and Michelle Berry, who was untrained in fighting fires, Wooden instructed the crew to put on Goretex acid suits and to go down to relieve Gunder's crew until help could arrive. (Tr. 274). Wooden told Berry to remain in the break room until he notified her to leave. (Tr. 276-77).

Although most of the evening crew routinely arrived at the plant on a company bus from Elko 15 minutes early at 7:15 p.m., it was Paul's practice to take a later bus which arrived at the plant shortly before 7:30 p.m. (Tr. 57). Paul saw black smoke rising from the fire as he arrived at the plant a few minutes before 7:30 p.m. Paul went to relieve day shift mill operator Joe Best. Best gave Paul his radio. Best informed Paul that he thought everyone was evacuated, but that he could not hear the evacuation horn over the noise from the mill. Paul took some pressure readings at the mill and then proceeded to bring his lunch box to the lunchroom. Berry was the only person in the lunchroom. Berry and Paul spoke briefly and then Paul went up to the control room where Ed Durazo directed Paul to put on his acid gear and fight the fire. As a mill operator, Paul did not have acid gear. Therefore, Durazo gave Paul keys to lockers containing the Goretex suits.

Shortly before 7:50 p.m., Wooden instructed his crew to go up to the "meeting area" at the west side of the plant because the fire fighters were arriving. (Tr. 279). While Paul was in the locker looking for the appropriate gear, he heard Wooden on the radio attempting to find out if Paul had arrived. Paul responded on the radio that he had arrived. Newmont does not

allege that this radio transmission violated company policy. Wooden requested Paul to meet him by the caustic scrubber.

Paul and Wooden met at the scrubber at about 7:50 p.m. (Tr. 282-83). As Paul approached, Wooden instructed him to join the others up on the hill at the evacuation point. Paul testified that he asked Wooden why no one told him they evacuated, to which Wooden replied, "just go." (Tr. 65). Wooden testified that Paul asked him if they had evacuated to which he replied, "no." (Tr. 279). Wooden then hurriedly returned to the gas cleaning area in the vicinity of the fire. (Tr. 243, 283).

Paul reported to the evacuation area. He remembered seeing Berry in the lunchroom and he noticed she was not with the others on the hill. Paul testified:

As soon as I seen (sic) that she wasn't there, it clicked in my head where she was and what her circumstances were. She didn't know anything. She didn't have a radio. I called the control room. I got on the radio and I called the control room. This was like two or three minutes after I talked to R.D. (Wooden), and he told me to go up there.

I got on the radio and I called the control room, and I said, 'Mickey (Berry) is in the lunchroom, and she doesn't have a radio. Would you please call her (on the telephone) and let her know that we've evacuated.' (Tr.70-71).

Paul testified he communicated with the control room about evacuating Berry rather than Wooden because: the control room had direct contact with Berry via the telephone; it was the quickest method of accomplishing her evacuation without unduly causing radio interference; and Wooden was apparently preoccupied with directing the fire efforts in that he had hurriedly returned to the fire area after their meeting at the caustic scrubber only minutes before. (Tr. 95-96). Paul's testimony is supported by Wooden who stated, he was in a hurry when he left the caustic scrubber "because I was trying to help coordinate the fire fighting efforts." (Tr. 297).

Paul's radio transmission with Ed Durazo in the control room occurred at approximately 7:50 p.m. (Tr. 283). Durazo is a supervisor that reports to Wooden. (Tr. 216, 288-89).

Wooden, who overheard Paul's communication, testified that the entire transmission was between five and ten seconds. (Tr. 299). Durazo telephoned Berry in the lunchroom and told her to report to the evacuation area. (Tr. 31-32). Berry arrived at the evacuation point a few minutes later. (Tr. 71).

Wooden was standing with Gunder directing the fire fighting efforts when he overheard Paul's communication at 7:50 p.m. Wooden testified that he immediately "got on the radio and confirmed that we had not evacuated and informed Lance I knew where my people were and to maintain radio silence unless authorized." (Tr. 283). Paul testified, "[a]s soon as I got off the radio, R.D. came on and said he was the boss and there was no evacuation and that -- I don't remember how he said it, but my ears burned a little bit." (Tr. 71, 75-76). Regardless of the exact words used by Wooden, it is undisputed that Wooden was extremely upset. (Tr. 146).

At approximately 9:00 p.m. Wooden confronted Paul over the evacuation of Berry. Paul testified:

... he was walking into me and he was shaking his finger on to my chest and in my face. He was shouting at me so that his spittle was on my cheek. He was telling me that I was out of line. He was chewing me again for making the radio call to evacuate Michelle Berry. The first time he did it was on the radio right after I had done it. He was leaning on me so heavy I couldn't even walk, he was edging me over. (Tr. 79).

Paul's account of Wooden's behavior in this incident was corroborated by employees Michelle Berry, Lidia Peasnall and Chad Rooney. (Tr. 23, 143-44, 153; Exs. C-5, C-6, C-7).

With the exception of fire fighters, the entire plant was evacuated from approximately 9:00 p.m. until the fire was brought under control at approximately 10:30 p.m. (Tr. 73-74, 193-95). The fire was controlled with an application of foam by the Elko Fire Department. Everyone returned to the plant at approximately 10:30 p.m. (Tr. 193).

Paul was having lunch in the lunchroom at approximately 4:30 a.m. whereupon he met Wooden, and, another argument over Berry's evacuation ensued. At trial, Newmont stipulated that Wooden was upset over Paul's breaking of radio silence and that Wooden engaged in three heated discussions with Paul in which Wooden expressed his displeasure. (Tr. 145-51). Wooden testified he believed Paul's communications to the control room constituted insubordination. (Tr. 293-95).

Paul worked until 7:30 a.m. and was scheduled to return to work at 7:30 p.m. on November 4, 1994. At 5:00 p.m., before leaving for work, Paul called Jim Mullins, Newmont's General Superintendent, to allege that he had been assaulted by Wooden over the Berry incident. (Tr. 147, 346).

Upon arriving for work at 7:20 p.m. on November 4, 1994, Paul was informed by Wooden that he had been suspended pending an investigation and that there would be no further discussion. (Tr. 84). Wooden gave Paul a "Notice of Disciplinary Action" reflecting a written warning for Paul's failure to remove locks on November 2, 1994. (Ex. R-2).

A meeting with the union concerning Paul's employment status was conducted on November 10, 1994, at which time Paul was terminated. The meeting was attended by Cindy Rider, Manager of Employee Relations, Trent Temple, Area Operations Superintendent, Union Representative Siemon Ostrander, Wooden and Paul. Paul testified that, "Cindy told me the reason was insubordination for breaking radio silence and directing the work force and that was a violation of my Last Chance Agreement that I had signed almost two years earlier." (Tr. 86). Paul further stated that he was surprised because he thought the subject of the meeting was his failure to remove the locks on November 2, 1994. (Tr. 86). Paul was given a "Personnel Transaction Notice" signed by Wooden and Temple on November 10, 1994, reflecting that Paul's last day of work was November 3, 1994, and that the reason for termination was "Insubordination/Violation of Last Chance Agreement." (Ex. C-2).

Paul's discharge is the subject of a pending grievance proceeding. (Tr. 87). In a letter to union representative Ostrander, dated December 6, 1994, Tom Enos, Newmont's General Superintendent, summarized the company's position:

After gaining your input, I have taken the time to again review the issues surrounding Mr. Paul's termination and find the following facts:

Mr. Paul was on a Last Chance Agreement, signed by all parties, (himself, the Company and the Union), and this agreement clearly outlines that he may be subject to "immediate" discharge if he "fails to uphold his responsibilities as an employee of Newmont Gold Company or violates any company rules or regulations."

Mr. Paul violated the lockout rule when he did not remove his locks on 11/2/94, a rule which is well known. Failure to remove locks affects production as equipment cannot be put into operation until all locks are removed and accounted for. This violation in itself is a basis to terminate his employment as outlined in the Last Chance Agreement which is why General Foreman Gonzales had him suspended to look into the violation of his Last Chance Agreement.

In the third grievance meeting, Mr. Paul acknowledged that he was aware he should not break radio silence during an emergency and in spite of this, he broke radio silence and attempted to direct the workforce on the night of the fire, 11/3/94. He had just been in the Lunch Room area, which is right below the Control Room, and he knew it was well out of the fire area. There was no reason for him to assume Ms. Berry was in danger or that he should assume the responsibility of directing the work force. Further, he made no attempt to check with his foreman to ascertain any facts or information prior to breaking radio silence and directing the Control Room Operators to remove her from the building. Again, Mr. Paul did not uphold company rules and regulations; in fact, his conduct was insubordinate, and also basis for discharge from employment as outlined in the Last Chance Agreement.

As far as Mr. Paul's allegations of physically abusive treatment by Mr. Wooden, there are obviously two different versions of the incident; however, I do not find that Mr. Paul is more believable than Mr. Wooden. In fact, were he the subject of abusive treatment or "assault," it is incredible that he would not have immediately contacted company management to complain the night of November 3rd.

I find that the termination was proper in light of the circumstances. Accordingly, it is my decision to deny this grievance. (Emphasis added). (Ex. R-10).

Although Cindy Rider attempted to characterize Paul's failure to remove his locks, which Rider admitted was inadvertent, as insubordination, it is clear that the "insubordination" referred to in the November 10, 1994, Personnel Transaction Notice was directed at the November 3, 1994, breaking of radio silence. (Tr. 293-94, 315-16). This notice served as the basis for Paul's November 10, 1994, discharge. (Ex C-2).

Disposition of Issues

Discriminatory Discharge

Paul, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Paul must establish that his expressed concerns about the safety of Ms. Berry constituted protected activity, and, that the adverse action complained of, in this case his November 10, 1994, discharge, was motivated in some part by that protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d. Cir., 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

Newmont may rebut a *prima facie* case presented by Paul by demonstrating either that Paul's November 3, 1994, radio transmissions did not constitute protected activity, or that Paul's November 10, 1994, discharge was not motivated in any part

by protected activity. Robinette, 3 FMSHRC at 818 n.20. If Newmont fails to rebut, Newmont may also affirmatively defend against Paul's *prima facie* case by establishing that (1) it was also motivated by Paul's unprotected activity (Paul's failure to remove his locks), and (2) that it would have discharged Paul anyway for his unprotected activity alone. See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); 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). Newmont bears the burden of proving an affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935, 1937 (November 1982). However, the ultimate burden of proof remains with Paul as the complainant in this proceeding. Robinette, 3 FMSHRC at 817-18.

Protected Activity

It is axiomatic that miners have an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. Secretary of Labor ex rel. 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 (3d Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). This statutory right is afforded to miners who bring to the attention of mine management conditions or circumstances that pose hazards to fellow employees as well as to themselves. See Secretary on behalf of Cameron v. Consolidation Coal Company, 7 FMSHRC 319 (March 1985). A miner's right to voice safety related complaints is so fundamental that the Mine Act even protects complaints about conditions that do not pose an immediate hazard as long as the complaint does not involve a work refusal. Secretary o.b.o. Ronny Boswell v. National Cement Company, 16 FMSHRC 1595, 1599 (August 1994).

Communication of potential health or safety hazards, and responses thereto, are the means by which the Act's purposes are achieved. Once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived

danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985).

Although an operator is under no obligation to agree with a miner's concerns, an operator must address a miner's concern in a way that reasonably quells the miner's fears. Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989). A miner's willingness to express safety and health related complaints should be encouraged rather than inhibited. Such protected complaints may not be the motivation for adverse action against the complainant by mine management personnel.

In the instant case, Durazo, serving in a supervisory capacity, could have responded to Paul's concerns in a variety of ways that would not violate the anti-discrimination provisions of the Mine Act. At Paul's suggestion, he could have evacuated Berry from the lunchroom; he could have considered Paul's suggestion and concluded Berry was in no danger; or, he could have consulted with Wooden over the wisdom of Berry remaining alone in the lunchroom. However, it is obvious that, if Paul's termination was influenced by his safety related communication with Durazo, his discharge cannot be sanctioned by the Mine Act.

Paul's Prima Facie Case

At the outset, I wish to dispose of the issues of whether Berry was in actual jeopardy, and the nature of the plant conditions during the fire. First, Berry testified that, although she did not know what was happening outside, she did not feel she was in any jeopardy during the period she was in the lunchroom. (Tr. 33). Wooden also testified he believed Berry was in no danger. (Tr. 280). Consequently, the record reflects Berry was in no immediate danger prior to her 7:50 p.m. departure from the lunchroom. However, as noted above, the relevant question is not whether Berry was actually in danger, but, rather, whether Paul had a reasonable, good faith belief that Berry's continued presence in the lunchroom was hazardous.

With respect to the fire, it is clear that the November 3, 1994, ROTP fire was a major event. It was a chemical fire that took approximately four hours to bring under control. There were significant smoke inhalation dangers created by the fire. Even Wooden admitted the fire was of significant magnitude and that the fire conditions were getting progressively worse. (Tr. 295-96).

The fire was the subject of a November 4, 1994, Freepress newspaper article that reported there were three injuries to fire fighters and that seven Newmont employees were checked for smoke inhalation. (Ex. C-3). I reject Newmont's characterization of this newspaper account as "sensationalism," and the testimony provides no basis for trivializing this event. (Tr. 133).

In addition to the gravity of the fire, the evidence reflects the events of November 3, 1994, were chaotic. In this regard, truck mechanic Paul McKenzie testified concerning wind changes increasing the smoke inhalation hazards, a shortage of foam to fight the fire, and general evacuation orders. (Tr. 184-95). Gunder's sounding of the evacuation horn at 6:50 p.m., which was only intended for contractors, but which signaled a general evacuation, was also confusing. Finally, Wooden's directions that his crew go to the "meeting area," which is also the evacuation point, provided mixed signals, particularly in view of Gunder's earlier evacuation horn signal. (Tr. 279). It is in this setting that the reasonableness of Paul's concerns for the safety of Berry must be evaluated.

In addressing the reasonableness of Paul's concerns for Berry's well-being, I find myself in the uncomfortable position of explaining the obvious. Ms. Berry was isolated in a room during a fire, while her fellow employees were ordered to stay out of harm's way outside at the evacuation point. The lunchroom is located in the middle of the plant, approximately 100 yards away from the location of the fire at the east end of the plant. (Tr. 363). The evacuation point was located at the farthest west end of the plant, a distance of approximately 220 yards from the fire. (Tr. 365; See photograph of plant in Ex. R-11). Thus, the "meeting area" employees were outside at a designated evacuation point, in the company of each other, and twice as far away from the fire as Berry.

In addition, Berry did not have a radio to monitor what was happening. Her only contact with the outside was via a telephone to the control room which would be of little use if she were overcome by smoke. Moreover, if conditions deteriorated and control tower personnel suddenly evacuated, it is conceivable that they might forget to evacuate Berry, the only member of Wooden's crew that had not been evacuated.

Simply put, when Wooden decided to remove his crew from the vicinity of the fire, he did not elect to send them back to the lunchroom for safety. On the contrary, he sent them to the evacuation point. I see nothing unreasonable about Paul's desire for Berry to join her peers. Likewise, General Foreman Gonzales and Foreman Gunder also testified they believed Paul's concerns about Berry were reasonable. (Tr. 233-36, 255). In fact, Paul's concern was commendable and, not surprisingly, greatly appreciated by Berry. (Tr. 33-34). Thus, Mr. Paul's expression of concern for Ms. Berry was indeed protected activity. It follows that Paul has made a *prime facie* showing that his discharge for "insubordination" was motivated, at least in part, by his protected activity.

Newmont's Defense

a. No Protected Activity Occurred

As noted above, Newmont may rebut Paul's case by showing that no protected activity occurred. In this regard, Newmont argues that Paul's radio communication was not protected because it violated the company's policy against breaking radio silence in an emergency. As a threshold matter, application of a company policy that prohibits protected activity is preempted by the Mine Act and does not provide a defense to discriminatory conduct.

Furthermore, although this Commission's function is not to pass on the wisdom or fairness of an asserted justification for a particular business decision, the Commission must determine if such justifications are credible. Bradley v. Belva, 4 FMSHRC 982, 993 (June 1982). Here, it is obvious that Newmont's claim that Paul violated its emergency radio use policy is a pretense. The purpose of the policy is to prevent unnecessary communications and radio interference during an emergency so that lines of communication remain open. With respect to the need to

maintain a clear channel, Wooden admitted Paul's communication was less than ten seconds in duration. (Tr. 299). Although Newmont would not tolerate Paul's brief radio use, Wooden demonstrated no reluctance to clutter the frequency when he admonished Paul over the radio.

With respect to permissible radio use, even Cindy Rider and Wooden admitted employees are authorized to use the radio to assist others who are in danger in an emergency. (Tr. 300, 320-22). In short, Paul's transmission was brief and it was necessary. Newmont has no good faith basis for asserting Paul's action violated company policy.

Newmont also argues Paul's communication to the control room was not protected because Paul was not authorized to direct the evacuation of company personnel. Newmont's argument misses the point. Paul did not evacuate Berry. Even Wooden admitted it was supervisor Durazo, not Paul, who directed Berry out of the lunchroom. (Tr. 288-90). Moreover, General Foreman Gonzales conceded it was the decision of Durazo, rather than Paul, to remove Berry. (Tr. 235). Cognizant of the significance of management's role in evacuating Berry, Newmont, in its Post Hearing Brief, in a notable understatement, characterizes Durazo's "management" role in these circumstances as "problematic." (Resp. Br. at p.9). I view Durazo's management role as dispositive.

While Wooden adamantly maintains that Paul should have first called him on the radio,² I credit Paul's testimony that calling the control room was the most efficient and quickest means of expressing his concerns for Berry. (Tr. 95-96). After all, only the control room had direct contact with Berry via telephone.³

² To highlight the absurdity of Newmont's position, perhaps Newmont would argue that Paul should have repeatedly traversed the plant in search of Wooden, thus avoiding "breaking radio silence," while Berry all the while remained in the lunchroom.

³ Radio use during this emergency would be greater if Paul first called Wooden, as Wooden had no direct means of contact with Berry. Thus, Wooden would have had to use the radio to contact the control room.

Moreover, Wooden testified that he was in a hurry after leaving Paul moments before at the caustic scrubber, "because I was trying to help coordinate the fire fighting efforts." (Tr. 297).

Finally, Newmont maintains that Paul's action placed Wooden in danger in the event he searched for Berry without the benefit of knowing she had been evacuated. This circumstance could have been easily remedied if supervisor Durazo, who was a subordinate of Wooden's, notified Wooden that Berry had been evacuated. (Tr. 289, 319-20). Thus, Newmont has failed to demonstrate that no protected activity occurred, or that Paul committed an egregious violation of company policy that should overshadow Paul's protected activity.

b. Paul's Discharge Was Not Motivated
In Any Part By Protected Activity

Newmont asserts that even if Paul's November 3, 1994, radio communication was protected, his discharge was motivated solely by his November 2, 1994, failure to remove his locks. However, this assertion ignores Newmont's own behavior, personnel actions and representations made during this proceeding.

For example, Wooden was more than a little upset at Paul's suggestion that the control room should evacuate Berry. Wooden characterized Paul's action as insubordination. (Tr. 293-94). As noted above, insubordination was the reason given for Paul's discharge in the November 10, 1994, Personnel Transaction Notice discharging Paul. This insubordination was also given as a "basis for discharge from employment" in Superintendent Enos' December 6, 1994, letter to the union.

Finally, as previously noted, in preparation for this proceeding, Newmont has maintained the breaking of radio silence was a "far more significant violation of company policy" than Paul's inadvertent failure to remove his locks. Thus, the evidence reflects Paul's discharge was motivated in substantial part by his November 3, 1994, protected activity.

c. Paul Would Have Been Discharged
Regardless of his Protected Activity

We now arrive at Newmont's last hope. Even if Paul's discharge was, in part, motivated by protected activity, Newmont can affirmatively defend by maintaining Paul would have been fired solely for his November 2, 1994, failure to remove locks without regard to his protected activity. In this regard, Newmont states that Paul's failure to remove locks occurred three weeks prior to the 24 month expiration of his Last Chance Agreement and violated that agreement.

As a preliminary matter, Newmont's actions are inconsistent with its position in this matter. Although Paul's November 2, 1994, failure to remove locks was given as the reason for his suspension on November 4, 1994, he was permitted to work on November 3, 1994, without being informed of any disciplinary action. It was only after he engaged in protected activity on November 3, 1994, that he was advised of his suspension. It was also only after his intervening protected activity that he was advised of his termination.

Significantly, the November 4, Notice of Disciplinary Action referencing his failure to remove locks was only designated as a written warning. (Ex. R-2). While General Foreman Richard Gonzales testified that Paul was not timely notified of his termination after the November 2, 1994, lock removal incident because of the fire the following day, the fact remains that Paul was not discharged until after he engaged in protected activity. Newmont has the burden of proving its affirmative defense that Paul would have been discharged for his unprotected activity alone despite his protected activity. Newmont's failure to discharge Paul immediately after this unprotected activity, and prior to his protected activity which Newmont admittedly believed warranted Paul's discharge, is fatal to its affirmative defense.

Reasonable inferences of discriminatory motivation may be drawn when an operator claims to have relied solely on unprotected activity, rather than protected activity, as a basis for discharge. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981) rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983). The progressive disciplinary stages at Newmont are: (1) a verbal warning; (2) a verbal warning

reported in the employee's personnel file; (3) a written warning; (4) suspension; and (5) termination. (Tr 310-11). Paul had no intervening disciplinary problems between the November 25, 1992, execution of his Last Chance Agreement and his November 2, 1994, failure to remove his locks. (Tr. 319). Both Cindy Rider and Richard Gonzales testified that Paul would have received only a verbal warning if his failure to remove his locks had occurred three weeks later, after the November 25, 1994, expiration of his Last Chance Agreement. (Tr. 229-30, 334-35).

Newmont's alleged literal application of the agreement to provide Newmont a "last chance" to terminate Paul after Paul had reported to work on his day off and worked through the early morning hours on November 2, 1994, is pretextual in nature and was not the principal motivation for Paul's discharge. Rather, the record demonstrates Paul's November 3, 1994, protected activity was an essential motivating factor in his November 10, 1994, termination of employment. Consequently, Newmont has failed to rebut or affirmatively defend Paul's *prima facie* case that he was the victim of a discriminatory discharge.

I wish to note that I am mindful of the potential influence Newmont's interest in defending Wooden against Paul's assault accusations had on Newmont's decision to discharge Paul. (Tr. 147; See Ex. R-10). However, the altercation between Wooden and Paul cannot be disassociated from Paul's protected activity and there is no evidence that Paul was the aggressor. The record reflects both Wooden's response to Paul on the day of the fire, as well as Paul's allegations of assault, were overreactions. Unfortunately, these overreactions apparently interfered with Newmont's ability to resolve this personnel matter without violating the protections afforded miners under section 105(c) of the Mine Act.

ORDER

Accordingly, Newmont Gold Company's November 10, 1994, discharge of Lance A. Paul was discriminatorily motivated and in violation of Section 105(c) of the Mine Act.⁴ Consequently, **IT IS ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

(a) stipulating to the position and salary to which Paul should be reinstated at Newmont's refractory ore treatment plant, or, in the alternative, agreeing on economic reinstatement terms (i.e. a lump sum agreed upon payment in lieu of reinstatement);

(b) stipulating to the amount of back pay and interest computed from November 4, 1994, to the present, less deductions for unemployment benefits and earnings from other employment;

(c) stipulating to any other reasonable and related economic losses or litigation costs incurred as a result of Paul's November 10, 1994, discharge.

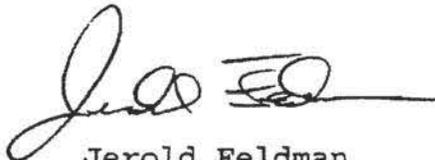
2. If the parties are able to stipulate to the appropriate relief in this matter, they shall file with the judge, within 30 days of the date of this decision, a Proposed Order for Relief. Newmont's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of this decision on liability or relief.

⁴ Pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary is urged to file with this Commission, within 45 days, an appropriate petition for assessment of civil penalty for Newmont Gold Company's violation of section 105(c) of the Mine Act.

3. If the parties are unable to stipulate to the relief, Paul shall file with the judge, and serve on opposing counsel, within 30 days of the date of this decision, a Proposed Order for Relief. Paul's proposed order must be supported by documentation, such as check stubs from his prior and current employment, notices of pertinent unemployment awards, and bills and receipts to support any other losses or expenses claimed.

4. If Paul files a Proposed Order for Relief, the respondent shall have 14 days to reply. If issues on relief are raised, a separate hearing on relief will be scheduled.

5. This decision shall not constitute the judge's final decision in this matter until a final Order for Relief is entered.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 23 1996

BERWIND NATURAL RESOURCES, CORP., : CONTEST PROCEEDINGS
KENTUCKY BERWIND LAND COMPANY, :
KYBER COAL COMPANY, : Docket No. KENT 94-574-R
JESSE BRANCH COAL COMPANY, : through KENT 94-797-R
Contestants : and
v. : KENT 94-862-R
:
SECRETARY OF LABOR : AA & W Coals, Inc.
MINE SAFETY AND HEALTH : Elmo No. 5 Mine
ADMINISTRATION (MSHA), :
Respondent : Mine I.D. No. 15-16856
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-682
Petitioner : A. C. No. 15-16856-03544
v. :
: Docket No. KENT 95-690
BERWIND NATURAL RESOURCES, CORP., : A. C. No. 15-16856-03542
Respondent :
: Docket No. KENT 95-694
: A. C. No. 15-16856-03547
:
: Docket No. KENT 95-698
: A. C. No. 15-16856-03545
:
: Docket No. KENT 95-706
: A. C. No. 15-16856-03548
:
: Docket No. KENT 95-711
: A. C. No. 15-16856-03543
:
: Docket No. KENT 95-716
: A. C. No. 15-16856-03546
:
: Docket No. KENT 95-779
: A. C. NO. 15-16856-03549
:
: AA&W Coals, Inc.
: Elmo No. 5 Mine

SECRETARY OF LABOR,	:	Docket No. KENT 95-681
MINE SAFETY AND HEALTH	:	A. C. No. 15-16856-03544
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 95-691
v.	:	A. C. No. 15-16856-03542
	:	
KENTUCKY BERWIND LAND COMPANY	:	Docket No. KENT 95-695
Respondent	:	A. C. No. 15-16856-03547
	:	
	:	Docket No. KENT 95-700
	:	A. C. No. 15-16856-03545
	:	
	:	Docket No. KENT 95-708
	:	A. C. No. 15-16856-03548
	:	
	:	Docket No. KENT 95-710
	:	A. C. No. 15-16856-03543
	:	
	:	Docket No. KENT 95-714
	:	A. C. No. 15-16856-03546
	:	
	:	Docket No. KENT 95-777
	:	A. C. No. 15-16856-03549
	:	
	:	AA&W Coals, Inc.
	:	Elmo No. 5 Mine
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 95-689
MINE SAFETY AND HEALTH	:	A. C. No. 15-16856-03544
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 95-692
v.	:	A. C. No. 15-16856-03542
	:	
KYBER COAL COMPANY,	:	Docket No. KENT 95-697
Respondent	:	A. C. No. 15-16856-03547
	:	
	:	Docket No. KENT 95-701
	:	A. C. No. 15-16856-03545
	:	
	:	Docket No. KENT 95-707
	:	A. C. No. 15-16856-03548
	:	
	:	Docket No. KENT 95-713
	:	A. C. No. 15-16856-03543
	:	

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.
JESSE BRANCH COAL COMPANY,
Respondent

: Docket No. KENT 95-715
: A. C. No. 15-16856-03546
:
: Docket No. KENT 95-776
: A. C. No. 15-16856-03549
:
: AA&W Coals Inc.
: Elmo No. 5 Mine
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: Docket No. KENT 95-688
: A. C. No. 15-16856-035444
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: Docket No. KENT 95-693
: A. C. No. 15-16856-03542
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: Docket No. KENT 95-696
: A. C. No. 15-16856-03547
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: Docket No. KENT 95-712
: A. C. No. 15-16856-03543
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: Docket No. KENT 95-732
: A. C. No. 15-16856-03546
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: Docket No. KENT 95-778
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:
: AA&W Coals, Inc.
: Elmo No. 5 Mine

PARTIAL DECISION

and
DECISION

Appearances: Marco M. Rajkovich, Esq., Robert Cusick, Esq., Mindy G. Barfield, Wyatt, Tarrant & Combs, Lexington, Kentucky, for Contestants/Respondents; Timothy M. Biddle, Esq., Thomas C. Means, Esq., Edward M. Green, Esq., Crowell & Moring, Washington, D.C., for Contestants/Respondents; Stephen D. Turow, Esq., Mark Malecki, Esq., U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Barbour

These contest and civil proceedings are brought under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act, 30 U.S.C. §§ 815, 820). They involve approximately 225 citations and orders issued for alleged violations of mandatory safety and health standards, and arise out of an explosion that occurred on November 30, 1993, at the Elmo No. 5 Mine of AA&W Coals, Inc. (AA&W). The explosion took the life of one miner.

Following an investigation of the accident, the Secretary's Mine Safety and Health Administration (MSHA) issued the citations and orders to AA&W, Kyber Coal Co. (Kyber), Jesse Branch Coal Company (Jesse Branch), Berwind Land Company and Berwind Natural Resources Corporation (Berwind) (collectively, the Contestants in the contest proceedings and the Respondents in the civil penalty proceedings).¹

AA&W operated the Elmo No. 5 Mine pursuant to a contract with Kyber. Kyber, Jesse Branch and Kentucky Berwind are subsidiaries of Berwind. The Contestants contend they are not operators within the meaning of the Mine Act and therefore that the contested citations and orders were issued invalidly. The Secretary responds that the Contestants are liable jointly and

Subsequently, and upon the unopposed motion of counsel for the Secretary, Kentucky Berwind Land Company (Kentucky Berwind) was substituted for Berwind Land Company in the contest proceedings (Order Substituting Parties (January 20, 1995)).

severally as operators of the mine.² AA&W does not dispute the Secretary's jurisdiction.

The contest proceedings were bifurcated so that the jurisdictional status of Berwind, Kentucky Berwind, Kyber and Jesse Branch could be resolved prior to addressing the individual merits of the cases. Following extensive discovery, the parties filed 302 joint stipulations of fact (JSF) and cross-motions for summary decision. The Secretary's motion was denied. The Contestants' motion was granted in part (Berwind Natural Resources, Corp., 17 FMSHRC 684 (April 1995)).

In ruling on the motions, I outlined the background and relationships of the Contestants:

AA&W

AA&W is a corporation chartered in Kentucky. The corporation is closely held by Jim and Harold Akers, the company's president and vice president. The brothers are the sole shareholders (JSF 3-7). AA&W operates several mines, in which it extracts coal owned and/or leased by others (JSF 10).

In the past, AA&W has operated various mines pursuant to contracts with Kyber and Jesse Branch. The Elmo No. 5 mine was one of those mines (JSF 20). At the Elmo No. 5 mine, AA&W employed approximately 20 miners who produced between 180,000 and 200,000 tons of coal per year (JSF 16, 18).

KYBER

Kyber is a corporation chartered in Kentucky (JSF 22). Its officers consist of a board chairman, president, vice president, vice president of operations, vice president of engineering, treasurer, assistant treasurer, secretary, and controller (JSF 23). Kyber's name is an amalgam of "Kentucky" and "Berwind" (JSF 25).

² The parties raise essentially the same contentions in the civil penalty proceedings.

Kyber leases land and coal reserves from Kentucky Berwind and contracts out the mining of the coal. Kyber owns a preparation plant. Almost all coal mined by Kyber's contractors is blended, sized and washed at the plant. The coal then is sold by Kyber's sales agent, Berwind Coal Sales, Inc., a wholly owned subsidiary of Berwind (JSF 22, 31).

JESSE BRANCH

Jesse Branch is a corporation chartered in Kentucky (JSF 23, 34). Jesse Branch has the same officers as Kyber and the same people serve in the same offices in both corporations, including the mutual president of Jesse Branch and Kyber, Jimmy Walker (JSF 23, 34).

Like Kyber, Jesse Branch leases land and coal reserves from Kentucky Berwind and contracts with others to mine the coal it leases. Jesse Branch also owns a preparation plant, and almost all coal mined by Jesse Branch's contractors is blended, sized and washed at the plant. The coal is then sold (JSF 32-34). Jesse Branch never has extracted coal (JSF 36).

RELATIONSHIP BETWEEN KYBER AND JESSE BRANCH

The companies share a president, Jimmy Walker; a vice president of operations, Steve Looney; a vice president, Randolph Scott; and a controller, Bob Bond. In the past, the companies also have shared the same treasurers and assistant treasurers (JSF 23, 34). Each of these people performs duties on behalf of the two companies and as agreed to between the companies (JSF 39).

The companies share one office (JSF 40). It was at this common office that AA&W obtained its weekly "ticket," listing the amount of coal received by Kyber during the week. AA&W was paid by Kyber based on its production as listed on the "ticket" (JSF 49).

Jesse Branch provided map drafting and surveying services to AA&W. Kyber paid Jesse Branch for the services in a fee based on the tons of coal produced by AA&W (JSF 41).

Occasionally, coal produced at Kyber contract mines is processed at the Jesse Branch preparation plant (JSF 42). Also, occasionally Jesse Branch and Kyber use each others equipment (JSF 48).

Kyber's secretarial tasks sometimes are performed by Jesse Branch's employees. A Jesse Branch employee monitors the amount of coal received by both companies from their contract mines and arranges for its transportation to the companies' preparation plants (JSF 47, 48).

Kyber, Jesse Branch, and the vast majority of other Berwind-related companies, are members of the same employee pension plan. This arrangement is common to many corporate groups (JSF 46).

KENTUCKY BERWIND

Kentucky Berwind is a Kentucky corporation. It is a wholly owned subsidiary of Berwind (JSF 50, 51). Its principal place of business is Charleston, West Virginia, but it maintains an office in Kentucky. Kentucky Berwind owns approximately 90,000 acres of coal reserves in Pike County, Kentucky, some of which is leased to Kyber (JSF 50-53).

The chairman of the board of Kentucky Berwind also is the chairman of the board of Kyber and Jesse Branch. The vice president of Kentucky Berwind is the vice president of Kyber and Jesse Branch. Those serving as treasurer, assistant treasurer, secretary and controller of Kentucky Berwind serve in the same capacities for Kyber and Jesse Branch (JSF 23, 34, 55).

Steve Dale, chief mine inspector and lands manager of Kentucky Berwind, supervises two other company mine inspectors, Richard Belcher and Bryan Belcher (JSF 56, 57).

BERWIND

Berwind is a holding company incorporated in Delaware and located in Philadelphia, Pennsylvania. Berwind is the sole shareholder of Kyber, Jesse Branch and Kentucky Berwind (JSF 58, 63). Berwind's business

as a holding company is to oversee the operations of its subsidiaries. Berwind is involved also in decisions that affect the general direction of business of its subsidiaries, and Berwind, as sole shareholder, has the power unilaterally to replace the officers of its subsidiaries (JSF 64, 66).

C.G. Berwind, Jr. is chairman of the board of Berwind. Thomas Falkie is president of Berwind and chairman of the board of Kyber, Jesse Branch and Kentucky Berwind. Berwind's vice president is also vice president of the three subsidiaries. Berwind's chief financial officers acted in the same capacity for Kyber, Jesse Branch and Kentucky Berwind. Its assistant secretary acted as secretary for the three subsidiaries and its controller acted as controller for Kentucky Berwind (JSF 23, 34, 54, 60).

Berwind's board approved the election of Jimmy Walker as president of Kyber and Jesse Branch. Walker hired Steve Looney as vice president of operations for Kyber and Jesse Branch. Falkie, president of Berwind, was aware of Walker's decision to hire Looney and approved [of it] "in general terms" (JSF 67). Bob Bond, the controller of Kyber and Jesse Branch, also was hired by Walker, and Berwind's board approved (Id.). The president of Kyber and Jesse Branch and the president of Kentucky Berwind report to Berwind's president (Falkie) (JSF 69).

Berwind's three subsidiaries are required to submit financial statements to Berwind. These statements are reviewed by Berwind's vice president and chief financial officer and are used to project Berwind's cash flow (JSF 70-72). The financial officer also receives production reports from Kyber and Jesse Branch to determine whether projected revenues will be met (JSF 73).

Falkie and Richard Rivers, Berwind's vice president, who is also vice president of Kyber, Jesse Branch and Kentucky Berwind, monitor Kentucky Berwind's lease-holding activities and are aware generally of the economic performance, personnel, coal sales and coal quality of Kyber and Jesse Branch (JSF 75). Falkie receives monthly reports from Kyber

and Jesse Branch regarding coal production at each mine in which contract mining is conducted. At times, Falkie also receives daily reports on the amount of coal processed at Kyber's and Jesse Branch's preparation plants (JSF 76, 77). In addition, Berwind's board receives reports from Kyber and Jesse Branch that summarize the production of the subsidiaries' individual contract operators (JSF 78) (17 FMSHRC at 685-689).

I also described the mine, the lease under which Kyber gained the right to mine coal, the contract between Kyber and AA&W, and numerous aspects of the operation of the mine as they related to the Contestants (17 FMSHRC at 689-697).

In delineating Kentucky Berwind's and Berwind's relationship to the mine, I stated:

Kentucky Berwind never funded any of AA&W's mining operations. Neither loans nor advances of money were made by Kentucky Berwind to AA&W or to its officers and directors for operations at the mine. Kentucky Berwind did not pay any debts for AA&W nor did it pay wages, benefits or bonuses to any AA&W employees (JSF 237-241).

Kentucky Berwind did not provide or sell supplies, machinery or tools to the mine. It did not require AA&W to obtain approval for the purchase, lease or use of mining machinery or equipment. It did not own any of the equipment used by AA&W (JSF 242-245).

Kyber annually provided Kentucky Berwind with current mine maps and on a monthly basis provided Kentucky Berwind with reports of the amount of coal mined (JSF 256). Kentucky Berwind received monthly royalties from Kyber for the coal (JSF 257).

Kentucky Berwind had no labor management issues or activities connected with AA&W (JSF 246-248). It did not share directors or officers or offices with AA&W (JSF 249-250). The only Kentucky Berwind employees who worked in the mine were those who quarterly entered the mine, or who entered upon request, to examine the workings in order to insure coal was being recovered

properly and to check seam heights and tonnages to confirm royalties (JSF 252-254).

Steve Dale, Kentucky Berwind's chief mine inspector and manager of lands, was required to protect the surface interests of Kentucky Berwind by preventing unauthorized encroachment on mine property and the theft of timber and other surface property (JSF 258) (17 FMSHRC at 697-698).

* * *

Berwind never provided funding, loans or advances to AA&W. In addition, Berwind never lent money to any of AA&W's officers, directors or employees, or paid any of the company's wages, benefits, bonuses or debts (JSF 259-263).

Berwind did not provide any supplies, materials, machinery, or tools to AA&W for use at the mine. AA&W was not required to obtain Berwind's approval before it obtained machinery or equipment (JSF 264-266).

Berwind had no role in labor management relations connected with AA&W. It did not hire, fire or discipline AA&W employees. It did not supervise or train them. It did not exchange employees with AA&W and it did not share directors, officers or shareholders. Berwind employees did not work underground at the mine (JSF 268-271, 274).

Berwind had no input into the development of the specific contract between Kyber and AA&W. It received no production reports or financial reports from AA&W. It provided no financial analysis or advice to AA&W (JSF 275, 277-278).

Kyber mailed monthly reports to Berwind listing the projected tonnage and the amount of coal actually mined for all Kyber contract mines, including the Elmo No. 5 Mine. The reports contained small maps of areas of contract mines that had been mined (JSF 281). Kyber also delivered monthly financial reports to Berwind specifying the money generated by mining operations involving Kyber's leased reserves (JSF 282).

Berwind reviewed the budgets submitted by its subsidiaries. If the Berwind board approved the budgets, Berwind allocated capital to each subsidiary as necessary to meet the subsidiary's budget. Expenditures by subsidiaries that were beyond those set forth in the budgets were subject to approval by Berwind (JSF 281-283).

Neither Jesse Branch nor Kyber is profitable. Berwind provides funds to them for their operating expenses and capital expenditures. Significant capital expenditures, such as the purchase of coal preparation plants and expenditures for face-up work to open new mines, are approved by Berwind (JSF 284). In this regard, Berwind approved the expenditure of funds by Kyber to do the face-up work to open the Elmo No. 5 Mine (JSF 286).

Kyber is one of 21 coal lessees of Kentucky Berwind in Pike County, Kentucky. Berwind never . . . received a dividend as a shareholder of Kyber. However, Kentucky Berwind pays dividends to Berwind out of its earnings, which are attributable in part to royalties received from its lessees, including those paid by Kyber on coal mined at the Elmo No. 5 Mine (JSF 287-288). Berwind also receives a management fee from its subsidiaries for legal, financial and administrative services (JSF 289) (17 FMSHRC at 698-699).

THE CROSS-MOTIONS FOR SUMMARY DECISION

In ruling on the parties' motions for summary decision, I noted the parties' agreement that AA&W exercised most of the aspects of control and supervision at the mine:

AA&W hired, fired, disciplined, trained, supervised, directed and paid its employees (JSF 132-135). AA&W developed and submitted all of the plans required under the Act and instituted all of the measures necessary to comply with dust and noise sampling programs (JSF 116, 118). For all practical purposes, AA&W furnished and maintained all of the equipment, machinery, tools and materials used in the mine, as well as all of the machinery, equipment and structures for stockpiling coal on the surface (JSF

136-140). AA&W participated in all MSHA inspections and conferences. AA&W decided to contest violations. AA&W decided how to abate violations. AA&W paid the civil penalties assessed for violations (JSF 206-208). Finally, although Kyber could request that AA&W increase production, AA&W ultimately determined whether it would comply with such a request (JSF 105). The debate . . . is whether the Contestants' involvement in what was left was sufficient to make them operators (17 FMSRHC at 706).

After reviewing the evidence of operator status contained in the joint stipulations, I concluded that additional evidence was needed before I could rule regarding the status of Kyber and Kentucky Berwind (17 FMSHRC at 706-710, 712-715). On the other hand, I concluded that the undisputed material facts established that Jesse Branch and Berwind were not "operators" within the meaning of the Act (17 FMSRHC at 710-712, 715-716).

Subsequently, and pursuant to notice, a hearing was convened in Pikeville, Kentucky.

ADDITIONAL STIPULATIONS

At the commencement of the hearing the parties agreed upon eleven additional stipulations:

1. Harold Coleman became the Superintendent of the . . . [mine] in approximately August or September of 1993. During the time that the [m]ine operated prior to that, he was a supervisory electrician there.

2. Prior to the time that . . . Coleman became the Superintendent, he was not responsible for, nor involved in the general operation of the mine.

3. As Superintendent . . . Coleman did not enter the [m]ine on a daily basis.

4. After August 1993, Norman Stump, the mine foreman, occasionally contacted Jim Akers directly to discuss issues relating to mining operations.

5. It was not . . . Coleman's responsibility, even as Superintendent, to assure that mining was conducted pursuant to projections.

6. Coleman saw Jimmy Walker at the [m]ine three or four [times], always on the surface, and doesn't know why he was there. Walker never gave any instructions about how mining should be performed.

7. Coleman saw Steve Looney at the [m]ine five or six times. The only communication Coleman remembers between him[self] and Steve Looney related to AA&W's request to change the direction of mining.

8. Coleman saw Randy Scott at the [m]ine twice. On one of those occasions, Scott was there to get information to determine where the next entry should be driven.

9. As Superintendent, . . . Coleman did not have authority to change the direction of mining without permission from someone from Jesse Branch or Kyber . . . , which . . . Akers would request and communicate back to Coleman.

10. Coleman never discussed with Kyber or Kentucky Berwind . . . where and when to begin pillaring.

11. Maps provided to AA&W by Kyber never showed exactly where pillaring would begin (Tr. 11-12).

THE SECRETARY'S POSITION AT TRIAL

In ruling on the parties' motions, I held that to prove the Contestants were "operators," the Secretary had to establish that directly or indirectly they substantially participated in the day-to-day operations of the mine, or had the authority to do so (17 FMSHRC at 705). At the hearing, Counsel for the Secretary stated that although the Secretary did not agree with this formulation of his burden, the Secretary's evidence would establish that Berwind and Kyber in fact did substantially control or have the authority substantially to control the day-to-day operations of the mine, and thus were "operators" within the meaning of the Act. According to counsel, each of the entities set "numerous mining parameters that had a substantial effect over the day-to-day operation, and took a great deal of subjective control from AA&W, the production operator" (Tr. 28).

Further, the Secretary maintained that the activities of Jesse Branch should be attributed to Kyber and that the

collective activities of Jesse Branch and Kyber should be considered when determining whether Kyber operated the mine (Tr. 28).

Regarding the status of Kentucky Berwind, counsel for the Secretary argued that the company played a role in determining where AA&W was going to mine in that it was occasionally consulted regarding whether or not it was possible to mine an area. Counsel also asserted that Kentucky Berwind had the authority to impose a lost coal penalty on Kyber and that its determination in this regard influenced whether or not AA&W continued mining in a particular direction, or mined elsewhere (Tr. 469-470). In counsel's view, all of this constituted substantial involvement by Kentucky Berwind and amounted to statutory control because it helped to determine where AA&W would mine coal (Tr. 471).

Finally, Counsel maintained that the mine was an "integrated mining operation" and each of the Contestants, together with AA&W were operators of the mine (Tr. 28-29).³

The fact that no prior enforcement action apparently was taken against the Contestants did not, in counsel's opinion, bar the Secretary from enforcing the Act as he believed necessary. In addition, counsel pointed out that the facts regarding the relationships of a contract operator and companies allegedly controlling it are almost exclusively within the knowledge of the contract operator and the companies. Frequently, the Secretary can not know the facts until after an extensive investigation (Tr. 618).

THE CONTESTANTS' POSITION AT TRIAL

Counsel for the Contestants maintained that Kyber and Kentucky Berwind did not control the day-to-day operations of the mine, and had no authority to dictate how the mine was operated. Essentially, Kentucky Berwind's role was that of an auditor "to give notice to Kyber, its lessee, of potential

³ Although I concluded the undisputed material facts to which the parties stipulated established that Jesse Branch and Berwind were not operators, I entertained the Secretary's arguments and testimony with regard to Jesse Branch's and Berwind's status in order to afford the Secretary the opportunity to make his case in full.

areas or situations in which claims by Kentucky Berwind against Kyber for lost coal might be avoided" (Tr. 31, 468-469).

Although Kyber occasionally requested AA&W to work on a Saturday so that Kyber could fill orders for coal, it was AA&W's decision whether or not to work, and in general, AA&W always produced as much coal as it could (Tr. 35-36).

Indeed, all of AA&W's involvement with Kyber and Kentucky Berwind was through arms-length transactions that insured AA&W's independence and its contractual right to control day-to-day mining (Tr. 36).

AA&W had authority over the number of entries, the pillar sizes, the sequence of cuts, the pillar recovery plans, the type of ventilation, the manner of blasting coal at the faces, the size and model of the mine fan, the roof control system plan, the haulage system, the belt types and configurations, the belt drives, the underground electric power distribution system, the fire detection and suppression system, and the equipment used. In other words, AA&W rather than Kyber or Kentucky Berwind had complete control over the day-to-day operations of the mine (Tr. 34-35).

Finally, counsel questioned whether making multiple companies liable as operators for violations of a contract operator -- as the Secretary seeks to do here -- enhances safety. In counsel's opinion, the issue should be resolved through rulemaking, rather than litigation (Tr. 621).

THE TESTIMONY

NORMAN STUMP

Norman Stump, AA&W's mine foreman, was called to testify by the Secretary and by the Contestants. Stump worked at the mine from May 1990, until the date of the explosion, as a laborer, as a section foreman, and, ultimately, as the mine foreman (Tr. 38-39, 135).

Stump stated that Jim Akers was "above [him]," and he initially reported to Akers (Tr. 40). After Harold Coleman became the superintendent of the mine, Stump reported to Coleman (Tr. 40-41).

Stump testified that coal was mined by the conventional method, approximately five days a week, one shift a day (Tr. 42, 121). Saturdays usually were used to perform "dead work," which Stump described as "whatever needed to be done . . . to get ready for Monday" (Tr. 42-43).

There were times when coal was produced on Saturday. "[T]hey'd call from the tibble and either tell Jim [Akers] or Harold [Coleman]. . . that they need[ed] the coal, that they had orders . . . to fill" (Tr.44). (Stump believed the tibble was operated by Kyber (Tr. 45)). When informed that the tibble needed more coal, Stump told the production crew and the crew usually worked on Saturday to mine the coal. There was no established pattern when Saturday production was requested (Tr. 46).

Stump testified that an additional reason to mine coal on Saturday was to make up for lost production. For example, if a holiday occurred in the middle of the week, or if the mine shut down for some other reason during the week, a Saturday production shift might be required (Tr. 132-133). AA&W did not always produce coal when Kyber requested it (Tr. 48-49, 130-131).

Regarding the amount of coal produced, Stump testified that Jim Akers told him the mine had to produce a certain amount of coal a day. Most of the time the mine met the production goal (Tr. 51). However, in 1991, there was a four month period when Kyber was unable to take all of the coal the mine produced. This resulted in the mine cutting back on work days and only producing coal two, three, or four days a week (Tr. 51).

The mine was developed on the basis of projections. Stump explained that projections showed the direction of mining, the entries and headings to be developed, the crosscuts, and, at times, the distance to be mined (Tr. 55-56). The projections also showed the centering to be used as mining progressed (Tr. 56, 60).

Stump was not involved in the development of the projections (Tr. 73). Rather, he directed mining so that it followed the projections. If the projections were changed (as in one instance when the projections were altered to turn the entries to the right, rather than to continue them straight (Tr. 105-106)), he followed the changes (Tr. 106). Stump stated, "[I]f we were projected to go somewhere, we had to follow . . . [the

projections] unless we . . . could show . . . the reason that we couldn't" (Tr. 107).

As the foreman, Stump believed he had discretion to mine as far as he could within the scope of the projections (Tr. 139-140). However, there were times when Stump discontinued mining an entry even though continued development was projected. One reason for "dropping" an entry was poor roof (Tr. 223). There were other times when mining could not be conducted as projected because of low coal or water (Tr. 81). If he wanted to discontinue mining a projected area, he believed that Jim Akers contacted Kyber and that Steve Looney "or somebody" came to the mine to review the situation (Tr. 154). Kentucky Berwind also was consulted about dropping or adding entries (Tr. 155).

However, if Stump wanted to discontinue mining or change direction because of a safety-related reason, he believed he had the authority to do so (Tr. 66-67). In general, he discontinued mining as projected on his own initiative, although he might tell Jim Akers. If conditions improved, he resumed following the projections (Tr. 67-68). Also, if he encountered roof control problems, he had discretion temporarily to change the type of roof bolts he was using. Kyber and Kentucky Berwind had nothing to do with his decisions in this regard, and had nothing to do with the mine's roof control plan or ventilation plan (Tr. 149, 191).

Stump stated that when mining was in progress he carried "a little pocket map," which he understood was obtained from Kyber's engineering department (Tr. 63-64). The pocket map projected mining eight to ten cross cuts ahead of the area being mined (Tr. 64). When Stump wanted to change the direction of mining because of conditions that did not present an immediate safety concern, Kyber personnel had to "come in and do the projections . . . [T]hey'd have to get us a new map with projections on it, and then we'd have to go with the projections" (Tr. 216). Looney was the person who usually came. Although, at times, Walker might come too (Tr. 84). Stump added, "[w]hen you run into bad conditions, you've got to call in somebody and let them look at them . . . [a]nd if they felt the conditions were bad enough to pull off, then they'd let you pull off. If they didn't, you'd have to try to mine as long as they wanted you to mine" (Tr. 224).

Once, when Walker visited the mine, Stump recalled Walker telling Akers to keep mining in the one particular panel

(Tr. 192, 87-88). Stump stated, "He thought we could mine it . . . a little farther" (Tr. 193). Subsequently, mining went ahead and when low coal was encountered Steve Looney was called. He came to the mine and discussed the situation and the decision was made to discontinue mining in the section (Tr. 193). Following that, when mining again came to a halt in the particular area because of roof conditions, Looney came to the mine and agreed the area could not be mined. An instruction was given to change the direction of mining in order to avoid the unmineable area (Tr. 89).

Stump stated that decisions whether areas were to be mined straight ahead or whether they were to be pillared were made by Jim Akers and Kyber. The specifics of how to conduct pillaring (for example, the mining sequence to follow) were made by Coleman and Akers. Kyber and Kentucky Berwind had no input into these decisions (Tr. 181, 184-185). In addition, Stump had authority to decide whether particular pillars could be mined (Tr. 118).

Spad setters came to the mine when requested by AA&W, which was approximately one time a week (Tr. 79; see also Tr. 100-101, 142-143). The only time engineers came to the mine on their own was when they had to "run elevations" (Tr. 142). Stump was not certain about the purpose of the elevation measurements, but he thought they might have been used to indicate how far the area mined was above or below creek level (Tr. 211-212).

Stump recalled one particular area where he thought seven entries could be driven, but "engineering" projected five entries because the area was under a hollow. As a result only five entries were driven (Tr. 71). This involved the same area where mining had been turned to the right (Tr. 145). Stump was asked to whom the term "engineering" referred. He replied, "I don't know whether it was Kyber or Jesse Branch . . . because . . . they're all associated with each other" (Tr. 71). He stated, "[t]hey're both . . . the same company but just different parts of it" (Tr. 72). However, Stump admitted that he knew nothing about the corporate structure and business dealings of the Contestants (Tr. 130).

With regard to persons from Kentucky Berwind who came to the mine, Stump stated that there were three, including Steve Dale, the chief mine inspector and lands manager of Kentucky Berwind. The Kentucky Berwind personnel would "look at a section, and measure the [seam] height and . . . more or less look at the seam

of coal" (Tr. 98). They took a "fast look" and they departed (Tr. 191).

JIM AKERS

Jim Akers, the vice president of AA&W, was also called to testify by the Secretary and by the Contestants. Akers stated that he had been the vice president of AA&W for approximately 15 years (Tr. 226).

Akers agreed with Stump that coal was produced at the mine five days a week, one shift a day, nine hours a shift, and that Saturdays were reserved usually for "dead work" (Tr. 228). Approximately 18 miners worked at the mine when coal was produced and eight worked when "dead work" was performed (Tr. 229).

There were Saturdays when the mine produced coal. Akers stated, "[s]omeone . . . would call and say they needed to run coal on Saturday" (Id.). Akers understood that the coal was needed to fill a order at the tipple (Tr. 230). Usually, the "someone" who called was Steve Looney (Tr. 230). Akers believed that AA&W would comply approximately 80 percent of the time Saturday production was requested by Kyber or Jesse Branch (Tr. 231).

Akers was asked why he mined coal on Saturdays. He explained that AA&W hoped to maintain a good relationship with Kyber and to contract with Kyber to operate another mine (Tr. 235). He stated, "[w]e were there to try to run as much coal as we could, to keep the relationship going, to prove to them that we were a good contractor" (Tr. 233). "[I]f you have an order out there to fill, if you don't fill it, somebody else will, some other company. So it's best from my interest . . . to try to fill that order" (Tr. 291-292).

The contract under which the mine operated specified a minimum production of 5,000 tons of coal a month (Tr. 233). Generally, AA&W met the requirement (Tr. 236). Regardless of the minimum requirement, AA&W wanted to produce as much coal as possible for economic reasons (Tr. 234).

Akers stated that the purpose of projections was to detail the way in which the mine was to be developed for the next

six months to a year (Tr. 241). Akers understood AA&W to be required to mine in accordance with the projections and to the best of his knowledge AA&W did (Tr. 261).

The projections showed mining direction, mining distance, the number of entries and the location of the cross-cuts. Akers could not say that AA&W was "involved" in developing the projections (Tr. 241-243). In Aker's opinion, Jesse Branch was the "person" responsible for projecting the number of sections, entries and headings. Akers stated that AA&W could make requests for changes (Tr. 244-245). Akers recalled a time when AA&W wanted to increase the number of entries but the company was advised that there was too much "cover" to add more entries (Tr. 246). The decision was made by Randy Scott. Akers described Scott as an engineer and an employee of Jesse Branch. He stated that Scott, "knew the conditions . . . knew the structure . . . [and] . . . knew how much cover we had" (Tr. 247). In addition, a Jesse Branch "spad group" set the spads in the mine. AA&W followed the spads (Tr. 248-249).

On the other hand, AA&W developed the mine's ventilation plan and system, and other required plans such as the fire fighting plan, the miner training plan, the smoking articles search plan, and the fan stoppage plan (Tr. 289-290). AA&W was also responsible for developing the mine's haulage system and for maintaining the pre-shift and on-shift examination books (Tr. 290-293). Only Stump and Coleman assigned jobs to the miners (Tr. 293).

Akers testified that when the coal seam got too narrow and AA&W wanted to change the direction of mining in order to more easily extract coal, Akers called Steve Looney or Scott. One or both came to the mine and looked at the condition and, "they [told] me whether I could go that way or not" (Tr. 250). If AA&W requested a change of mining direction based on safety concerns, Kyber and Jesse Branch always agreed (Tr. 284-285). Akers testified, "[i]t's not 'you do this' or 'you do that.' No it's not like that. They listened." (Tr. 285).

Akers recalled one instance when Jesse Branch decided that AA&W should discontinue mining straight ahead, should make a perpendicular turn and should drive under a creek and a hollow. AA&W followed the instructions (Tr. 256). Akers believed the turn was made so that more coal could be mined on the right side of a ridge (Tr. 257).

Akers also consulted Looney when he believed a panel could not be driven any further and it was time to begin retreat mining. The decision was based on the condition of the roof and he and Looney never disagreed (Tr. 263-265). Akers believed that he probably discussed with Randy Scott the method of pillaring that would be used during retreat mining (Tr. 265). AA&W initiated the plans for retreat mining and Jesse Branch drafted them (Tr. 293-294). Stump and Coleman implemented the plans (Tr. 294). For example, the foreman and superintendent decided on the number of cuts to be made in each block of coal (Tr. 295).

According to Akers, there came a time when AA&W wanted to use a continuous mining machine, rather than to mine conventionally, but Walker and Looney did not agree because a continuous miner could not cut the size and quality of coal they needed (Tr. 272).

JACK TISDALE

Jack Tisdale, is a senior MSHA official with a long and distinguished career in the mining industry. He played a major role in selecting the personnel who investigated the accident at the mine. He also provided oversight and advise to the investigation team.

Tisdale described the general nature of the mining process and gave his opinion regarding control of the process. He testified that the person or organization that decides the direction in which a mine is developed controls the mine. Such person or organization has "the authority to require changes in direction to suit whatever needs they have, as opposed to the needs and desires of the contract mine operator" (Tr. 313). (However, later he appeared to modify this view when he agreed that control over the direction of mining would not necessarily indicate control over the day-to-day operation of the mine (Tr. 368-369).)

Tisdale was asked to assume that Kyber had the authority to designate the direction of mining, the minimum production level, the areas to be mined, and the number of entries. He was asked if this would constitute substantial day-to-day control of mining operations. He answered that it would, "[b]ecause Kyber [would control] significant elements of the mining process" (Tr. 329). He explained that in an integrated mining operation, areas of the business such as sales, engineering, finance, purchasing,

operations, human resources and corporate development, are generally headed by a vice-president of the company. If the departments are separate corporate entities, collectively they constitute an operator of the mine. In addition, each entity is an operator in its own right (Tr. 341-342, 348-349, 351).

He maintained that this is different from a land company that engages in leases to various mine operators and has no involvement other than monitoring extraction in order to ensure that it is paid proper royalties. Also, it is different from an engineering consulting firm that provides engineering services to various mines, but has no other involvement or interaction with other controlling groups at the mine (Tr. 351). In his opinion, Kyber, Jesse Branch, Kentucky Berwind and Berwind provided all of the functions of an integrated mining company except one -- that of a contract mine operator (Tr. 331-333).

Tisdale was asked how the activities of Jesse Branch that were contracted for by Kyber advanced the mining process. He responded that Jesse Branch provided engineering services to Kyber (Tr. 335). As for Kentucky Berwind, it filled the role of corporate development and to some extent financed the mining operation (Tr. 336). Jim Akers had the same authority that a mine foreman or a mine superintendent had in an integrated company (Tr. 337).

STEVEN F. LOONEY

Steven F. Looney, vice president of operations for Kyber and Jesse Branch, was called to testify by the Secretary and by the Contestants.

Looney stated that he was the person who represented Kyber if there was an issue that AA&W wanted to raise (Tr. 376-377). Looney explained that there were times when AA&W believed it could not continue to mine economically along a projection because of the diminishing height of the coal seam. When this happened, Looney went to the mine to look at the situation. He stated, "[w]e had a contract with them to mine a particular reserve and . . . if [AA&W] felt that there was an area that's too low for them to economically mine . . . we went out and looked at it. And in 99% of the cases, we didn't have any objection at all from them pulling out of an area" (Tr. 380). However, if Kyber instructed AA&W to continue mining, AA&W either had to comply or had to cease mining for Kyber (Tr. 382). He

summarized, "[i]t's our obligation to . . . get the coal mined as effectively and efficiently as we can" (Tr. 402).

He stated that there also were occasions when Kyber requested that Kentucky Berwind to look at a projected area that AA&W and Kyber agreed AA&W could stop mining. Kyber wanted Kentucky Berwind to confirm that the area was not mineable (Tr. 383). If Kentucky Berwind believed AA&W was abandoning coal, Kentucky Berwind could make a claim against Kyber (Tr. 384). Therefore, when a contract operator, such as AA&W, wanted to change mining direction, Kyber would usually go to the mine to view the area. Looney stated that Kyber needed to monitor the situation to ensure the contract operator mined efficiently and did not just "butcher up [the] reserve block that we're responsible for" (Tr. 403).

Looney testified that Kyber, in consultation with AA&W, determined the number of entries to be used in a particular area of the mine (Tr. 396). Kyber had the right to reject decisions made by AA&W if it believed the decisions would not lead to the efficient extraction of coal (Tr. 396-397).

With regard to retreat mining, Looney recalled an occasion when Jimmy Akers stated that it was no longer economical to continue retreat mining in a particular area. Kyber told Akers to begin mining in another area. Rather than do as Akers requested, AA&W began mining elsewhere (Tr. 387-388). Kyber discussed the decision with Akers and told Akers that AA&W should have mined where Kyber indicated. When Akers stated that the area indicated by Kyber could be mined from a different direction, Kyber did not disagree (Tr. 389-390). Kyber did not advise Kentucky Berwind of this change because Kyber accepted AA&W's explanation, and believed that no coal would be lost (Id.).

According to Looney, Jesse Branch employed Randy Scott and himself as engineers (Tr. 392). One of their jobs was to determine for AA&W the height and nature of the cover above AA&W's mining operations. The cover effected how mining could be conducted. When the cover was especially high, an independent consultant was hired to study how many entries could be mined safely. Scott made the arrangements for the consultant to come to the mine (Tr. 394). The consultant brought to the situation expertise that Jesse Branch's engineers did not have (Tr. 400).

Looney stated that at one time Akers expressed interest in using a continuous mining machine. Kyber did not want coal to be extracted with a continuous machine and Akers dropped the idea. Looney stated that, "Akers was well aware of the fact that we'd made a significant investment in a preparation plant based on the past production of other contractors with conventional equipment and that we were in a unique market for the product produced by conventional equipment" (Tr. 397). Akers "was aware of [it] before he signed the contract" (Tr. 398).

Looney described his main duty as a vice president of Kyber as "obtain[ing] and maintain[ing] contract operators to mine the coal quantity and quality pursuant to the sales orders that [Kyber] may endeavor in" (Tr. 516).

Looney testified concerning his interpretation of provision 4.c. of the Kyber/AA&W contract. The provision required AA&W to mine in accordance with mining plans and projections prepared by Kyber's engineers in consultation with AA&W and approved by Kyber.⁴ He stated that the provision meant, "[t]hat [Kyber] sat down with the contractor that we're ready to sign the contract with, show[ed] him the reserve area, show[ed] him potentially the coal heights . . . [and showed him] where the projections [were] going in order to stay in that high coal" (Tr. 517). It was important to point out the heights because Kyber wanted the contractor to mine the high coal to maximize production (Tr. 517-518). Put another way, when asked about the direction of mining and Kyber's input into it, Looney stated, "[w]e sat down . . . in conference with them and laid out the projections from time to time" (Tr. 520).

Looney maintained that Akers and Randy Scott, the chief engineer for Jesse Branch, had input into the initial projections, and that Kyber approved them once they were

⁴ Paragraph 4.c. states in part that the contract operator will:

Conduct all mining operations . . . in compliance with all mining and safety laws and regulations . . . and . . . in accordance with mining plans and projections proposed by Kyber Coal Company's engineers, such plans and projections to be made in consultation with Contractor and Kyber Coal and approved by Kyber Coal (JSF, Exh. C).

developed (Tr. 521, 541). AA&W might initiate subsequent changes in the projections depending on the seam thickness and on the overburden (Tr. 526-529).

Kyber never ordered AA&W to mine according to the original projections if AA&W insisted that a projected area was unsafe to mine (Tr. 530). However, Kyber usually was notified if AA&W did not mine an area as projected (Tr. 536-537).

Looney was asked if Kyber had any input into the roof control plan, the type of roof bolts, the length of roof bolts, the spacing of roof bolts, the smoking material search plan, the evacuation plan, the coal haulage plan, the electrical plan, the respirable dust control and suppression plan, the pillaring plan, the pillaring cut sequences, the belt line size, the belt motor drive sizing, the location of the belt drive, the ventilation plan, the size of the ventilation fan, and the hiring, firing, training and disciplining of employees. To each of these, he answered, "No" (Tr. 518-520; see also Tr. 524, 529).

Looney also testified about the role of surveyors and spad setters in the mining process. He stated that their job was to keep the on-site operator "in a straight line" so that the "belt lines or entries won't run into each other" (Tr. 524). In the Elmo No. 5 Mine, Jesse Branch's surveyors went into the mine approximately one time a week. In addition to setting spads and recording the location of mining, they measured coal heights in order to record the information on the mine map (Tr. 525). In Looney's view, the surveyors and spad setters had neither the authority nor ability to supervise AA&W employees (Tr. 526).

Looney agreed that at times Kyber asked Akers to produce more coal. When this happened, the mine would operate on Saturdays. There were times when Kyber's request was denied. Looney stated, "I had the authority to ask them to work Saturday's[,] but I did not have the authority to direct them to work Saturdays" (Tr. 534). According to Looney, Kyber's records showed that in 43 months the mine operated on 31 Saturdays. Looney testified that one summer when Kyber had a lot of orders for coal, and one of its other mines was not productive, the Elmo No. 5 Mine produced coal on four Saturdays in a row. The rest of the time, "whether or not they would work or whether or not we would ask them [to work]" was erratic (Tr. 532).

STEVE DALE

Steve Dale, the manager of lands for Kentucky Berwind, was called to testify by the Secretary and by the Contestants. Dale heads a three person staff that examines properties leased by Kentucky Berwind (Tr. 409). Dale is supervised by Robert Hunt, the vice president of Kentucky Berwind. Dale estimated that approximately 20 percent of his time is spent inspecting leased mines. Because the Elmo No. 5 Mine is one of 20 or 25 leases, Dale believed that he spent a very small percentage of his time there (Tr. 439, 441-442).

Dale testified that when he went to a mine to look at an area a contract operator did not want to mine, he could tell the lessee it would not be subject to a lost coal penalty, but he could not tell the lessee such a penalty would be imposed. Hunt made the decision to impose the penalty (Tr. 411). Dale maintained that Kentucky Berwind never formulated mine plans for its lessees and never was consulted about any plans for Elmo No. 5 Mine. In addition, he never saw projections for the Elmo No. 5 Mine (Tr. 443-444).

Dale estimated that he, or one of the other Kentucky Berwind inspectors, was asked by Kyber to come to the mine to observe conditions about four times. Kentucky Berwind's inspectors never disagreed with Kyber about the conditions (Tr. 444-445).

JIMMY WALKER

Jimmy Walker, the president of Kyber and Jesse Branch, was called to testify by the Secretary and the Contestants.

Walker maintained that when he went to the Elmo No. 5 Mine, it was to check the coal seam height. He wanted to assure himself that AA&W "had not quit and wasted any of the assets that we had" (Tr. 451).

Walker also stated that at one time Akers felt that it might become necessary to use a continuous mining machine to extract coal at the mine. He and Akers discussed the problems that the Kyber tipple might have in processing coal from coal mined with such a machine. Coal extracted by a continuous mining machine would include more rock than that mined by conventional methods, which would result in processed coal with a higher ash content than Kyber's coal consumers would want (Tr. 453-455).

According to Walker, Jesse Branch offered surveying services (which included mapping, spad setting and cover analysis) at mines where either Kyber or Jesse Branch engaged contract operators (Tr. 457, 459). Kyber exclusively used Jesse Branch (Tr. 459).

Kyber had three to five employees. They were the superintendents of the preparation plant and the other employees who operated equipment, such as end loaders at the plant. Kyber never extracted coal on a day-to-day basis. Rather, the company's business was to process and to sell coal, mainly in the industrial and metallurgical market (Tr. 475-476).

Jesse Branch also operated a preparation plant. It was a larger facility than Kyber's, but it processed smaller size coal (Tr. 476-477).

The contracts that Kyber entered into with its contract operators were basically the same. The form of the contracts was common in the industry (Tr. 477).

Walker described projections as "lines on a map or piece of paper, which basically designates how an area is being mined or projected to be mined" (Tr. 478). He distinguished projections from a mine plan, in that a mine plan entails the total mining operation, including things such as the roof control plan, the ventilation plan, the number of employees, the type of equipment, the amount of equipment, and the size and number of belts (Tr. 478-479). Essentially, Walker testified that Kyber had nothing to do with the mine plan at the Elmo No. 5 Mine (Tr. 479-480). Walker agreed, however, that any ventilation plan submitted to MSHA by AA&W would have been prepared for AA&W by employees of Jesse Branch (Tr. 497). He also agreed that projections were a part of a total mine plan (Tr. 509).

According to Walker, the initial projections for the Elmo No. 5 Mine were the result of the joint efforts of Kyber and AA&W. The projections showed the number of entries, the entry centers, the entry widths and the direction of the entries (Tr. 481). Once the projections were determined, it was AA&W's job to implement them (Tr. 485). The mine map was prepared by Jesse Branch based on the projections (Tr. 483-484).

Walker described a time when he received a telephone call from Akers regarding a change in mining direction: "[Akers] called to say that they needed to move off the pillar line . . . [a]nd I told him that . . . would be fine. Obviously, if he

needed to, he needed to. But . . . for him to move back to the closest rooms off the mains to the left. And [Akers] said, '[w]ell I'm glad because we've already started'" (Tr. 485). According to Walker, he and Akers discussed how AA&W planned to extract the coal that was not being mined. Akers explained that AA&W would mine it from a different direction (Tr. 485). Kyber agreed. Kyber did not notify Kentucky Berwind because Kyber did not believe there was a potential lost coal claim (Tr. 486).

Walker stated that contract provision 4.c. meant that AA&W and Kyber jointly agreed on the projections. Although the provision referred to "plans and projections," it was only implemented with respect to projections. According to Walker, Kyber, "never, ever looked at any mine plans" (Tr. 487).

In Walker's view, the provision of the contract which stated that AA&W be capable of mining and delivering at least 5,000 tons of coal per month, was included to insure that AA&W had the equipment necessary to produce at least that tonnage of coal (Tr. 505). In fact, AA&W's production averaged much more than the contractual minimum (Tr.491).

Finally, Walker testified that when one of Kyber's customers needed coal on an expedited basis, Kyber might request that AA&W extract coal on Saturday. When AA&W did not respond to Kyber's request, Kyber did not retaliate (Tr. 491-492).

DONALD H. VISH

Donald H. Vish, an attorney practicing law in Kentucky and specializing in legal issues relating to the coal industry, testified on behalf of the Contestants and over the objections of the Secretary. Vish is a former associate solicitor for the U.S. Department of the Interior. In the course of his legal work, Vish developed a model coal lease and a model contract mining agreement. He described the lease between Kentucky Berwind and Kyber as "based on my form . . . published in the American Law of Mining in 1984" (Tr. 563-564). He described the contract under which AA&W mined Kyber's leased coal as "obviously based on some of my ideas" (Tr. 564). Vish was permitted to testify concerning his opinions regarding contract mining in general, and the subject contract and lease in particular (Tr. 565-566).

Vish explained that since the late Nineteenth Century, American coal deposits have almost never been sold. Rather,

they have been transferred by lease. Traditionally, the lease transfers title to the coal and spreads out payment over the period when the coal is extracted (Tr. 574). Vish described the Kyber/Kentucky Berwind lease as "a classic, traditional coal lease . . . negotiated between two parties bargaining at arms length" (Tr. 573). The lease conveyed to the lessee a property interest in coal in place. The property interest was contingent only in the sense that the lessee's interest could be forfeited for breach of condition. He characterized the concept of control over the day-to-day operations of the mine as inimical to the lease (Tr. 574).

Vish described the Kyber/AA&W contract as "very much like the mining contracts . . . in which the coal lessee wishes to engage an independent mining contractor and specify the ultimate objective of that work, leaving the details of that work to the contractor" (Tr. 579). Vish was asked why the contract included a provision like paragraph 4.c. He stated that such a provision was necessary to avoid the contract being viewed as conveying a possessory interest to the contract operator (Tr. 583-584). In addition, the provision was to meet the lease's requirement that the lessee exercise adequate supervision to make certain the lease's terms were not violated. This is to protect the lessor from the legal fiction in Kentucky that if there is a trespass, it is commanded by the lessor (Tr. 583).

In Vish's opinion, the provision reflects the fact that when an entity engages someone to carry out work that is hazardous (such as mining), the entity has the duty to include in the contract adequate provisions for its own involvement in order to protect itself from charges of negligence (Tr. 587-588). In his view, the provision was an attempt to protect Kyber from possible negligence charges, while at the same time preserving the independent contractor relationship (Tr. 602-605).

Vish did not believe that under the contract, Kyber had the authority to control substantially the day-to-day operations of the mine (Tr. 590).

THE LAW

The issue of whether the Contestants are "operators" must be resolved within the context of the statutory definition of that word (30 U.S.C. § 802(d)). To put the matter in its simplest terms, either they meet the definition or they do not. Those that do were properly cited for the contested citations and

orders. Those that do not are entitled to dismissal of the charges against them.

As I have noted previously, analysis of the Contestants' status begins with the words of the statutory definition and the assumption that the Act's drafters carefully chose the words to mean what they say (Order, 17 FMSHRC at 703; see also Southern Minerals, Inc., 17 FMSHRC __, slip op. at 13 (December 13, 1995)). The Act defines an "operator" as "[a]ny owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction work at such mine" (30 U.S.C. § 802(d)). The clause, "who operates, controls, or supervises a coal or other mine," describes and qualifies each noun in the preceding phrase "any owner, lessee, or other person." Thus, the definition requires "owners, lessees or other person[s]" to participate in and/or have authority over the operation, control, or supervision of a mine (see Elliot Coal Mining Company, Inc., v. Director, Office of Workers Compensation, 17 F.3d 616, 629-630 (3d Cir. 1994)). The purpose of the statutory definition is to place responsibility for health and safety upon those entities that create the conditions at the mine or that have actual authority over the conditions on the theory that such responsibility will further compliance. Control may be either direct or indirect, but it must be actual. In other words, an operator must "call the shots" at a mine regarding its day-to-day operation, or have the authority to do so (see Southern Minerals, slip op. at 13 (citing National Industrial Sand Ass'n v. Marshall, 601 F.23d 698, 701 (3d Cir. 1979) ("Designation . . . as operators . . . requires substantial participation in the running of the mine" (emphasis in original)))).

For these reasons, I concluded previously -- and state again here -- that, in order to establish an entity as an "operator" subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of the mine, or had the authority to do so (Berwind, 17 FMSRHC at 705; Southern Minerals, slip op. at 16).

Because the forms of participation and authority vary from entity to entity, the question of whether an entity meets the statutory definition of "operator" must be resolved on a case-by-case basis (17 FMSHRC at 705; Southern Minerals, slip op. at 14).

The Commission's decision in W-P Coal Company, 16 FMSHRC 1407, 1411 (July 1994), provides guidance. There, the Commission gauged a lessee's involvement with its contract operator by looking to specific indicia of operator status -- characteristics such as an entity's involvement in a mine's engineering, financial, production, personnel and safety affairs. Echoing the court's requirement that a cited entity exhibit "substantial participation in the running of the mine" (National Industrial Sand, 601 F.2d at 7801), the Commission determined that the lessee's "substantial" and "considerable" involvement in the operation of the mine warranted the Secretary proceeding against it (16 FMSRHC at 1411, n.3). By implication, the Commission's decision recognized that an entity's involvement in the day-to-day operation of a mine could be so infrequent or minimal, i.e., so insubstantial, inconsiderable, or removed from mining, that operator status would not vest (17 FMSHRC at 705; Southern Minerals, slip op. at 14).

This approach to determining jurisdictional status not only reflects what the Act requires, it has the added virtue of being in harmony with the way the coal industry operates. In the East especially, where contract mining is common, leased coal reserves often are mined not by lessees, but by entities with whom lessees contract. The details of these lessee/contractor relationships may differ. By looking to the specific indicia of operator status to determine whether there is substantial control over the day-to-day operation of the contractor's mine, or whether there is the authority to exercise such control, the differences are accounted for and compliance is fostered.

Those who control day-to-day mining, and/or who have the authority to do so, are those who do or should control the conditions and practices that insure compliance with the Act and the mandatory safety and health regulations promulgated pursuant to it. They should be held responsible when the conditions and practices fall short. (In this regard, the Secretary does not appear to disagree, as witnessed by the statement of his counsel, that the intent of the Act is to hold liable "those who do have the ability to control and supervise, and who actually do control and supervise" (Tr. 61)).

In addition, because I believe the Commission has recognized that an entity's involvement in the day-to-day operation of a mine may be so infrequent, minimal or removed, i.e., so insubstantial, inconsiderable or remote from actual mining, that operator status does not vest, I view the issue as one of the

degree of an entity's control and supervision. A minimal or insubstantial degree of involvement is not sufficient for an entity to be deemed an operator (see Southern Minerals, slip op. at 14-15).

I do not subscribe to the Secretary's theory that multifaceted corporate entities are of necessity statutory operators solely because they together function as a unitary entity performing all of the aspects of mining, from the acquiring of the mineral rights to the extraction and processing of the mining. Parts of the industry have functioned in this way for years and, as far as can be determined from this record, the Secretary never has had a policy of citing all corporate entities involved in the operation of a mine for the production operator's violations (see Tr. 617-619; see also Southern Minerals, slip op. at 15). While this does not stop the Secretary from electing to cite the Contestants for violations allegedly committed by AA&W - - provided those cited are "operators" within the meaning of the Act -- it certainly raises questions about the validity and wisdom of a "unitary" approach to enforcement.

Further, and as I have noted previously, a "unitary entity" theory of operator status may fly in the face of the entities' corporate rights to be treated separately and may be used to extend jurisdiction without a logical limit (see Southern Minerals, slip op. at 15-16).

Therefore, I reiterate that the issue before me is whether the Secretary has established that each of the Contestants either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of the Elmo No. 5 Mine, or had the authority to do so.

THE CONTESTANTS AS OPERATORS

THE STATUS OF BERWIND

Based upon the stipulations and the parties' cross-motions for summary decision, I concluded that the Secretary had not established that Berwind was an "operator" within the meaning of the Act (17 FMSHRC 715-716). Nothing subsequent has caused me to conclude otherwise, and I affirm my prior holding.

Tisdale testified that he considered Berwind to be an operator because it was one of the entities that together provided all of the functions of an integrated mining operation,

with the exception of the actual extraction of coal (Tr. 333). I do not agree, and I reject the position that Berwind is liable solely because it is part of a group that worked together to make possible the operation of the Elmo No. 5 Mine.

Separate corporate entities are entitled to be treated on their own merits provided they function separately, and those acting for them do so in a manner consistent with their distinct nature. Here, Berwind and its officers did just that. The record contains no suggestion that those who acted for Berwind actually were controlling and supervising the Elmo No. 5 Mine, or were attempting to do so. Indeed, Berwind had virtually nothing to do with the day-to-day operations of the mine.

Tisdale believed that Berwind "provided the financial wherewithal so that the operation could continue" (Tr. 336), and it is true that Berwind allocated capital to its subsidiaries to meet their budgets, and that expenditures beyond those in the budgets were subject to Berwind's approval (JSF 281-283). It is also true that Berwind approved the expenditure of funds by Kyber to do face-up work prior to opening the Elmo No. 5 Mine (JSF 286).

However, as I have noted, an entity's activities may be so remote from mining that operator status does not vest. Such is the case here where Berwind's fiscal involvement with the Elmo No. 5 Mine is simply too far removed from the mine's day-to-day operation, to conclude that Berwind used it to play a substantial role in controlling and supervising the day-to-day operation of the mine, or to have the authority to do so. The record simply does not support finding that Berwind met the statutory definition.

For these reasons, and for the reasons I set forth previously, I conclude that Berwind is not an operator of the Elmo No. 5 Mine.

THE STATUS OF KENTUCKY BERWIND

Based upon the stipulations and the parties' arguments, I denied both the Secretary's and the Contestants' motions for summary decision with respect to Kentucky Berwind. While I acknowledged that Kentucky Berwind owned the mineral rights at the mine and leased those rights to Kyber, I rejected the Secretary's assertion that ownership of the mineral rights was necessarily an indication of statutory control of the day-to-day

operation of a mine. I stated that it all depended on what the owner of the mineral rights did with respect to the rights (17 FMSHRC at 712).

I did not find the lease provisions that enumerated Kyber's responsibilities to Kentucky Berwind to indicate that Kentucky Berwind reserved to itself substantial participation in the day-to-day operations of the mine. Rather, I found the provisions to be consistent with those one would expect an owner of mineral rights to insist upon in order to insure its coal was mined efficiently and without waste (17 FMSHRC at 713).

I also rejected the Secretary's contention that the report forms completed by Kentucky Berwind personnel after they were inside the mine were evidence of control. In my view, the information recorded was consistent with Kentucky Berwind's interests as the owner of the mineral rights, and I noted the lack of linkage of the information on the forms to substantial participation by Kentucky Berwind in the day-to-day operations of the mine or to the authority to participate (17 FMSHRC at 713).

What the stipulations did not make clear was the role Kentucky Berwind played when AA&W wanted to deviate from its mining projections. I requested the parties supplement the record in this regard, as well as present evidence concerning whether or not Kentucky Berwind used its role to dictate where and how AA&W would mine (17 FMSHRC at 713-714).

The testimony reveals little more than the stipulations, namely that the Kentucky Berwind employees who entered the mine did so to examine the workings to insure coal was being recovered properly and to check seam heights and tonnages in order to confirm royalties (JSF 252-254). Steve Looney testified that when Kyber called Kentucky Berwind inspectors to the mine it was to confirm that mining could be discontinued along a particular projection without Kyber being held liable for wasting coal reserves, that Kentucky Berwind personnel had to confirm that Kyber was not abandoning a mineable area (Tr. 383-384). Steve Dale, Kentucky Berwind's lands manager, who on occasion went to the mine at Kyber's request, agreed that this was the sole purpose of his visits. He and other Kentucky Berwind employees never disagreed with Kyber and AA&W about the propriety of discontinuing mining in the area in question (Tr. 411, 443-445).

Dale further testified that Kentucky Berwind had no input into the formulation of projections for the mine (Tr. 443-444). Norman Stump testified that Kentucky Berwind had nothing to do with the roof control and ventilation plans under which the mine operated (Tr. 149, 191). Nor did Kentucky Berwind have anything to do with decisions regarding the sequences in which pillars were mined (Tr. 181). Rather, and as Jim Akers confirmed, these decisions were within the province of the foreman (Tr. 295).

Although Tisdale stated that he believed Kentucky Berwind "to some extent" financed the operation at the Elmo No. 5 Mine (Tr. 336), no additional testimony was proffered in this regard and, in fact, the parties stipulated that Kentucky Berwind had no financial dealings with AA&W. Kentucky Berwind never funded any of AA&W's mining operations. Kentucky Berwind never leased money or made advances of money to AA&W or to its officers and directors. Kentucky Berwind did not sell supplies or tools to AA&W or require AA&W to purchase, lease or use any equipment (see 17 FMSRHC at 697 (citing JSF 237-241)).

Finally, I disagree with the Secretary's assertion that Kentucky Berwind could exert substantial control over the direction of mining through its determination whether or not to impose a lost coal penalty (Tr. 469-471). As I stated in denying the parties' motions for summary decision, a lost coal penalty provision is fully consistent with the protection of the owner's property interest in its mineral rights. The provision is not aimed at allowing the owner to control or have the authority to control day-to-day mining. Rather, its purpose is to insure that the owner's mineral is mined to the maximum extent possible. To hold otherwise would be to make Kentucky Berwind (and, I suspect almost all other similarly situated owners of coal rights) liable because it seeks to effectuate those rights (see 17 FMSRHC at 714).

For these reasons, and the reasons I have set forth previously, I conclude Kentucky Berwind is not an operator of the Elmo No. 5 Mine.

THE STATUS OF KYBER

Based on the stipulations and the parties' arguments I denied the parties' motions regarding Kyber. In so doing, I rejected the proposition that contract mining invariably places an entity such as Kyber in the position of being an "operator"

of its contract mine. In my view, the important things to consider were the ways in which the parties actually carried out their contract and related to one another within the indicia of operator status (17 FMSHRC at 706-707).

Looking at the indications of Kyber's control and supervision through its involvement in projections, I found that I could not determine from the stipulated facts whether Kyber used the projections substantially to control day-to-day mining. I indicated that I believed testimony was needed regarding the use of the projections, Kyber's and AA&W's understanding of the impact of the projections on mining, as well as instances in which the projections were changed and the results of such changes on mining (17 FMSHRC at 707).

The witnesses generally agreed that projections for the mine showed things such as the direction of mine development, the number of entries to be developed, the centering to be used for the entries, the position of the cross-cuts and, in some instances, the overall distance to be mined (see Tr. 55-56, 241-243, 481). They agreed further that under the contract AA&W was required to mine in accordance with the projections and that the projections were prepared by Kyber in consultation with AA&W and were approved by Kyber (see SJF Exh. C, Paragraph 4(c); Tr. 107, 396-397).⁵

Walker stated that the projections were mutually agreed to by AA&W and Kyber (Tr. 481-482). This is true, as far as it goes, for Stump and Akers testified that in general AA&W agreed with the projections. However, it is also clear that Kyber had the authority to insist upon the projections it wanted, and that once the projections were approved by Kyber, AA&W could not unilaterally modify them (Tr. 261).

Looney stated that if there was a disagreement between Kyber and AA&W regarding an area that was projected to be mined and Kyber instructed AA&W to mine it, AA&W's choice was either to mine the area or to "leave the mine" (i.e., to cease being the contract operator) (Tr. 402). In fact, Kyber had the right to

⁵ Although Paragraph 4.c. of the contract refers to "plans and projections," the testimony is clear the provision was implemented only with respect to projections. There is no basis for finding Kyber, or any of the other Contestants, had anything to do with mining plans at the Elmo No. 5 Mine.

reject what AA&W wanted if Kyber believed AA&W's proposal or request would not lead to the efficient extraction of coal (Tr. 396-397). Kyber kept ultimate control in order to prevent contractors from inefficiently mining its leased coal reserves. As Looney put it, to prevent contractors from "butcher[ing] up a reserve block [of coal]" (Tr. 403). He added, "[i]t's our obligation to get coal mined as effectively and efficiently as we can" (Tr. 402). The point is that Kyber kept ultimate control.

The effect of this arrangement was that Kyber, not AA&W, had the bottom line authority for determining mining direction, and that AA&W implemented Kyber's directional decisions (see Tr. 295). The Kyber-AA&W relationship was such that AA&W had considerable discretion to deviate from the projections for reasons of safety. Stump testified that he could depart from the projections if he encountered "an emergency" (Tr. 155). Akers essentially agreed that although AA&W had an obligation to consult with Kyber, Kyber never challenged AA&W's opinion that mining should be discontinued because of safety concerns such as poor roof (Tr. 254-255, 258-259, 284-285). Akers' testimony in this regard was supported by Looney (Tr. 530).

However, in situations that did not involve safety concerns -- for example where AA&W believed the coal seam height was too low to permit efficient mining -- Kyber was called to look at the situation and to approve a change in direction or in the type of mining (for example, to approve a change to retreat mining) (Tr. 154, 216, 223, 250, 263-265). Stump added that if Kyber did not conclude the conditions warranted the change, AA&W had to mine along the original projections (see, e.g., Tr. 245). While Looney believed that "99 percent" of the time Kyber agreed to the non-safety related changes AA&W wanted, it is certain that Kyber did not always agree (Tr. 380).

For example, I credit Stump's testimony that in one instance he thought the coal seam in a certain panel was becoming too low to mine, that Walker looked at that panel, that Walker thought it could be mined further and Stump was directed to continue mining (Tr. 192-193). It is equally certain that whether exercised or not, Kyber retained the authority to dictate the particular direction of mining (Tr. 380).⁶

⁶ While I also credit Looney's testimony regarding the instance in which AA&W mined in a direction different than that

I recognize that the owner or lessee of mineral rights has the right to protect its asset and to try to insure the asset is developed to the maximum extent possible consistent with sound safety and environmental practices. Consistent with this right, when the owner or lessee contracts the mining of its mineral, it is permissible for the entity, in conjunction with its contract operator, to project an overall course of mine development. However, once overall projections have been agreed to, the owner or lessee must give leeway to the contractor to act independently within the general constraints of the projections. If it does not afford the contract operator such autonomy, the lessee or mineral right owner may retain control sufficient to make it an operator for Mine Act purposes.

In my view, Kyber's relationship with AA&W illustrates such a situation. Except for conditions relating to safety, AA&W could not change the direction of mining without Kyber's approval. The fact that Kyber frequently agreed with the non-safety related changes AA&W wanted does not alter the fact that Kyber had the authority to forbid the changes or to insist on something else. When it exercised its authority, the choice faced by AA&W was either to mine as Kyber wished or to cease mining -- period (Tr. 402). In dictating the course mining had to take and in having the authority to dictate that course Kyber denied AA&W autonomy of action within the overall constraints of the projections. The owner or lessee of mineral rights can not deny its responsibility for the actions of its contract operator, when the contract operator is not free to choose the course of mining it believes best in this regard.

I recognize Kyber's dilemma. It is a conundrum that was aptly described by Vish. The exercise or reservation of too little control over the contractor may make the owner or lessee liable for negligence and wasting its mineral assets. The exercise or reservation of too much control may make the owner or lessee liable under the Mine Act (Tr. 603-604).

approved by Kyber, I conclude this was a rare exception to the rule. AA&W's exercise of independence was only ratified after Kyber became convinced the coal it believed AA&W missed could be extracted from a different direction (Tr. 387-390, 448, 485).

Balancing these concerns is difficult, but not impossible. In striking the balance, the owner or lessee of the coal must afford its contractor autonomy to change direction and development as the contractor believes best within the general constraints of the projections. Here, it did not, and I conclude that Kyber's active participation and its authority to actively participate in the decision making process regarding the daily development of the mine through the projections made it an "operator" within the meaning of the Act.

In denying the parties' cross-motions for summary decision, I also concluded that the stipulations did not make clear whether Kyber exercised control over the day-to-day operations of the mine with regard to production (17 FMSHRC at 709). Having considered the testimony, I find that Kyber's requests for Saturday work and the provision in the contract requiring AA&W to produce a minimum amount of coal were not indications of Kyber's status as an operator under the Act.

Saturday work was not the rule. I credit Looney's testimony that Kyber's records show that the mine operated on 31 of approximately 162 Saturdays (Tr. 532). I credit Stump's testimony that there were times when AA&W did not produce coal on Saturday, even though Kyber requested it to do so (Tr. 48-49, 130-131), as well as Aker's implication that AA&W turned down Kyber's requests approximately 20 percent of the time (Tr. 231). Complying with Kyber's requests was clearly in AA&W's self interest (Tr. 291-292), and AA&W retained its autonomy to decide whether or not to accede.

Finally, Walker testified persuasively that the contractual production requirement was included in the contract to ensure the contract operator used the equipment necessary to yield the amount specified not to control day-to-day production. In any event, the record establishes that the requirement had no practical effect on daily production in that AA&W produced coal far in excess of the required amount (Tr. 491).

For the reasons set forth above, I conclude that Kyber was an operator of the Elmo No. 5 Mine.

STATUS OF JESSE BRANCH

In granting the Contestants' motion for summary decision, I concluded, based upon the stipulations, that the Secretary had not established Jesse Branch was an operator of the mine. With

respect to Jesse Branch's involvement in engineering, I found no indication that Jesse Branch controlled, or had the authority to control, the day-to-day operations of the mine when it provided surveying and spad setting services to the mine or when it provided map preparation services. I stated:

I do not find the nature of surveying and spad setting to be, ipso facto, an indication of substantial control over the day-to-day operation of the mine. Mines must be developed faithful to their boundaries and projections. To accomplish this, surveying and spad setting is a necessity. Frequently, on-site operators lack in-house capacity for the tasks. Consequently, they contract for the services. There is nothing unusual about such arrangements. There is no indication in the stipulated facts or the record that in providing the services Jesse Branch was acting so as to control the day-to-day operation of the mine, or that it had the authority to exercise such control.

* * * *

Few operators employ workers who have map drafting expertise. Thus, the contracting of map making is common. The stipulated facts indicate the purpose of the maps was compliance with federal regulations. There is no indication in the stipulations or the supporting record that in providing the maps for AA&W Jesse Branch was acting so as to substantially control the day-to-day operation of the mine, or that it had the authority to exercise such control (17 FMSHRC 711-712).

The parties stipulated that Kyber paid Jesse Branch a fee to perform surveying and map drafting for the mine (JSF 149, 151). The maps were certified by Jesse Branch engineer and vice president Randy Scott (JSF 155). The stipulations also confirmed that employees of Jesse Branch did the spad setting at the mine (JSF 160-164).

The testimony reveals that Jesse Branch's engineers did more. They provided AA&W with the technical expertise AA&W lacked. Akers believed Jesse Branch was "responsible" for projecting the sections, entries and headings (Tr. 244-245). However, Aker's testimony confirms that in reality Jesse Branch's responsibility consisted of the engineers advising AA&W when the

cover was too much to sustain the number of entries AA&W wanted to drive or when the cover would allow more or wider entries (Tr. 244-245). As Akers stated, Randy Scott, "knew the conditions . . . knew the situation . . . [and] knew how much cover we had" (Tr. 247). When the question at issue was beyond Jesse Branch's expertise, Jesse Branch, through Scott, called on outside engineers to evaluate the situation (Tr. 394, 400). In addition to section entries and headings, the decision to mine on 40 foot centers was made on the basis of Jesse Branch's assessment of the cover (Tr. 252-253).

Thus, it is clear from the stipulations and the testimony that Jesse Branch participated in drafting and mapping the overall projections and providing AA&W with technical expertise when AA&W had questions regarding the on-site implementation of the projections.⁷ I do not find any indication in the record that Jesse Branch denied AA&W autonomy of decision-making within the confines of the projections or reserved for itself the authority for such decision-making. When it "weighed in" on a question of direction or configuration it was on the basis of expertise AA&W did not have and for which Kyber paid (see for example Tr. 256). Although Akers testified that Jesse Branch dictated the "ultimate direction" in which the mine developed (Tr.254), the specific instances he described to illustrate Jesse Branch's "dictation" involved Jesse Branch's engineers giving opinions based on geological conditions beyond AA&W's knowledge. It would have been just as accurate for Akers to state that the cover, or seam height, or location of an overhead creek dictated the overall direction of the mine. Jesse Branch was the entity that informed AA&W of these determinants.

Tisdale correctly described Jesse Branch as providing engineering services to Kyber (Tr. 335). Through Kyber those services were provided to AA&W. Providing the services did not place Jesse Branch in the position of controlling the day-to-day operation of the mine.

⁷ I discount Aker's testimony that in one instance, Jesse Branch "initiated" turning the entries to the right (Tr. 256). Akers admitted he did not know that conditions at the faces before the turn was made, and Jesse Branch's participation in the turn seems to have been to determine that the cover was not sufficient to permit seven entries after the turn was made and mining progressed under a creek (Tr. 70-71).

For these reasons, and for the reasons I have set forth previously, I conclude Jesse Branch is not an operator of the Elmo No. 5 Mine.

THE CIVIL PENALTY CASES

Subsequent to the docketing of the contest proceedings, the Secretary filed civil penalty proceedings for the violations alleged in the contested citations and orders. The petitions were filed with respect to each of the Contestants (Respondents in the civil penalty cases).

Berwind and Jesse Branch moved to dismiss the civil penalty proceedings on the grounds that they were not operators. They noted that I had ruled in their favor in the cross-motions for summary decision filed in the contest proceedings. Because the status of Kentucky Berwind (Kentucky Berwind Land Company in the civil penalty proceedings) and Kyber was not determined in the order denying the cross-motions, Kentucky Berwind and Kyber moved to stay the civil penalty proceedings relating to them, pending a decision in the contest proceedings.

The Secretary responded that the activities of all of the Respondents constituted control, operation and supervision of the mine and that together they acted in a coordinated fashion to exercise such control, operation or supervision. In other words, the Secretary maintained the Respondents were "operators" within the meaning of the Act. The Secretary also noted that the order denying the cross-motions "did not result in the immediate dismissal" of the Respondents in the civil penalty proceedings.

The merits of the alleged violations aside, it is clear from the pleadings that the parties agree the threshold issue is the status of the Respondents as operators. Obviously, the Secretary lacks jurisdiction to seek the assessment of civil penalties against any of the entities that did not operate, control or supervise the Elmo No. 5 Mine.

The issue now has been tried and decided. I have concluded that Berwind, Kentucky Berwind, and Jesse Branch are not operators within the meaning of the Act and that Kyber is an operator. None of the parties has indicated that it would bring to the civil penalty proceedings evidence or stipulations that would change my conclusions. Certainly, further litigation of the issue would be duplicative and needlessly would tax the parties' and the Commission's resources.

Therefore, and for the reasons set forth above, I again conclude that Berwind, Kentucky Berwind, and Jesse Branch are not operators within the meaning of the Act and that the subject civil penalty proceedings were brought invalidly against them by the Secretary. I also conclude again that Kyber is an operator and that the subject civil penalty proceedings were validly brought against it. The merits of the violations allegedly committed by Kyber remain at issue.

ORDER

The contests of Berwind, Kentucky Berwind and Jesse Branch are **GRANTED** and the contest and civil penalty proceedings are **DISMISSED** with respect to them. Kyber's contests are **DENIED**, as is its motion to stay the civil penalty proceedings.

NOTICE OF HEARING

The parties are advised that barring Commission review of the issue, the contest proceedings and civil penalty proceedings involving Kyber are consolidated and are scheduled to be heard commencing on Tuesday, April 30, 1996, in Pikeville, Kentucky. (The specific hearing site will be designated later.) The matters of law and fact are as stated in the pleadings except that no further argument will be entertained on the status of Kyber as an operator under the Act.

The parties are reminded that any person planning to attend the hearing who requires special accessibility features and/or the use of auxiliary aids (such as sign language interpreters) must request those in advance (see 29 C.F.R. §§ 2706.150(a)(3) and 2706.160(d)).

In preparation for the hearing, the parties are directed to complete the following on or before April 2, 1996: (a) confer on the possibility of settlement and stipulate as to all matters that are not substantial dispute; (b) stipulate the issues and fact and law remaining for the hearing, and, if unable to stipulate the issues, exchange written statements of the issues as contended by the respective parties; (c) exchange lists of exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) stipulate as to those exhibits which may be admitted into evidence without objection, and as to others indicate whether the exhibit is accepted as an authentic document; and (e) exchange witness lists with a synopsis of the testimony expected of each witness.

The parties are directed to file on or before April 16, 1996, prehearing reports stating (a) lists of exhibits and witnesses together with the parties' synopses of expected testimony; (b) stipulations entered into; (c) statements of the issues; and (d) a memorandum of law on any legal issue raised with citations to the principal authorities relied upon.

CERTIFICATION

The Contestants/Respondents remain subject to continuing citation by MSHA at the Elmo No. 5 Mine, and at other mines with which they are involved, on the same theories that the Secretary here has argued. Accordingly, it is **CERTIFIED**, in accordance with Rule 54(b), Fed. R. Civ. P.:

(1) That I have directed the entry of final judgement in the contest proceedings brought by Berwind, Kentucky Berwind and Jesse Branch, and in the civil penalty proceedings brought by the Secretary against Berwind, Kentucky Berwind and Jesse Branch.

(2) That my conclusion Kyber is an operator within the meaning of the Act is final; and

(3) That I have determined there is no just reason for delay.

David F. Barbour

David F. Barbour
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 23, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. YORK 95-71-M
Petitioner	:	A. C. No. 37-00070-05501 TMC
	:	
v.	:	J.H. Lynch & Sons Pit & Mill
WESTERN MASSACHUSETTS	:	
BLASTING CORPORATION,	:	
Respondent	:	

DECISION

Appearances: David Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner;
Richard O. Lessard, Esq., Warren, Rhode Island, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Western Massachusetts Blasting Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on December 12, 1995, and the parties have submitted post hearing briefs.

Section 110(a) of the Act, 30 U.S.C. § 820(a), provides that a mine operator of a facility covered under the Act where a violation of a mandatory health and safety standard occurs, shall be assessed a civil penalty. Where a violation is proved, section 110(i), 30 U.S.C. § 820(i), sets forth six factors to be considered in determining the appropriate amount of a civil penalty which are as follows: gravity, negligence, prior history of violations, size, ability to continue in business, and good faith abatement.

The two alleged violations in this case were contained in a citation and order issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). That section provides that where there is a violation that is both significant and substantial and due to unwarrantable failure, a citation should be issued containing

such findings. If within 90 days the inspector finds another violation due to unwarrantable failure, a withdrawal order shall be issued.

Section 56.6202 of the Secretary's mandatory standards, 30 C.F.R. § 56.6202 provides in pertinent part:

- (a) (8) (i) Vehicles containing explosive material shall be secured while parked by having the brakes set.
- (ii) Vehicles containing explosive material shall be secured while parked by having the wheels chocked if movement could occur.
- (b) (1) Vehicles containing explosives shall have no sparking material exposed in the cargo space.

Citation No. 4293626, dated September 28, 1994, charges a violation of the mandatory standard in 30 C.F.R. § 56.6202(b) (1) for the following condition:

The blasting Superintendent, Robert Whitlock, was in charge of and in fact did load 5 - 55 lb. cases of Ireco ExGel 40 explosives into the partially unlined bed of the Ford F-250 pickup truck VIN - 1FTHF25HOLNB24031. The floor of the pickup was lined with ¾" plywood as was the tail gate. The steel sides of the bed were exposed as was the steel powder box magazine and the steel detonator magazine in the pickup cargo bed. Also in the bed was a steel bladed shovel. This vehicle was parked at the blast site in the quarry. This is an unwarrantable failure.

The inspector who issued the citation found the violation significant and substantial and due to unwarrantable failure.

Order No. 4293627, also dated September 28, 1994, charges a violation of the mandatory standard in 30 C.F.R. § 56.6202(a) (8) (i) for the following condition:

The parking brake was not set nor were the wheels chocked to prevent movement of the Ford F-250 explosive truck VIN - 1FTHF25HOLNB24031. This

vehicle was within 15' of a 25' high highwall. Vertical drop would be about 25' from this bench to the bench below. Explosives and detonators were in the magazines located in the cargo area of the bed. Truck was parked on a very slight grade in the quarry. There were several Lynch employees within several hundred feet of this area. This is an unwarrantable failure.

The inspector found this violation significant and substantial and due to unwarrantable failure.

At the hearing the parties agreed to the following stipulations (Tr. 9):

1. Respondent is an independent contractor who was performing work at the subject site;
2. Respondent is a mine operator under section 3(d) of the Federal Mine Safety and Health Act and the independent contractor and the mine are subject to the jurisdiction of the Act;
3. The administrative law judge has jurisdiction of this case;
4. The inspector who issued the subject citation and order was a duly authorized representative of the Secretary;
5. True and correct copies of the subject citation and order were properly served upon the respondent;
6. Respondent demonstrated good faith abatement;
7. Respondent has no prior history of violations;
8. Respondent is small in size with 16 employees;
9. Respondent has had no fatalities or lost time injuries.

Citation No. 4293626

The inspector testified that when he visited the mine he saw the blasting supervisor sitting in a pickup truck near the blast site (Tr. 24). The supervisor had just finished loading a shot and was doing paperwork as he sat in the cab of the truck (Tr. 22-23, 80). The inspector saw five cardboard cases filled with

sticks of dynamite in the bed of the truck. The explosives were EX-Gel 40 consisting of blasting powder with nitroglycerine and ammonium nitrate (Tr. 24-26). One of the boxes did not have a lid (Tr. 26). The bed of the truck and the tailgate were lined with plywood, but the steel sides were exposed (Tr. 26). The inspector was of the opinion that if the truck were in motion, the sides, magazines, and shovel would present a sparking hazard (Tr. 27-29). The movement of the truck could cause the shovel to hit either the sides of the pickup's bed or the magazines, thereby creating a spark which could ignite the explosives (Tr. 28-29). A spark also could have occurred when the shovel was placed in the truck bed (Tr. 29). The danger was that the spark could ignite the explosives in the cardboard boxes (Tr. 31). If the truck did not move, detonation would be very unlikely (Tr. 66). According to the inspector, the individuals in the immediate area were the foreman and his helper (Tr. 27). The situation was abated when the foreman put the explosives in the magazines (Tr. 31-32).

The blasting supervisor agreed that the explosives were in cardboard boxes in the bed of the truck (Tr. 80). The shovel had been used in preparing the blast and was not in the bed of the truck when he put the explosives there (Tr. 93, 80-81). He was not aware the shovel was there (Tr. 80). When he finished the paperwork, he intended to put the explosives in the magazines (Tr. 80, 90-91).

There is, therefore, no conflict over the conditions and practices which the inspector found. However, a conflict exists with respect to whether the supervisor intended to drive to the next blasting site before he put the explosives in the magazines. The inspector testified that the supervisor told him that he was going to move to the next blasting site without placing the explosives in the magazines (Tr. 29-30, 55-57, 62-63). But the supervisor maintained that before driving to the next site, he intended to put the explosives in the magazines and said that is what he does all the time (Tr. 82-83). After carefully observing and listening to the witnesses, I find the testimony of the supervisor more credible and accordingly find that he would have placed the explosives in the magazines prior to going to the next blasting site.

I have not overlooked the supervisor's admission that prior to being cited he had moved the truck about thirty feet when it was in the same condition as the inspector saw it (Tr. 57, 80, 91). The supervisor moved the truck so that its underside would

not become entangled with tubing being used in connection with the blasting (Tr. 57-58, 60, 87). The supervisor was trying to improve safety, but he was wrong in thinking he could move the truck a short distance without putting the explosives away (Tr. 87, 89-90, 92). Nevertheless, I find that his candor in acknowledging his actions enhances his overall credibility.

Section 56.6202(b)(1) of the regulations, quoted above, is clear. Vehicles containing explosives shall have no sparking materials in the cargo space. The exposed steel sides of the truck, the magazines, and the steel shovel could have sparked, setting off the exposed explosives. Just throwing the shovel in the truck bed could have created a spark. Accordingly, I find a violation existed.

The inspector found that the violation was "significant and substantial" within the meaning of the Act. The Commission has established a four part test to determine whether a violation is significant and substantial. The Secretary must prove (1) the existence of an underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is a measure of danger to safety; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. National Gypsum Company, 3 FMSHRC 822 (April 1981); Mathies Coal Company, 6 FMSHRC 1 (January 1984); Peabody Coal Company, 17 FMSHRC 508 (April 1995).

The exposed explosives presented a measure of danger since a spark could have been created, setting off the explosives. However, the Secretary has failed to establish reasonable likelihood because the inspector was not asked and did not address the issues of whether the occurrence of an injury was reasonably likely and whether a reasonably serious injury would result. On this basis the finding of significant and substantial is vacated because the Secretary has not sustained his burden of proof. However, it is also noted that the blasting supervisor's intent to put the explosives away before moving to the next site precludes a finding of reasonable likelihood. The inspector admitted that detonation would be very unlikely if the truck did not move (Tr. 66).

The violation is however, of some gravity. A violation can be serious even though it does not meet the criteria required for significant and substantial. Consolidation Coal Company, 15 FMSHRC 34, 41 (Jan. 1993); Consolidation Coal Company, 10 FMSHRC

1702, 1706 (December 1988); Columbia Portland Cement Company, 10 FMSHRC 1363, 1373 (September 1983), See also, Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987). Here the exposed explosives and the presence of sparking materials presented a degree of danger, although the Secretary has failed to prove reasonable likelihood and the facts do not show it.

As set forth previously, in order for a citation to be issued under section 104(d) (1) of the Act, it must be both significant and substantial and due to unwarrantable failure. Since the Secretary has failed to sustained the significant and substantial finding, the citation must be modified from a 104(d) (1) citation to a 104(a) citation.

The inspector also determined that the operator's negligence was high. I credit the statement of the blasting supervisor that he was unaware of the shovel in the truck bed and that the shovel was not readily visible (Tr. 80-81). In addition, he intended to put the explosives in the magazines before he drove to the next blasting site (Tr. 82-83). Finally, this citation was the first issued to the operator under the Act. The statement of the operator's owner that the company has never received a citation from the State or any other Federal agency, is undisputed (Tr. 101). This is not to say, however, that the operator is without fault. It should have been aware of Federal laws governing its activities. Under the circumstances I conclude that the operator's conduct did not amount to high negligence but is more properly characterized as ordinary negligence.¹

¹ Since the violation was not significant and substantial, a finding on unwarrantability is not necessary to modify the order. I do, however, note that the Commission has determined that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004, (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). Therefore, even if the Secretary had met his burden with respect to significant and substantial, the operator's conduct did not rise to the level contemplated by Commission for unwarrantable failure.

Citation No. 4293627

The inspector testified that he saw the blasting supervisor a second time (Tr. 32, 72). There is no dispute that the parking brake was not set (Tr. 32, 85, 87). The inspector relied upon subsection (a)(8)(i) of section 56.6202 of the mandatory standards, supra, which requires that vehicles containing explosive materials must be secured while parked by having the brakes set. Accordingly, a violation existed with respect to the parking brake.

The narrative portion of the citation also describes the failure to chock the wheels. Subsection (a)(8)(ii) of section 56.6202, supra, requires that vehicles containing explosives must have their wheels chocked if movement could occur. The inspector did not cite that subsection but the operator has raised no issue regarding lack of notice. I find the operator was fully apprised of this charge. The inspector and the supervisor agreed that the truck was parked on a very slight grade (Tr. 32, 70, 86). They disagreed on how the vehicle was parked. The inspector testified that the truck was parked at an angle to the highwall, but the supervisor said it was parked parallel (Tr. 70, 85). The truck was in low gear (Tr. 86). Based upon the evidence, I find that movement could have occurred. The standard applies wherever there is a possibility of movement, without reference to any degree of probability. Based upon the fact that the truck was on a slight grade, I find that movement could have occurred and conclude, therefore, that a violation existed.

In view of the modification of the previous citation, the subject citation must be considered as though it were the initial 104(d)(1) citation. The inspector found the violation significant and substantial within the meaning of the Act. Under the interpretation adopted by the Commission, the first two requirements to support the inspector's characterization are present. A violation existed. And there was a measure of danger, because if the truck were to move and turn over, the explosives could detonate (Tr. 34). However, the Secretary has failed to prove reasonable likelihood because the inspector was not asked and did not address whether the occurrence of an injury was reasonably likely or whether it was reasonably likely that a reasonably serious injury would result. On this basis the finding of significant and substantial is vacated because the Secretary has not sustained his burden of proof. It is also noted that the

very slight grade, the parallel position of the vehicle, and that the vehicle was in low gear would preclude a finding of reasonable likelihood.

Accordingly, in this instance also the Secretary has failed to sustained the significant and substantial finding. Therefore, the order must be modified from a 104(d)(1) order to a 104(a) citation and a determination of unwarrantable failure is again unnecessary.

With respect to the negligence finding, the blasting supervisor testified that he forgot to set the brake because he was upset over the first citation (Tr. 87, 88). The inspector confirmed this (Tr. 33). The supervisor's conduct, therefore, amounted to only a momentary lapse in judgment which is explained, if not justified, by the circumstances. Such behavior does not rise to the level of high negligence as rated by the inspector. The degree of negligence was ordinary.²

Determination of Appropriate Penalty Amount

As set forth above, under section 110(i) of the Act six criteria must be taken into account in fixing the amount of penalty. Findings with respect to gravity and negligence for each of the violations have been made.

Another factor specified in section 110(i) is the effect of a penalty upon the operator's ability to continue in business. The operator has submitted evidence regarding its financial situation. Due to the Rhode Island banking crisis the operator lost its line of credit with a Rhode Island bank (Tr. 105). Also, its present loan balance of \$220,000 with another bank has been placed in collection (Tr. 109). The operator's tax returns show losses of \$25,507 in 1992 and \$34,855 in 1993 (Op. Exh. 034; Tr. 109). Working drafts from the operator's accountant show losses of \$20,317 for 1994 and \$45,419 for 1995 (Op. Exh. 034, Tr. 109). Based upon the foregoing, I find that imposition of substantial penalties would impair the operator's ability to continue in business.

² For the reasons given in footnote 1, the unwarrantability finding could not be upheld even if the violation had been significant and substantial.

Also identified by the Act as a relevant factor is the operator's history of prior violations. Here the operator has no prior history. I recognize that the operator did not obtain an MSHA I.D. number until the subject violations were issued (Tr. 36-37). However, the fact remains that there is no prior history and the Act directs that this be taken into account in setting a penalty amount. In addition, the evidence is uncontradicted that the operator received no citations from the State. Again, these circumstances militate against imposition of a heavy penalty.

It has been stipulated that there was good faith abatement and that the operator is small in size.

In light of all the evidence and in accordance with applicable provisions of the law, I determine that penalties of \$125 be assessed for the violation in No. 4293626 and \$100 for the violation in No. 4293627.

The operator should understand that these modest penalties which represent substantial reductions from the original assessments, are based in part upon the absence of a prior history. This circumstance will, of course, not be present in a future proceeding. It is the operator's responsibility to familiarize itself with the requirements of the Act as they apply to its activities. The operator's belief that it is acting safely is not a defense to the charge of a violation.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is ORDERED that the findings of a violation for Citation No. 4293626 and Order No. 4293627 be AFFIRMED.

It is further ORDERED that Citation No. 4293626 and Order No. 4293627 be MODIFIED to delete the significant and substantial designations.

It is further ORDERED that Citation No. 4293626 be MODIFIED from a 104(d)(1) citation to a 104(a) citation and to reduce negligence from high to ordinary.

It is further ORDERED that Order No. 4293627 be MODIFIED from a 104(d) (1) order to a 104(a) citation and to reduce negligence from high to ordinary.

It is further ORDERED that a penalty of \$225 be ASSESSED and that the operator PAY \$225 with 30 days of the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 26 1996

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), on :
behalf of IRINEO G. BELTRAN, : Docket No. CENT 96-40-DM
Complainant : MSHA Case No. SC MD 95-02
v. :
: Chino Mines
TERRAZAS, INCORPORATED, : Mine I.D. No. 29-00708
Respondent :

DECISION AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Ernest A. Burford, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for the
Complainant;
Matthew P. Holt, Esq., Sager, Curran, Sturges
& Tepper, Las Cruces, New Mexico, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination and an application for temporary reinstatement filed by MSHA on behalf of the complainant, Irineo G. Beltran, formerly employed by the respondent as a laborer. The complaint was filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., following an MSHA investigation, and MSHA seeks the temporary reinstatement of Mr. Beltran pending further consideration of his complaint.

The complaint and supporting affidavit alleges that the respondent discriminated against Mr. Beltran by unjustly terminating him on or about March 21, 1995, for refusing to work in unsafe conditions, namely, his alleged refusal to operate an unsafe sweeper used for cleaning the mine parking lots. In

this regard, the supporting affidavit executed by MSHA's Acting District Manager for the South Central District states, in relevant part, as follows:

*** The investigation determined that Mr. Beltran was discharged on March 21, 1995, when he refused to operate an unsafe sweeper used for cleaning parking lots. The continued operation of the sweeper could have resulted in serious injury to the complainant or another employee because its defects made it difficult to control and it could have run into another vehicle or employee.

The relief requested by MSHA includes (1) a finding that the respondent unlawfully discriminated against the complainant by discharging him for engaging in protected activity, (2) an appropriate civil penalty assessment against the respondent pursuant to section 110(i) of the Act for the alleged violation of section 105(c)(1), and (3) the temporary reinstatement of Mr. Beltran to his laborer's position, at the prevailing wage rate and with the same or equivalent duties as assigned to him immediately prior to his discharge.

The respondent filed a timely answer to the complaint contesting Mr. Beltran's reinstatement and denying that he was terminated. The respondent asserted that Mr. Beltran "chose to leave of his own free will" after being told "to do a better job on the project that he was involved with at the time, or else to go ahead and go home." Respondent concluded that "Mr. Beltran's choice was to leave his work site rather than to do a better job." The respondent further asserted that the Gehl sweeper in question was not cited by MSHA, and was inspected by one of its inspectors and found to be "fine and safely operable."

A hearing was conducted in Truth or Consequences, New Mexico, and the parties appeared and presented testimony, evidence, and arguments on the record in support of their respective positions. At the conclusion of the hearing, I issued a bench decision concluding that the complaint filed by MSHA was not frivolous and that Mr. Beltran should be temporarily reinstated pending a further hearing on the merits of his complaint.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq. particularly Rule 45, 29 C.F.R. § 2700.45, Temporary reinstatement proceedings, which states, in relevant part, as follows:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

Stipulations

The parties stipulated that the presiding judge has jurisdiction in this matter, and that the respondent is covered by the Act. The respondent agreed that it is an independent contractor performing cleaning operations at the parking lot of the subject mine, and that for the purposes of this proceeding, it is a covered employer (Tr. 8-9).

Issue

The issue presented is whether or not the petitioner's discrimination complaint filed against the respondent has been frivolously brought.

Discussion

Mr. Beltran's signed initial complaint, dated April 10, 1995, and filed by mail with MSHA's Albuquerque, New Mexico field

office on April 14, 1995, states that he was discharged by the respondent on March 21, 1995, from his \$6.75 per hour laborer's job. His verbatim complaint states as follows:

On March 21st 1995 at 12:20 p.m. I was on lunch break. I was setting inside unit #5 pickup truck, Cruz Terrazas came to the truck where I was eating lunch in a very angry mode, and ask me what kind of shit I was doing. I ask him why? He replied that kind of shit you are doing is no good. I told him I could not do any better because the sweeper was no good. I told him this sweeper is not so safe to do the job. Cruz then left. In about 2 minutes he returned, was still very angry and approached me again. He was saying to me to do a better job than that or get the fuck out. He was so close to my face I could feel spit hitting my face. I told Cruz this sweeper is not safe and I will not continue to operate it. Cruz told Carlos Miranda, another employee, to get me out of the mine. He repeated very angry over and over get him out get him out. I feel I should get back and be payed (sic) for all the time and money I have spent on gas looking for work.

A supporting statement by laborer Carlos Miranda, included as part of Mr. Beltran's complaint, states as follows:

On March the 21st at 12:20 p.m. I Carlos Miranda was having lunch with Mr. Irineo Beltran. When Cruz Terrazas was telling Mr. Beltran he had to do a better job then what he was doing or to get the fuck out of the mine. Mr. Beltran told Cruz he could not do any better because the sweeper was no good and not safe to work with. Cruz was very angry with Mr. Beltran because he want him to do a better job. Mr. Belrtan explained the conditions of the sweeper, but Cruz told me in a very angry voice to get this man out of the mine. Over and over. He was right in Mr. Beltran face. Mr. Beltran walked away.

At this stage of the proceeding, the only issue is whether or not the petitioner's complaint has been frivolously brought and whether Mr. Beltran should be temporarily reinstated pending a further hearing on the merits of his complaint. Any findings and conclusions with respect to the ultimate issue of alleged

discrimination, including any remedial sanctions and remedies, will be made after a hearing on the merits has been concluded. See: Secretary v. Thunder Basin Coal Company, 15 FMSHRC 2425 (December 1993); and Secretary v. Jim Walter Resources Inc., 9 FMSHRC 1305, 1306 (August 1987), aff'd Jim Walter Resources Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990), where the court stated, as follows, at 920 F.2d 747:

The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's complaint appears to have merit' - an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted.] In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's theories of law and fact are not insubstantial or frivolous. See Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975) cert denied, 426 U.S. 934, 96 S. Ct. 2646, 49 L.Ed 2d 385 (1976).

At the hearing, the petitioner presented the testimony of adverse witness Cruz Terrazas, the respondent's vice-president, Judy Peters, the MSHA special investigator who conducted an investigation of Mr. Beltran's complaint, Mr. Beltran, and Carlos Miranda.

The respondent relied on the testimony of Mr. Terrazas, Anthony Maynes, formerly employed by the respondent in March, 1995, as an operator/laborer, and now employed by the Phelps Dodge Mining Company, and Jesus Perez, employed by the respondent as a site superintendent, and who was the project supervisor for the work being performed by the respondent at the Phelps Dodge Chino Mine in March 1995.

Cruz Terrazas, respondent's vice-president, testified that the respondent is an independent contractor and that on March 21, 1995, it was performing contractual cleanup work at the Chino Mine, a copper mine located in Santa Rita and operated by the Phelps Dodge Company. He stated that Mr. Beltran was employed as a laborer and had worked for his company "on and off" for more than two years.

Mr. Terrazas stated that on March 21, 1995, Mr. Beltran was assigned to operate the Gehl sweeper to clean the mine parking lot area. He considered Mr. Beltran to be a trained equipment operator, but did not know who trained him, and he was not aware of any training records for Mr. Beltran at that time.

Mr. Terrazas stated that his job foreman and Mr. Beltran's supervisor at the work site on March 21, 1995, was Jesus Perez, and that he (Terrazas) went from job site to job site to check out the work. There were two Gehl sweepers and seven other sweepers at the site on March 21, and he did not know if maintenance records were maintained at that time. Mr. Terrazas stated that he considered Mr. Beltran to be a "complainer" who always found someone else, or the equipment, to be at fault. He stated that he was unaware of any employees who were fired in 1995 (Tr. 10-18).

Mr. Terrazas stated that he could not recall testifying at Mr. Beltran's unemployment claim hearing that the sweeper in question had two uneven tires. He believed that the sweeper operated by Mr. Beltran on March 21, had the same sized tires and that the sweeper mechanism was an attachment that was new. He was not aware that the sweeper had a pin missing or that it leaked hydraulic oil. He stated that the sweeper was approximately one year old (Tr. 27-28).

Mr. Terrazas identified complainant's Exhibit No. 1 as a copy of a discharge slip stating that Mr. Beltran was discharged on March 21, 1995, and he confirmed that Sammie Vigil, whose signature appears on the slip, is one of his superintendents. Mr. Terrazas was of the opinion that Mr. Beltran quit his job (Tr. 28-30).

Mr. Terrazas denied that he has a bad temper, but admitted that he is impatient. He confirmed that he and Mr. Beltran were arguing at the time of the March 21, incident. He stated that 22 people were assigned to clean the mine site that day, and that the parking areas consisted of approximately one acre. He stated that he told Mr. Beltran that he wanted the job done and gave him the option of using a broom and shovel, rather than the sweeper, to get the job done.

On cross-examination, Mr. Terrazas stated that he had a contractual obligation to complete the mine clean up job by the next day, March 22, and to remove all of his equipment by

one o'clock. He stated that other employees were using brooms and shovels to clean up, and he did not believe that this was unsafe. He stated that no one informed him that there was anything wrong with the sweeper, and Mr. Beltran simply told him that it was an old piece of junk that was "not worth a shit." He further stated that Mr. Beltran said nothing about any missing pins, hydraulic leaks, or uneven wheels (Tr. 35-39).

Mr. Terrazas stated that the sweeper and the machine to which it is attached operate at one speed, and that if it is operated too fast, it will not pick up all of the dirt and will leave it in rows on the ground. He stated that he told Mr. Beltran to slow down while operating the machine and that he assigned someone else to operate it after Mr. Beltran quit and left the work site at noon on March 21 (Tr. 39-40).

Mr. Terrazas stated that no one advised him that there was a problem with the sweeper machine and that MSHA inspected it after the complaint was filed and that it was not "red-tagged" as unsafe. He denied that Mr. Beltran was discharged for safety reasons or out of retaliation for making safety complaints (Tr. 42-45).

Mr. Terrazas stated that he visited the work site on March 20, but did not recall how long he was there and could not recall seeing anyone there. He was at the site the next day, March 21, for approximately 45 minutes and recalled that he spoke with Mr. Beltran for ten to fifteen minutes. He stated that Mr. Beltran did not want to hear anything else and kept repeating that the sweeper machine "was a piece of shit" and that he was upset and angry. Mr. Terrazas stated that his employees were not afraid to complain to him, but that all complaints were to go to their foremen (Tr. 46-49). Mr. Terrazas denied that his employees were afraid to complain to him out of fear of being fired (Tr. 51).

In response to bench questions concerning the company separation form stating that Mr. Beltran was discharged, Mr. Terrazas stated that the superintendent who signed it assumed that Mr. Beltran had been fired because Mr. Beltran told everyone that this was the case and the form had already been filled out (Tr. 52-53).

Judy Peters, MSHA Supervisory Safety and Health Inspector, confirmed that she conducted the investigation of Mr. Beltran's complaint and initially contacted and interviewed Mr. Beltran and Mr. Miranda. She also interviewed Superintendent Virgil, Mr. Terrazas, and other company personnel who provided her with the respondent's defense. She stated that she determined that an act of discrimination occurred after considering the five elements necessary to make that determination, namely that Mr. Beltran was a miner working at a mine location; that he was involved in protected activity by operating a piece of machinery at a mining operation and made a safety complaint; and that an adverse action of discharge had been taken against him. She also considered the respondent's defense and concluded that there "was the nexus, which is a connection between all of these acts" (Tr. 60-62).

Ms. Peters stated that after she concluded that a case of discrimination occurred, her recommendation and file was forwarded to MSHA's District Manager, and then to MSHA Headquarters in Arlington, Virginia, where the Solicitor's Office decides whether to pursue the case further (Tr. 62-63).

Ms. Peters explained her investigative contacts and interviews, including interviews with Mr. Terrazas and Mr. Beltran, and she confirmed that she either took their statements personally, or was present and transcribing their statements taken by a fellow inspector (Tr. 66-67).

On cross-examination, Ms. Peters declined to make the investigative file available to the respondent's counsel or to reveal the names of any miner witnesses she may have interviewed, and objections posed by counsel were overruled (Tr. 68-73). She confirmed that her conclusions regarding the complaint were made after she completed the investigation and after she spoke with Mr. Terrazas (Tr. 74). She confirmed that she did not inspect the sweeper in question, and responded as follows to questions about Mr. Beltran's belief that the sweeper was unsafe (Tr. 74-75):

Q. If there was nothing wrong with the Gehl sweeper, and if Mr. Beltran believed there was nothing wrong with the Gehl sweeper, do you believe he would be protected in the event that someone took action against him because he said the equipment was a piece of shit?

A. All the complainant has to have is a sincere belief that the piece of equipment is unsafe to operate and could cause him or any other individual harm.

Q. I don't think you answered my question.

A. Well, rephrase the question, please.

Q. If, in fact, there wasn't anything wrong with the equipment, and if, in fact, Mr. Beltran did not believe there was anything wrong with the equipment, would he be protected if he made complaints about it?

MR. BURFORD: I think its's been asked and answered.

JUDGE KOUTRAS: Well, he'd be protected, counsel , but he probably wouldn't prevail in his discrimination case. I think that's the answer, wouldn't you agree?

THE WITNESS: Yes, sir.

Ms. Peters stated that she evaluated whether or not Mr. Beltran sincerely believed the sweeper was unsafe by the statements made by Anthony Maynes and Carlos Miranda. Mr. Maynes stated that Mr. Beltran said that someone was going to get hurt on the sweeper (Tr. 76).

Ms. Peters stated that she was not provided with any information that Mr. Beltran had ever been reprimanded, and she was unaware of his state unemployment compensation claim until after her investigation (Tr. 77).

In response to bench questions, Ms. Peters stated that an MSHA inspector went to the work site the week the complaint was filed to inspect the Gehl sweeper in question. However, the only one he found was being repaired in the shop and could not be inspected, and a second one could not be found (Tr. 83-84). No determination was made as to which sweeper Mr. Beltran may have been operating on March 21, 1995, because there was some confusion as to the sweeper serial number and Mr. Beltran was not present to point it out (Tr. 84).

Ms. Peters stated that when she interviewed Mr. Beltran he described in detail several things that were wrong with the sweeper, including a missing pin, lack of reflectors, an inoperable back-up alarm, and difficulty in controlling the directional machine hydraulic controls, and he expressed his fear that the missing pin might cause him to overturn and that he had to use both hands to control the hydraulic controls (Tr. 85). When asked why Mr. Beltran did not provide these details in his initial complaint, Ms. Peters responded, "the fact that he said it was unsafe was enough for us to pursue it" (Tr. 85). She confirmed that the MSHA complaint form was filled out by Mr. Beltran and mailed to the district office (Tr. 86-89).

Ms. Peters stated that Mr. Maynes confirmed that Mr. Beltran said someone would get hurt on the machine and Mr. Miranda said that Mr. Beltran was trying to tell Mr. Terrazas that the machine was unsafe, but that Mr. Terrazas would not listen to him. Mr. Miranda told her about the equipment defects, and two people told her the braking system was not working properly (Tr. 90-91). Ms. Peters stated that she determined that Mr. Maynes and Mr. Miranda were present on March 21, when Mr. Terrazas and Mr. Beltran had their discussions and that they both told her that Mr. Beltran stated that the machine was unsafe. Ms. Peters stated that based on these statements, she concluded that there was enough to move forward with the complaint (Tr. 96). She further explained (Tr. 101-102):

THE WITNESS: Correct. Two witnesses said that he did say -- one said he said someone was going to get hurt on it, and the other one said he said it was unsafe.

JUDGE KOUTRAS: These witnesses said he said that to Terrazas or he said that to the two witnesses?

THE WITNESS: He said that to Terrazas.

JUDGE KOUTRAS: To Terrazas?

THE WITNESS: They witnessed the altercation.

JUDGE KOUTRAS: Both of these people indicate to you that Mr. Beltran specifically told Mr. Terrazas that

this piece of equipment, in addition to what else he said here, is, someone is going to get killed and its unsafe?

THE WITNESS: Somebody is going to be hurt.

JUDGE KOUTRAS: Somebody is going to get hurt.

THE WITNESS: Right. And the individual that said that also said that he didn't understand a lot of Spanish, and he couldn't understand everything that was being said, but he did understand that he said someone was going to get hurt, because for most of the conversation, evidently, Terrazas and Beltran were speaking in Spanish.

Ms. Peters stated that Mr. Terrazas did not state to her that he fired Mr. Beltran for complaining about safety, but did say that "he gave him a choice" (Tr. 104).

Irineo Beltran, the complainant, testified that he has worked for the respondent for two or three years. He stated that he operated the Gehl sweeper on March 20, 1995, and inspected it before using it. He found that it was low on hydraulic fuel, had no front or rear reflectors, no backup alarm, no safety belt, and the left front tire was flat. He reported these conditions to Jesus Perez, the general foreman, and Mr. Perez told him to call the mechanic to start the machine and that Mr. Perez would send someone to take care of the flat tire. Mr. Beltran operated the machine, and inflated the tire three times during the course of cleaning up that day with the sweeper (Tr. 107-111).

Mr. Beltran stated that the next day, March 21, 1995, while eating his lunch in his truck, Cruz Terrazas confronted him about the work that he was performing and told him "to get the fuck out" if he could not do a better job. Mr. Beltran stated that he told Mr. Terrazas that the equipment was not safe and offered to prove it to him, but that Mr. Terrazas replied, "I don't want to hear nothing you say" (Tr. 111). Mr. Terrazas then instructed Carlos Miranda to escort him from the property, told someone in the security office that he had fired him, and Mr. Beltran left the property (Tr. 113).

Mr. Beltran testified about his prior experience and training operating similar equipment, and he explained that the

sweeper flat tire was changed, but the new tire was too big. When asked if this created a safety problem, he responded as follows (Tr. 114-115):

Q. Does that create a safety problem?

A. I feel that's not safe to do the work because, if you run it too fast, you can turn over or you can hurt somebody.

Q. What about --

JUDGE KOUTRAS: Excuse me. What if you didn't run it too fast?

THE WITNESS: If you run it too fast with the big large tire and one small tire on the right side, you can turn over.

JUDGE KOUTRAS: What does too fast mean? Why would you run it too fast?

THE WITNESS: I never ran it too fast.

JUDGE KOUTRAS: If you didn't run it too fast, would there be a problem?

THE WITNESS: No.

Mr. Beltran further stated that the sweeper attachment had one bolt missing and one bolt was four inches too high, and with an uneven front tire, "it's impossible for you to do the work" (Tr. 115). He confirmed that he informed Mr. Perez about the sweeper conditions on March 20, but that Mr. Perez "didn't pay too much attention to me." Mr. Terrazas was not present at that time, but that he tried to tell him about the sweeper conditions on March 21, "but he didn't listen to me, he just walked away and said I don't want to hear nothing about the equipment because I bought that equipment brand new and I'm pretty sure it will work" (Tr. 117).

Mr. Beltran explained the problem of operating the sweeper with no reflectors and low hydraulic oil. He stated that he was supposed to be doing other work on March 20 and 21, that he was

not a sweeper operator, but was "forced to do the job in the sweeper without training or qualifications. He stated that he had not previously used such a sweeper (Tr. 118).

On cross-examination, Mr. Beltran testified about his prior experience operating equipment similar to the Gehl sweeper. He denied ever being laid off by the respondent (Tr. 121-122). He also denied any prior reprimands or disciplinary actions against him (Tr. 124-125). He explained that he could have done a better job with another sweeper, but the one he was operating "was unsafe to work" (Tr. 129). He concluded that he had operated the sweeper 15 hours on Monday and Tuesday, before Mr. Terrazas spoke with him, but denied that the sweeper was ever safe and stated that he operated it because he was told to (Tr. 130). He maintained that Mr. Terrazas fired him because he got mad when he told him the equipment was unsafe, and became angrier when he told him the equipment was no good (Tr. 132).

Mr. Beltran confirmed that Mr. Miranda and Mr. Maynes were present during his encounter with Mr. Terrazas, but that Mr. Maynes was 75 to 80 feet away and did not hear their conversations (Tr. 133). Mr. Beltran stated that on March 21, he never refused to work or state that he was not going to do the job (Tr. 134).

In response to bench questions, Mr. Beltran stated that on March 20 and 21, he was competent to operate the Gehl sweeper and had previously operated one similar to that machine to transport barrels (photographic Exhibit R-5). He further stated that he had not previously operated the sweeper in question in this case, but had operated others in better shape and good condition (Tr. 138-140). He conceded that he operated the sweeper that he considered was unsafe, but did so because the general foreman told him he did not have the time to take care of it and that he was to go ahead and do the job with the machine (Tr. 141). He did not consider parking the sweeper because he believed he would be fired and needed the job (Tr. 142-143).

Carlos Miranda, formerly employed by the respondent as a laborer, testified that he was present at the job site on March 20 and 21, 1995, and heard Mr. Beltran tell Mr. Perez about the condition of the sweeper on March 20. He also heard the conversation between Mr. Beltran and Mr. Terrazas on March 21. Mr. Terrazas told Mr. Beltran that he was not doing a good job and Mr. Beltran told Mr. Terrazas that the machine

was not working properly (Tr. 146). Mr. Terrazas then told Mr. Beltran that "he was going to run him off," and told Mr. Miranda three times to remove Mr. Beltran from the property (Tr. 147).

Mr. Miranda described the condition of the sweeper in question and stated that he told Mr. Beltran that he could not use it on March 21 because "it wasn't safe to work on the machine" (Tr. 149, 154). He confirmed that Mr. Maynes was present, "but fairly far away," and that he (Miranda) was closer and heard all of the conversation between Mr. Terrazas and Mr. Beltran, but did not understand when they spoke English (Tr. 147, 150).

Anthony Maynes, currently employed by Phelps Dodge Mining Company, and previously employed by the respondent as an operator/laborer on March 21, 1995, testified that he was operating a scraper with a bucket that day scraping up dirt. Two Gehl sweepers were being operated that day, and Mr. Beltran was operating one of them. Mr. Maynes observed no problem with the operation of that sweeper, and Mr. Beltran did not complain to him about any problems with the machine (Tr. 172-174).

Mr. Maynes stated that he operated the sweeper that Mr. Beltran had operated before he left the mine, and he operated it with no problems after slowing it down and taking his time. He noted no defects with the machine, and did not believe it was unsafe for him or anyone else to use it, and he never told anyone that he believed the sweeper was unsafe (Tr. 175). He stated that he told Ms. Peters that he never had any problems with the sweeper, and did not tell her that it was unsafe. He confirmed that he had no conversation with Mr. Beltran concerning the sweeper and did not remember Mr. Beltran say that it was unsafe (Tr. 176).

On cross-examination, Mr. Maynes confirmed that during his interview with Ms. Peters she took his statement and he read, initialed, and signed each page, and he recalled that he told Ms. Peters that Mr. Beltran stated that the machine "was junk and stuff," and that "it was unsafe because it was junk" (Tr. 178).

Mr. Maynes stated that he only heard some of the conversation between Mr. Terrazas and Mr. Beltran, "because I was further back," and that "a lot of it was in Spanish, and I don't speak Spanish" (Tr. 180). He did not remember hearing

Mr. Terrazas tell Mr. Beltran to either leave or he could stay, and also heard Mr. Terrazas ask Mr. Miranda to give Mr. Beltran a ride to the gate (Tr. 180).

Mr. Maynes confirmed that he was trained in the operation of the Gehl sweeper as part of his safety training, and that he could report safety problems to Mr. Perez, or anyone else at the job site (Tr. 181).

Jesus Perez, respondent's superintendent, testified that he supervised the cleaning project on March 20 and 21, and he told Mr. Beltran that he needed to operate the sweeper slower to avoid leaving lines of dirt behind him. He stated that Mr. Beltran operated the sweeper on March 20, and again on March 21, until noon, and never informed him about any safety problems (Tr. 182-186).

Mr. Perez stated that he was not present on March 21, when Mr. Terrazas spoke with Mr. Beltran, but he did speak with Mr. Beltran before he left the mine and Mr. Beltran told him that he "wasn't going to put up with any more shit," and left the job site. Mr. Perez stated that Mr. Beltran mentioned that he would "get even; that he wasn't going to be treated the way he was treated" and indicated that he might write up a grievance against Mr. Terrazas (Tr. 187-188).

Mr. Perez stated that some of the foremen believed that Mr. Beltran was hard to work with and they had problems with his work (Tr. 190-193; Exhibits R-6 and R-7). Mr. Perez stated that Mr. Terrazas never said anything to him that would lead him to believe that Mr. Beltran was terminated for complaining about any safety issue, and he had no reason to believe that the termination was for reasons other than Mr. Beltran's unwillingness or inability to do the quality of work that was expected of him (Tr. 194).

On cross-examination, Mr. Perez stated that he did not recognize Inspector Peters, but did recall giving a statement to an MSHA inspector stating that he would hire Mr. Beltran back (Tr. 195). He explained the operation of the Gehl sweeper and confirmed that there were seven or eight other cleanup jobs that Mr. Beltran could have performed on March 21, if he had refused to work on the sweeper. He did not offer Mr. Beltran any of this

work. He did not believe that two written supervisory complaints against Mr. Beltran over a two-year period was excessive, and he did not record any other complaints (Tr. 199-200).

Mr. Perez agreed that a Gehl sweeper with different sized tires, a lack of hydraulic fluid, missing or loose attachment bolts, and missing reflectors would cause a safety problem and create a hazard for the operator or other people (Tr. 201).

In response to bench questions concerning the discharge slip reflecting Mr. Beltran's discharge (Exhibit C-1), Mr. Perez stated that he and project superintendent Virgil had the authority to fire employees. However, Mr. Perez did not believe that anyone fired Mr. Beltran and stated that Mr. Virgil "just wrote the paper," but he had no idea why he did so and only saw the discharge slip "after the fact" and did not try to correct it (Tr. 213-214).

MSHA argues that based on the affidavit of its acting district manager and the testimony of its witnesses at the hearing, it is clear that it has established a prima facie showing that the complaint was not frivolous. Recognizing that a difference of opinion may exist as to the merits of the complaint, MSHA concludes that it has established that it had a good faith belief that the case merits a hearing on the permanent reinstatement of Mr. Beltran.

The respondent argued that the "real issue" is whether or not the Secretary reasonably believes he should have gone forward with the case, and that this requires credibility findings by the Secretary and more than simply filing a supportive affidavit (Tr. 162-169).

The respondent further argued that there is no evidence to support any conclusion that Mr. Beltran used the word "unsafe" in describing the condition of the sweeper to Mr. Terrazas on March 21, 1995, or that Mr. Terrazas retaliated against Mr. Beltran by discharging him for complaining that there was something unsafe about the operation of the machine. The respondent maintains that Mr. Beltran "was terminated because he didn't do a good job and didn't have an acceptable excuse" (Tr. 203-205). In this regard, I take note of the fact that Mr. Terrazas testified that Mr. Beltran voluntarily quit his job and was not discharged. In any event, the thrust of the respondent's arguments concerning

the "frivolously brought" issue is that the Secretary had no probable cause to go forward with a case of discrimination, and that the nexus of the alleged discriminatory conduct is lacking (Tr. 204-205).

I take note of the fact that the respondent's position that Mr. Beltran voluntarily quit his job is contradicted by its own testimony and assertion that he was discharged for cause for doing a poor job. With regard to the respondent's assertion that Mr. Beltran did not specifically or directly articulate any safety complaint to the respondent, I note that he has a limited education, with a poor command of the English language. I find that his testimony, and the testimony of Mr. Miranda, is consistent with Mr. Beltran's initial complaint that he considered the condition of the sweeper in question to be unsafe to do the job to which he was assigned. I also note that Mr. Beltran's testimony that Mr. Terrazas would not give him an opportunity to explain the condition of the sweeper is supported to a degree by Mr. Terrazas's testimony (Tr. 47), where he confirmed that he was angry and that all Mr. Beltran wanted to talk about was the condition of the equipment.

After consideration of the arguments presented, I stated my agreement with MSHA's position in support of the request for the temporary reinstatement of Mr. Beltran pending a hearing on the merits of the complaint of discrimination, and concluded that MSHA has carried its burden of establishing that the complaint was not frivolously brought. My bench ruling in this regard was based on my review of the initial complaint and supporting affidavit, my in camera review of MSHA's investigative file, and the testimony of the witnesses who testified at the hearing (Tr. 211).

I conclude and find that MSHA has made a sufficient showing of the elements of the complaint pursuant to section 105(c) of the Act, and my oral bench ruling in this regard is re-affirmed. The question of who will ultimately prevail in this case will be decided after a trial of the merits of the complaint.

ORDER

In view of the foregoing, MSHA's request for the temporary reinstatement of Irineo G. Beltran **IS GRANTED**, and the respondent **IS ORDERED** to reinstate Mr. Beltran to the position of laborer which he held on March 21, 1995, or to a similar position, at the

same rate of pay and with the same or equivalent duties. The reinstatement shall be made within fifteen (15) days of the date of this decision.

The parties **ARE FURTHER ORDERED** to communicate with each other for the purpose of agreeing to a convenient trial date for a hearing on the merits of the complaint, and they are to communicate this to me by telephone, fax, letter, or conference call within the fifteen day period.


George A. Koutras
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 12, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. LAKE 94-72, etc.
Petitioner :
v. : Buck Creek Mine
BUCK CREEK COAL INC., :
Respondent :

ORDER CONTINUING STAY

On July 17, 1995, a 90 day stay of 80 orders and citations from among the more than 500 orders and citations in these cases was granted. *Buck Creek Coal Inc.*, 17 FMSHRC 1294 (Judge Hodgdon, July 1995). On November 24, 1995, the stay was continued for 44 of the orders and citations.¹ *Buck Creek Coal Inc.*, 17 FMSHRC 2149 (Judge Hodgdon, November 1995). The Secretary now requests that the stay be extended for 30 more days for the 44 orders and citations. The Respondent opposes the motion.

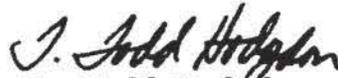
The Secretary incorporates his submissions seeking the two previous stays in support of his motion. In addition, a new declaration under seal from the Assistant U.S. Attorney is submitted for *in camera* review. Buck Creek makes the same objections to the motion that it has made in the past.

Essentially, except for the passage of time, nothing has changed. Further, I am encouraged by the Secretary's statement that "the government does not foresee a need to seek any further extension of this pre-indictment stay." Consequently, for the

¹ Although the Secretary's request and the ensuing order stated that 45 orders and citations were involved, in fact there were only 44 orders and citations.

reasons set out in the orders noted above, I conclude that a stay is still appropriate.²

Accordingly, it is **ORDERED** that proceedings in Order Nos. 3843374, 3843376 and 3843377 in Docket No. LAKE 94-21; Order No. 3843511 in Docket No. LAKE 94-42; Citation Nos. 3843532, 4055892 and 4055893 in Docket No. LAKE 94-50; Order No. 3843667 in Docket No. LAKE 94-72; Order No. 4055899 in Docket No. LAKE 94-81; Citation Nos. 4026051 and 4262257 in Docket No. LAKE 94-600; Citation Nos. 4259169, 4259170, 4262070, 4262307, 4262308, 4262313 and 4262314 in Docket No. LAKE 94-602; Citation Nos. 4262128 and 4259175 in Docket No. LAKE 94-669; Order Nos. 4259813, 4259814, 4262068, 4262080 and 4262275, and Citation Nos. 3843968, 4261879, 4262303, 4262304, 4262305 and 4262334 in Docket No. LAKE 94-708; Order Nos. 4259171, 4261728, 4262075 and 4262317 in Docket No. LAKE 94-709; Order No. 4262078 in Docket No. LAKE 94-746; Order Nos. 4259848, 4262374 and 4262375, and Citation Nos. 4262277, 4262278 and 4262279 in Docket No. LAKE 95-49; Order No. 3843970 in Docket No. LAKE 95-94; and Citation No. 4259854 in Docket No. LAKE 95-173 are **STAYED** for 30 days from the date of this order.³


T. Todd Hodson

Administrative Law Judge

² The Assistant U.S. Attorney's declaration does not provide any additional information on the commonality of evidence and issues between the civil and criminal charges. It does, however, give specific other reasons why lifting the stay would be particularly detrimental at this time.

³ The dockets listed are civil penalty dockets. In those cases where a notice of contest was filed concerning one of the orders or citations listed, the contest docket is also stayed.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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FEB 15 1996

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
on behalf of : Docket No. WEST 96-120-DM
RAMON S. FRANCO, :
Complainant :
v. : Phelps Dodge Morenci Mine
W.A. MORRIS SAND AND :
GRAVEL, INC., :
Respondent :

ORDER DENYING MOTIONS TO DISMISS
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Susanne Lewald, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California, for Complainant;
Phil B. Hammond, Esq., Hammond, Natoli & Tobler,
Phoenix, Arizona for Respondent.

Before: Judge Manning

On January 23, 1996, the Secretary of Labor filed an Application for Temporary Reinstatement ("Application") on behalf of Ramon S. Franco against W.A. Morris Sand and Gravel, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1988) ("Mine Act").¹ Respondent opposed the Application and, in addition, filed motions to dismiss this proceeding on jurisdictional grounds. An evidentiary hearing was held on February 7, 1996, in Phoenix, Arizona, and briefs were filed on the jurisdictional issues on February 13, 1996. For the reasons set forth below, I deny Respondent's motions to dismiss and find that the Secretary of Labor has met his burden of establishing that the underlying discrimination proceeding was not frivolously brought.

¹ The complaint originally named Andrew J. Gilbert, Sr., doing business as W. A. Morris Sand and Gravel. When Respondent objected on the basis that it is an Arizona corporation, Complainant moved to amend its application to show W.A. Morris Sand and Gravel, Inc., as the Respondent. Respondent did not object to the motion and it was granted at the hearing.

I. FACTUAL BACKGROUND

Ramon S. Franco began working for W.A. Morris Sand and Gravel, Inc. ("W.A. Morris") on or about January 21, 1991, as a truck driver. He drove several different kinds of trucks, including dump trucks, end-dump trucks and concrete mixers. (Tr. 13). W.A. Morris has its main office and other facilities in Safford, Arizona. W.A. Morris also has a concrete batch plant on property owned by Phelps Dodge Morenci, Inc. ("Phelps Dodge") near Morenci, Arizona. (Tr. 13, 54). Phelps Dodge operates a copper mine and related facilities on its Morenci property. Mr. Franco was frequently assigned to deliver concrete from the batch plant to various Phelps Dodge facilities. (Tr. 14-15).

On the days preceding January 24, 1995, Mr. Franco had been assigned to drive a concrete mixer to deliver concrete from the batch plant to Phelps Dodge's solvent extraction plant on its Morenci property. (Tr. 17-18, 114). On January 24, 1995, when Mr. Franco reported to work at the batch plant, Mr. Jack Gilbert, Jr., a supervisor with W.A. Morris, assigned him truck No. 158, a concrete mixer. (Tr. 16). In the previous days, Mr. Franco had been driving truck No. 159. (Tr. 57-58). Mr. Franco told Mr. Gilbert that he was not going to drive truck No. 158 because it was unsafe. (Tr. 18). Mr. Franco testified that he had driven that truck before and had problems with the chute dropping as the concrete was discharged from the mixer. (Tr. 18). He stated that the chute was equipped with booster wheels that were not staying up properly. (Tr. 19, 52-53, 74-76, 78-79). He believes that someone could be hurt or killed if it fell while someone was unloading the concrete. Id. Mr. Franco testified that this hazard would endanger the people unloading concrete from the truck but would not pose a risk to the driver of the truck while transporting the concrete to the construction site. (Tr. 52-53).

When Mr. Franco told Mr. Gilbert that he would not drive the truck he also stated that he would like to take his vacation until a safe truck was available. (Tr. 18, 20, 59-60). Mr. Franco testified that Mr. Gilbert replied that it would put the company "in a spot," but that it was "OK." (Tr. 20, 77). Mr. Franco then went to the Safford office to request vacation time. While he was there, Mr. Richard Clairage, a W.A. Morris management employee, told Mr. Franco that he may not be able to take vacation days because he heard over the company radio that he had been fired. Id. A few days later, Mr. Franco returned to the Safford office to pick up his pay check. (Tr. 23). Mr. Clairage handed him a check that included all of his vacation pay and advised Mr. Franco that he had been fired. Id.

Mr. Franco tried to contact Jack Gilbert, Sr., the president of W.A. Morris, to find out why he had been fired. Mr. Franco testified that a few days later Mr. Gilbert told him that he was

fired because he refused to drive truck No. 158. (Tr. 24). Mr. Franco further testified that it is his understanding that another employee of W.A. Morris refused to drive truck No. 158 a few days earlier and he was not fired. (Tr. 20). Mr. Gilbert, Sr., testified that he fired Mr. Franco because he refused to drive the truck. (Tr. 118).

About a week after Mr. Franco spoke with Mr. Gilbert, Sr., he went to the state unemployment office to apply for unemployment compensation benefits. (Tr. 26). He also submitted to the unemployment compensation office several handwritten letters describing his version of the events that led to his dismissal from W.A. Morris.² (Tr. 32-33; Ex. C-1). On April 10, 1995, Mr. Franco filed a complaint with the Arizona Attorney General's office alleging that he was discharged because of his national origin, age, and disability. (Tr. 38-39; Ex. C-2). The complaint states that Mr. Franco refused to drive the truck because he believed it to be unsafe. Id.

On July 10, 1995, Mr. Franco filed a discrimination complaint with MSHA. (Tr. 46-51; Ex. C-3). Mr. Franco testified that he first became aware that he could file a discrimination complaint with MSHA during an MSHA-approved training course he attended in June or July 1995 while employed by a different contractor at the Morenci Mine. (Tr. 45, 51, 77).

II. JURISDICTION

A. Ramon Franco was a miner.

Respondent contends that the Secretary is without jurisdiction under the Mine Act to enforce the temporary reinstatement provisions of section 105(c) because Mr. Franco did not work at a mine as that term is defined in section 3(h)(1) of the Mine Act. Respondent states that its "Morenci operation is located on real property which, although owned by Phelps Dodge, is not part of or appurtenant to any land from which minerals are extracted, any private way or road appurtenant to any land from which minerals are extracted, or any land, or other areas described in 30 U.S.C. § 802(h)(1), used in or resulting from the work of extracting minerals or to be used in the milling of such minerals." Motion to Dismiss at 2. In addition, Respondent maintains that the concrete in the mixer truck which Mr. Franco refused to drive was "destined for a flood control dam located approximately three miles upstream from Phelps Dodge's Morenci open pit copper mine." Id. It states that "the damsite was not used in, or to be used

² These letters were actually written by a friend based on Mr. Franco's description of the events. (Tr. 27-31, 61). He signed the letters but only read parts of them. Id.

in, or the result of, the work of extracting minerals from their natural deposits nor was the damsite used in, or to be used in, the milling or the work of preparing minerals." Id. at 2-3. Respondent represents that the "dam acted solely as a flood prevention device, up stream of the minesite, used to retain water and prevent flooding of the actual minesite." Id. at 3.

Mr. Franco is not entitled to the protection of section 105(c) of the Mine Act unless he is a miner. A miner is defined as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). A coal or other mine is defined, in pertinent part, as: "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, excavations ... structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds ... used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits...." 30 U.S.C. § 802(h)(1).

The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (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 602 (1978). This report also noted that the Committee included impoundments and retention dams in the definition because a dam collapsed at a mine in 1972 and MSHA's predecessor, the Bureau of Mines, was uncertain that it had jurisdiction over the dam. Id.

The issue is whether Mr. Franco was a miner. There is no question that Mr. Franco was working for W.A. Morris at the time he was discharged. Mr. Franco was assigned to drive truck No. 158, a concrete mixer, on January 24, 1995, and was to pick up concrete from W.A. Morris's Morenci batch plant, on the property of Phelps Dodge. Mr. Franco testified that he did not know where he was to deliver concrete on the day of his discharge. (Tr. 58). According to the motion, Mr. Franco was to deliver the concrete to a Phelps Dodge dam a few miles upstream from the open pit mine. Motion at 2; Brief at 10. The purpose of the dam was "to retain water and prevent flooding of the actual minesite." Motion to Dismiss at 3.³

³ Apparently, Phelps Dodge was concerned that this dam had weakened as a result of bad weather and that if it collapsed it would flood the pit. (Tr. 8).

MSHA Inspector Richard Cole testified that W.A. Morris's batch plant was not subject to MSHA jurisdiction despite the fact that it was located on Phelps Dodge's Morenci property. (Tr. 106). His testimony is consistent with a memorandum of understanding between MSHA and the Occupational Safety and Health Administration ("OSHA") which provides that asphalt and concrete batch plants are subject to OSHA rather than MSHA jurisdiction "whether or not located on mine property." 44 Fed. Reg. 22827 (April 17, 1979), amended, 48 Fed. Reg. 7521 (February 22, 1983). See also, W.J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994). This appears to be an exception to the general position of the Secretary that the Mine Act applies to all "working conditions on mine sites." Id.

Mr. Cole testified that he believes that a truck dispatched from the Morenci batch plant is subject to MSHA jurisdiction if it travels and delivers its load of concrete on the property of Phelps Dodge. (Tr. 114). He testified that if the load is delivered to the town of Morenci rather than to a facility on Phelps Dodge property, he believes that the truck would not be subject to MSHA jurisdiction. (Tr. 107, 114-115).

For the reasons discussed below, I find that Mr. Franco was a miner on the day of his discharge. I agree with Inspector Cole that the W.A. Morris's Morenci batch plant is not subject to MSHA jurisdiction. Normally, trucks dispatched from a batch plant would likewise not be subject to MSHA jurisdiction. If a truck delivers asphalt or concrete to a mine, however, the truck would be subject to MSHA jurisdiction while on mine property. This jurisdiction would attach even if the batch plant is not on mine property. Thus, if W.A. Morris delivered concrete to the Morenci Mine from a batch plant in the town of Morenci, the mixer trucks would be subject to MSHA jurisdiction while on mine property.

The record indicates that Phelps Dodge's Morenci property covers approximately 80 square miles. (Tr. 88). Much of this area may not be included within the definition of "coal or other mine" in section 2(h)(1) of the Mine Act. Nevertheless, I find that the area of the flood control dam is part of Phelps Dodge's Morenci Mine and is subject to Mine Act jurisdiction. First, the definition of coal or other mine includes retention dams used in the extraction of minerals. That term is not defined in the Mine Act. There is no dispute, however, that the dam in question was designed to retain water. I find that it is a retention dam as that term is used in the definition. The dam facilitated the mining of copper from the Morenci pit and was integrally related to the extraction of copper. As Respondent recognizes, the dam protected the open pit from flooding. Accordingly, I find that

the dam was part of the Phelps Dodge Morenci Mine and that Mr. Franco was a miner on the day of his discharge.⁴

In Otis Elevator Co. v. FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the Court held that a company engaged in the business of providing elevator maintenance and repair services at a mine was a mine operator subject to the jurisdiction of the Mine Act. It specifically rejected the company's contention that Mine Act jurisdiction only attaches to independent contractors who operate, control, or supervise a mine.⁵ 921 F.2d at 1289. In Lang Brothers, Inc., 14 FMSHRC 413 (September 1991) (published March 1992), the respondent had a contract to clean and plug gas wells at a coal mine site annually to ensure that natural gas did not seep through the wells into a mining area. In holding that the company was an independent contractor and therefore an "operator," the Commission stated:

Lang's work at the well sites ... was integrally related to [the mine's] extraction of coal. The sole purpose of Lang's cleaning and plugging contract ... was to facilitate [the] extraction of ... coal.

14 FMSHRC at 418 (citation omitted). See also, Bulk Transportation, 13 FMSHRC 1354, 1357 (September 1991).

I find that W.A. Morris was an independent contractor and therefore an operator under section 2(d).⁶ W.A. Morris performed

⁴ There is no dispute that Mr. Franco was at the batch plant when he refused to drive the truck and was discharged. One could argue that because the batch plant is not a coal or other mine, he was not a miner at the time of his work refusal and discharge. I reject such a narrow interpretation of the definition. I find that Mr. Franco was a miner despite the fact that he was not at a mine at the time of these events. His work activities would have taken him to a mine. Thus, if a hypothetical mine foreman called an employee at his home to assign him unsafe work at a mine and then discharged him for refusing to perform such work, the mine operator would not escape section 105(c) liability simply because the individual was not "working" at a mine at the time of the phone call.

⁵ The term "operator" is defined to include "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d).

⁶ I limit my finding to the circumstances of this case because other parts of W. A. Morris operations may not be subject to Mine Act jurisdiction.

work at the Morenci Mine including the dam that was "integrally related to" the extraction of copper. I recognize that a contractor's contact with a mine may be so infrequent or insubstantial that it should not be considered an operator. In this case, however, W.A. Morris had a continuing presence at the Morenci Mine. The fact that its activities subjected it to Mine Act jurisdiction should not have come as a surprise. Indeed, W.A. Morris had provided MSHA training for Mr. Franco. (Ex. R-2).

In its brief, Respondent relies, in part, on the decisions of two administrative law judges to support its position that the dam is not a mine. First, in Randall Patsy v. Big "B" Mining Co., 17 FMSHRC 224 (February 1995), Judge Feldman held that an individual working at a mobile home campground owned by a mining company was not a miner because he was not working at a coal or other mine. I agree with the judge's analysis that an individual's status as a miner is determined by whether he works in a mine and not whether he is employed by a mine operator. In this case, I base my conclusion that Mr. Franco was a miner on the fact that he was working at a mine, not that he was employed by W.A. Morris. Other W.A. Morris employees may not be miners.

Second, in Kaiser Steel Corp., 3 FMSHRC 1052 (April 1981), former Commission Judge Boltz determined that a dam upstream from a mine that provided drinking water for a town and domestic water for a mine was not subject to Mine Act jurisdiction. The Secretary argued that MSHA had jurisdiction because the dam was owned, operated, and controlled by a mining company; it was close to the mine; and water was used at the mine and coal preparation facilities. 3 FMSHRC at 1057. Judge Boltz held that the dam was not subject to Mine Act jurisdiction because the Secretary failed to establish that water from the dam was used at the mine or the preparation plant. Id. To the extent that his decision holds that a dam is subject to MSHA jurisdiction only if the water from the dam is used at the mine, I disagree with his analysis. In the present case, the water is not used at the mine but is diverted around the mine for downstream users. Respondent's Brief at 9. The dam protected Phelps Dodge's open pit from flooding and is therefore an integral part of the mine subject to the jurisdiction of MSHA.

For the reasons discussed above, I find that the dam is subject to MSHA jurisdiction, W.A. Morris was an operator when providing services or construction at the dam, and Mr. Franco was a miner. Accordingly, Respondent's motion to dismiss this proceeding on this jurisdictional ground is **DENIED**.

B. Mr. Franco's late-filed complaint should be excused.

Respondent also contends that this case should be dismissed because Mr. Franco did not timely file his discrimination complaint with the Secretary. There is no dispute that Respondent

discharged Mr. Franco on January 24, 1995, and that he did not file his discrimination complaint with MSHA until July 10, 1995, about 167 days after his discharge. Section 105(c)(2) of the Mine Act, provides that a "miner ... who believes he has been discharged ... by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary" 30 U.S.C. § 815(c)(2). Respondent argues that this proceeding should be dismissed because Mr. Franco failed to comply with this 60-day requirement.

Commission case law makes clear that the 60-day time limit is not jurisdictional. An administrative law judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" in order to determine whether the miner's late filing should be excused. Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 24 (January 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir 1984) (table). The Commission reached this conclusion based on the language of section 105(c), the legislative history of the Mine Act and the protective purposes of the Mine Act's anti-discrimination provisions. Id.

In this case, Mr. Franco filed his discrimination complaint about 107 days late. Based on the evidence in this case, I find that his late filing should be excused. As soon as he was discharged, Mr. Franco filed for unemployment compensation with the State of Arizona. His narrative description of the events was submitted to the state office on or before February 15, 1995. In this filing, he described the events that took place on the day of his discharge and stated his belief that the truck he was assigned to drive that morning was unsafe. In this filing, he also stated that he communicated his safety concerns to Andrew J. Gilbert, Jr., and he subsequently learned that he had been fired. In his filing he stated that he was "not sure what [he] did or said to get ... fired" He suggested that he was terminated because he is Hispanic, over 50 years old, and is "handicapped." (Ex. C-1).

On April 10, 1995, Mr. Franco filed a complaint with the Civil Rights Division of the Arizona Attorney General's office alleging that he was discriminated against because of his national origin, age, and his disability. In his complaint he set forth facts that he believed resulted in his discharge, including that he "informed Gilbert that the truck was unsafe to operate ... and [he] would not drive it until it was repaired." (Ex. C-2).

Although the discrimination complaint Mr. Franco filed with MSHA sets forth his safety concerns in more detail than his unemployment compensation claim or his civil rights complaint, the description of the events of January 24 is essentially the same. The only significant differences are the legal theories he alleged in support of his claims.

At the hearing, Mr. Franco testified that he first became aware that he could file a discrimination complaint under the Mine Act during an MSHA approved training course he attended while employed by another contractor after his discharge by Respondent. He testified that he filed the MSHA complaint soon after he learned that he could do so. I credit his testimony in this regard.

The legislative history of the Mine Act states that an extension of the statutory time limit may be warranted 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 ... misunderstands his rights under the Act." Legislative History, at 624. In this case, Mr. Franco advised an Arizona agency within 60 days that he was discharged after he refused to drive a truck that he considered to be unsafe. He stated that other W.A. Morris employees had refused to drive unsafe trucks and were not terminated. He further stated that he did not know why he was discharged for refusing to drive the truck, but noted that the other drivers who refused to drive unsafe trucks were not Hispanic, over 50 years old, or handicapped.

Thus, Mr. Franco brought his complaint to the attention of another agency with the 60-day period. Although he alleged different legal theories in the MSHA complaint, the factual predicate was the same. In addition, I note that Mr. Franco has only an eighth-grade education and, by his own admission, is not proficient at reading. (Tr. 52, 61). I find that he misunderstood his rights under the Mine Act and that once he learned of his rights at a training class, he filed his MSHA complaint expeditiously.

In Hollis, the administrative law judge did not credit the miner's claimed ignorance of his section 105(c) rights and he dismissed the discrimination proceeding because it was filed more than four months after the statutory deadline. The miner had pursued labor arbitration remedies and had filed complaints under civil rights and labor statutes. The judge determined that the miner, as the chairman of the local union safety committee, knew his rights under the Mine Act. In affirming the judge's decision, the Commission concluded that Congress did not intend that late-filed complaints be excused where "the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act." 6 FMSHRC at 25 (emphasis in original).

I find that Mr. Franco did not knowingly sleep on his rights when he sought unemployment compensation and invoked the aid of the Arizona Attorney General's Office. As stated above, he misunderstood his Mine Act rights and he filed his Mine Act complaint as soon as he learned of his right to do so. I also find that W.A. Morris was not unfairly prejudiced by Mr. Franco's late

filed complaint. At the time Mr. Franco was discharged, Mr. Gilbert knew that Mr. Franco refused to operate truck No. 158 because he believed it was unsafe. W.A. Morris could have fully investigated his safety claim at that time.

In its brief, Respondent relies, in part, on the decision of Judge Maurer in William T. Sinnott v. Jim Walter Resources, Inc., 16 FMSHRC 2445 (December 1994) to support its case. In that case the complainant filed his MSHA about three years three months after the alleged discrimination. In addition, the complainant had a college degree in mine engineering and did not claim ignorance of the filing requirements of the Mine Act. He sought to be excused from the filing requirements because he did not know why he was discharged. Judge Maurer dismissed his discrimination complaint. That case is factually distinguishable from the present case. Mr. Franco has only an eight grade education, little prior mining experience and does claim ignorance of the time limits in the Mine Act. He filed his complaint with MSHA soon after he learned of his rights, which was only about three months after the alleged discrimination. Accordingly, the judge's analysis in Sinnott is not applicable to this case.

For the reasons discussed above, I find that the failure of Mr. Franco to file his MSHA discrimination complaint within 60 days should be excused. Accordingly, Respondent's motion to dismiss this complaint for that reason is **DENIED**.

C. Complainant's Application should not be dismissed because of technical deficiencies in service and filing.

Respondent also maintains that the case should be dismissed because it was not properly served with the Application and the Application was not properly filed with the Commission. Respondent contends that the Application was not served or filed by personal delivery or by certified mail, return receipt requested as required by 29 C.F.R. §§ 2700.5(d) and .7(c).

Complainant admits that he served and filed the Application by regular first class mail. He states that this mistake was clerical in nature and that Respondent suffered no harm or prejudice as a result. He further states that, in a telephone call made by Respondent's counsel to Complainant's counsel on January 23, 1996, Complainant's counsel was advised that the Application had been received.

The certificate of service states that the Application was served and filed on January 17, 1996. It was received by the Commission on January 23, 1996. I conclude that this proceeding should not be dismissed on the basis that the Application was served and filed by regular first class mail. There is no dispute that the Application was promptly received by Respondent and

the Commission. Dismissal is a harsh sanction and Complainant's error was only a technical one.

Finally, Respondent contends that this Application should be dismissed because Complainant failed to attach to the Application a copy of Mr. Franco's complaint to the Secretary, as required by 29 C.F.R. § 2700.45(b). Complainant replied that he failed to attach a copy of Mr. Franco's complaint by mistake and that a copy was provided in accordance with my order of January 25, 1996.

I conclude that this proceeding should not be dismissed on this basis. The Complainant's error was a technical one and Respondent was able to fully participate in the hearing. Based on the foregoing, Respondent's motions to dismiss this proceeding are **DENIED**.

III. MR. FRANCO'S COMPLAINT WAS NOT FRIVOLOUSLY BROUGHT

The issue in this proceeding is whether Mr. Franco's complaint was frivolously brought. The Secretary of Labor has the burden of proof. This issue is entirely different from the issue in the underlying discrimination proceeding, WEST 96-121-DM. In Jim Walter Resources, Inc. v FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990), the Court concluded that the "not frivolously brought" standard is indistinguishable from the "reasonable cause to believe" standard under the "whistle-blower" provisions of the Surface Transportation Assistance Act. The court equated "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit." Id.

I conclude that Mr. Franco's complaint was not frivolously brought. As discussed above, Mr. Franco testified that he refused to drive the truck because he believed it to be unsafe. He also testified that he told his supervisor that his refusal was based on his safety concerns. Mr. Gilbert, Sr., President of W.A. Morris, testified that Mr. Franco was discharged because he refused to drive the truck. The alleged hazard is that the chute that discharges the concrete from the mixer was defective and could fall and thereby injure or kill someone. It is not clear whether Mr. Franco believed that he was personally endangered because he testified that the hazard was present only when the concrete was unloaded. The record does not disclose whether Mr. Franco would have helped unload the concrete at the dam site.

It is well established that in order to establish a prima facie case in a discrimination case, a complainant must establish that he engaged in a protected activity and that the adverse action complained of was motivated in any part by that activity. In some circumstances a miner may refuse to work based on a reasonable, good faith belief that his work activity would endanger

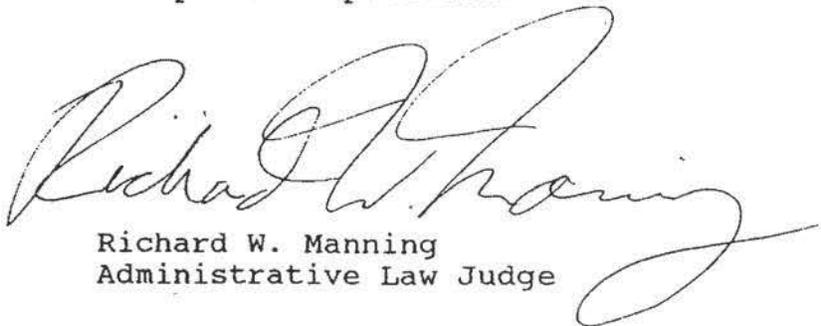
other miners. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364 (4th Cir. 1986).

Based on the above, I find that the Secretary has met his burden of establishing that Mr. Franco's complaint and the Secretary's decision to pursue the complaint were not "insubstantial or frivolous" or "clearly without merit." The Secretary made a sufficient showing of the elements of a prima facie case of discrimination. Of course, it is not certain that Complainant will be able to prevail in the discrimination proceeding. Respondent does not admit that it discharged Mr. Franco because of his safety complaint about the truck and has alleged that Mr. Franco was discharged for reasons that are not protected under the Mine Act.

The purpose of temporary reinstatement is to render the complainant financially secure during the pendency of his discrimination case. In enacting the "not frivolously brought" standard, Congress intended that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." Jim Walter Resources, 920 F.2d at 748 n. 11. Nevertheless, it would be inequitable to require Respondent to temporarily reinstate Mr. Franco for an indefinite period of time. Accordingly, I expect the parties to proceed with the discrimination case, WEST 96-121-DM, as expeditiously as possible. Respondent's answer is due on or before February 21, 1996. I will schedule a conference call soon after the answer is filed to discuss a hearing schedule.

IV. ORDER

W.A. Morris Sand and Gravel, Inc., is hereby ORDERED to immediately reinstate Ramon S. Franco to the position he held prior to his discharge at the same rate of compensation and with the same work hours, including overtime, as the other truck drivers at W.A. Morris. Mr. Franco's position must have substantially similar working conditions as his previous position.



Richard W. Manning
Administrative Law Judge

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