

FEBRUARY 2000

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FEBRUARY 2000

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

Secretary of Labor, MSHA v. Douglas R. Rushford Trucking, Docket No. YORK 99-39-M. (Judge Melick, January 19, 2000)

There were no cases filed in which Review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 2000

GILBERT V. ANKROM :
 :
 v. : Docket No. LAKE 98-126-DM
 :
 WOLCOTTVILLE SAND :
 AND GRAVEL CORPORATION :

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”), Administrative Law Judge Avram Weisberger concluded that Gilbert V. Ankrom established a prima facie case that Wolcottville Sand & Gravel Corporation (“WS&G”) had taken adverse employment action against him in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 20 FMSHRC 1185 (Oct. 1998) (ALJ). The judge determined, however, that WS&G established its affirmative defense that it would have taken such action in any event based upon Ankrom’s unprotected activity alone, and dismissed Ankrom’s complaint. *Id.* at 1191. The Commission granted Ankrom’s petition for discretionary review of the judge’s decision. For the reasons that follow, we affirm the judge’s determination.

I.

Factual and Procedural Background

WS&G operates a gravel pit in Newcomerstown, Ohio. Tr. 32. On August 18, 1997, Ankrom began working as a front-end loader operator on the night shift at the gravel pit. 20 FMSHRC at 1185-86. Ankrom was also certified as a foreman. Tr. 73. Ankrom stated that he made safety complaints on nearly a daily basis. Tr. 69, 210. After his first day on the job, Ankrom complained to his supervisor, Mark McKitrick, that the front-end loader did not have a seat belt. 20 FMSHRC at 1186; Tr. 302.

Approximately 3 weeks later, Dennis Jackson began working as the night shift foreman in place of McKittrick. 20 FMSHRC at 1187; Tr. 126-27. Other members of the night shift besides Jackson and Ankrom included Dan Gay, a front-end loader operator, and David Gay, a laborer. 20 FMSHRC at 1186; Tr. 275. Ankrom complained to Jackson that the berms were inadequate on the road on which he operated the front-end loader. 20 FMSHRC at 1186, 1187. Jackson testified that when he discussed Ankrom's safety concerns with Kevin Schemp, the superintendent at the mine, Schemp changed the subject and did not address them. *Id.* at 1187.

In early September, Ankrom complained to Jackson about employees repairing belts without adequate safety equipment, the lack of adequate berms, and that draglines were operated without lights, encouraging him to contact state and/or federal authorities so that the conditions would be corrected. *Id.* at 1186; Tr. 132-34. Jackson contacted an inspector with the Ohio Department of Natural Resources ("ODNR"), Fred Kidd. 20 FMSHRC at 1186; Tr. 49-50. On September 11, 1997, Kidd inspected the pit and issued correction orders to WS&G. 20 FMSHRC at 1186.

On October 8, 1997, Ankrom informed Glenn Freese, the day shift foreman, that the berms were inadequate and that the previous day, he had almost rolled over his front-end loader. *Id.* Ankrom also later so informed Jackson. *Id.* After receiving telephone numbers for the Department of Labor's Mine Safety and Health Administration ("MSHA") from Ankrom, Jackson contacted MSHA and the mine was inspected on October 14 and 15, 1997. Tr. 56-57, 61, 147-48. MSHA issued citations for various violations including inadequate berms. Tr. 66-67; C. Exs. 2A, 2B, 2C. Schemp later spoke to the employees at the mine and stated that MSHA had inspected the mine, and he was curious regarding the reason for that inspection. 20 FMSHRC at 1187; Tr. 61-62. Jackson made no response to Schemp's inquiry. Tr. 62.

In the middle of October, Schemp moved Ankrom and Jackson to the day shift. 20 FMSHRC at 1186 n.1. Schemp stated that he moved Ankrom and Jackson to the day shift because the night shift was "ineffective" in terms of production, and because the mine needed to have plant stock moved to the feed bin and he wanted to have WS&G employees, rather than independent contractors, move the overburden. *Id.* at 1188; Tr. 277. On the day shift, Ankrom and Jackson operated moxy trucks to haul material and remove overburden.¹ 20 FMSHRC at 1188. David Gay and Dan Gay remained on the night shift and moved material from stockpiles. *Id.*; Tr. 276.

On Friday, October 31, 1997, WS&G employees were asked to indicate on a form any of their safety concerns, and to return their forms by Monday, November 3. 20 FMSHRC at 1186; Tr. 160-61. Ankrom returned a completed form, noting his concerns regarding the lack of inspections by foremen at the beginning of shifts, and inadequate berms. 20 FMSHRC at 1186. The only other employee to return a completed form was David Blank, a day shift laborer, who voiced concerns about greasing the head sections of the conveyors. Tr. 285, 287. The mine was

¹ A moxy truck is a 30-ton rock truck. Tr. 28.

inspected again by State Inspector Kidd in early November. 20 FMSHRC at 1186; Tr. 153.

On November 7, 1997, Schemp informed Ankrom that he would be returning to the night shift. 20 FMSHRC at 1186; Tr. 165-66, 282-83. On November 8, Ankrom called State Inspector Kidd regarding the lack of adequate berms. 20 FMSHRC at 1187. The November 8 entry in the foremen's log notes that the ODNR had been contacted. Tr. 176-77; R. Ex. 1.

During the morning of November 9, Schemp called Ankrom at home and asked him why he had not gone to work. 20 FMSHRC at 1187. Ankrom replied that he was scheduled for the night shift. *Id.* Schemp told Ankrom to forget about that day and just come to work on November 10. Tr. 174. Ankrom brought up his safety concerns, including those he had described in the form, and a heated discussion ensued. 20 FMSHRC at 1187; Tr. 172-74.

On November 10, 1997, Schemp left a message on Ankrom's telephone answering machine, in which he stated: "After looking at everything around here, I think I'm going to park the moxy trucks and take them off rental and go to a straight day turn until the weather breaks and we can do something with the roads. So you are laid off until further notice, which I'll call you at the point that there's something to do here." Tr. 186-87. On that same day, Schemp also laid off Jackson, stating that for safety reasons, he did not want the crew to operate the moxy trucks in the mud. 20 FMSHRC at 1187. Approximately one day later, Schemp also laid off Dan Gay and David Gay. *Id.* at 1188; Tr. 223. Schemp stated that he made the decision to lay off the night shift "due to not being able to have any productive work being generated at that point in time from those particular four people." Tr. 316. The season ended on approximately December 10, 1997. 20 FMSHRC at 1188; Tr. 282.

On approximately March 12, 1998, Ankrom visited the mine and asked Schemp the status of his job. 20 FMSHRC at 1187. According to Ankrom, Schemp stated that the job was expected to last only another 4 months. *Id.* According to Schemp, Ankrom mentioned that he found other work, and Schemp had replied that he thought Ankrom should take it. Tr. 232, 234.

The night shift resumed on March 20, 1998, and consisted of Dan Gay, David Gay, Dennis Williamson, Robert Ferguson, and Brett McCune. 20 FMSHRC at 1188; Tr. 225. Williamson had worked during the day shift during the previous season. Tr. 225. McCune had been newly hired as a laborer, and Ferguson had been hired as a front-end loader operator in early March. Tr. 225-26. Ankrom and Jackson were not recalled. 20 FMSHRC at 1188.

Schemp stated that his decision not to recall Ankrom was based on Ankrom's poor work performance, lack of ability, and unwillingness to perform.² Tr. 229, 292-93. Schemp testified that he reviewed operations during the winter, and found it "wanting in places, and Gilbert Ankrom was one of the places." Tr. 227. Schemp testified that he reviewed personnel, and

² Schemp stated that he did not recall Jackson because he found his performance worse than Ankrom's. 20 FMSHRC at 1188; Tr. 238.

production figures on daily reports, the foremen's log, and cost accounting documents. Tr. 228, 253-54. In addition, he stated that Ankrom was unable to operate his equipment to maintain a flat pit floor, or a clean floor, and to efficiently load the end-loader bucket, and that he had to counsel him in an effort to correct his performance on approximately a weekly basis. Tr. 229-30, 291. Schemp stated that in January and February 1998, he was tending toward deciding not to recall Ankrom, and that the final decision was made with the assistance of his supervisor, Gary Saathoff, who found a more qualified person, Ferguson, to operate the loader. Tr. 230-31, 236-37, 294.

On November 24, 1997, Ankrom filed a complaint with MSHA alleging discrimination under section 105(c) of the Mine Act.³ C. Ex. 7A. MSHA investigated the complaint and informed Ankrom by letter dated March 25, 1998, that the investigation had not revealed a violation of section 105(c). By letter dated April 28, 1998, Ankrom filed a discrimination action with the Commission pursuant to section 105(c)(3) of the Mine Act. C. Ex. 7B. The matter proceeded to hearing before Judge Weisberger.

The judge concluded that Ankrom had proved his prima facie case of discrimination. 20 FMSHRC at 1189-90. First, the judge found that un rebutted testimony by Ankrom and Jackson revealed that Ankrom had engaged in protected activity by making safety complaints to Jackson, Schemp and Freese; by discussing with Jackson the need to contact government inspectors; and by making safety complaints on November 3 and 9, 1997, as stipulated by the parties. *Id.* at 1189. The judge also noted that the parties stipulated that WS&G took adverse action against Ankrom when it laid him off and failed to recall him. *Id.* Third, the judge concluded that the adverse actions taken by WS&G were motivated in some part by Ankrom's protected activities based on his findings that Schemp knew of Ankrom's safety complaints; there was a coincidence in timing between the protected activity on November 9 and the layoff the following day; and Schemp was hostile towards the safety complaints. *Id.* at 1190. In making his finding that Schemp was hostile toward the safety complaints, the judge discredited Schemp's denial that he told Inspector Kidd that part of the reason for downsizing was due to safety complaints. *Id.*

The judge determined, however, that WS&G had established its affirmative defense that its adverse action was also motivated by unprotected activity and it would have taken the adverse action in any event for the adverse action alone. *Id.* at 1191. As for the layoff, he concluded that Ankrom would have been laid off in any event for economic and weather reasons, relying on evidence that the entire shift had been laid off, including two members who had not made any safety complaints. *Id.* As for the decision not to recall Ankrom, the judge relied upon un rebutted evidence that Ankrom's work performance was unsatisfactory. *Id.* Accordingly, the judge dismissed Ankrom's discrimination complaint. *Id.*

Although he was represented by counsel during the hearing and filing of post-hearing

³ Jackson also filed a complaint alleging discrimination under section 105(c) of the Mine Act. Tr. 103.

pleadings, Ankrom filed a petition for discretionary review without benefit of counsel. In the petition, Ankrom cites to pages of the transcript and objects to various points raised by WS&G in its reply to Ankrom's proposed findings of fact filed before the judge. WS&G filed a statement in opposition to Ankrom's petition, stating that the petition does not refer to any conclusion made by the judge or identify an issue. Opp'n at 1-2. WS&G attached to its opposition the proposed findings of fact that it had submitted to the judge ("WS&G FOF"). The Commission granted Ankrom's petition for discretionary review. Ankrom subsequently designated his petition as his brief. See 29 C.F.R. § 2700.75(a).

II.

Disposition

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. See *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n.20.

If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. See *id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test). An operator bears the burden of proving an affirmative defense to a discrimination complaint. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982). This line of defense applies in "mixed motive" cases, e.g., cases in which the adverse action is motivated by both protected and unprotected activity. *Id.* The ultimate burden of persuasion does not shift from the complainant. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984). An operator may attempt to prove that it would have disciplined a miner for unprotected activity alone by "showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belya Coal Co.*, 4 FMSHRC 982, 993 (June 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.*

A complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have taken place in any event for such unprotected activities alone. *Robinette*, 3 FMSHRC at 818 n. 20. Because the ultimate burden of persuasion never shifts from the complainant, if a complainant who has established a prima facie case cannot refute an operator's meritorious affirmative defense, the operator prevails. *Id.*

Here, it is undisputed on review that the layoff and WS&G's failure to recall Ankrom were in some part motivated by Ankrom's protected activity in expressing safety concerns to WS&G supervisors and in discussing with Jackson the need to consult with government inspectors. The issue is whether substantial evidence supports the judge's determination that WS&G was also motivated by reasons unrelated to the protected activity and would have laid off Ankrom and failed to recall him for those reasons alone.

A. The Layoff

Ankrom argues that substantial evidence does not support the judge's finding that WS&G would have laid him off based on his unprotected activity alone.⁴ Ankrom contends that Schemp's testimony that he made the decision to lay off the night shift for economic reasons is inconsistent with the weather-related reason that Schemp gave Ankrom for his layoff. PDR at 4 ¶ 12; Tr. 316. Ankrom also asserts that the foremen's log does not reflect a lack of productivity by the night shift. PDR at 3 ¶ 7.

We agree that the judge erred in relying upon weather-related reasons in finding that WS&G established its affirmative defense. WS&G abandoned the weather-related reasons that Schemp gave for the layoff during the hearing and in post-hearing pleadings. As noted by Ankrom, at the hearing Schemp testified that he made the decision to lay off the second shift because he could not get "any productive work" from them. Tr. 316. Likewise, in its post-hearing brief, WS&G maintained that the entire night shift was laid off due to their lack of productive work and effectiveness, including two night shift members who had not made safety complaints. WS&G FOF at 3, 7.

⁴ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Nonetheless, the judge's conclusion that WS&G would have laid off Ankrom anyway for economic reasons is supported by substantial evidence. It is undisputed that Schemp laid off all four members of the night shift, including Dan and David Gay, who had not made safety complaints. Tr. 222-23, 283, 285, 307. In addition, Blank, the day shift laborer who had returned a completed safety complaint form to WS&G, was not laid off. Tr. 285, 287. Schemp testified that he laid off Ankrom as well as the entire night shift "due to not being able to have any productive work being generated at that point in time from those particular four people." Tr. 316. It appears that Schemp had ongoing concerns with the night shift's productivity, in that Schemp testified that he transferred Ankrom and Jackson in mid-October to the day shift in part because the night shift was "ineffective" in terms of production. Tr. 277. Moreover, contrary to Ankrom's assertion, it appears that the foremen's log generally reflects lower productivity for the night shift than the day shift. R. Ex. 1.

The judge credited testimony that Schemp would have laid off Ankrom in any event because he was dissatisfied with the productivity of the entire night shift. 20 FMSHRC at 1191. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) ("Dust Cases"), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *Dust Cases* at 1881 n.80. We do not find sufficient evidence in the record to take the "extraordinary step" of overturning the judge's credibility determination. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997). Accordingly, we affirm as supported by substantial evidence the judge's determination that WS&G would have laid off Ankrom for his unprotected activity alone.

B. The Failure to Recall

Ankrom argues that substantial evidence does not support the judge's finding that WS&G established its affirmative defense as to its decision not to return Ankrom to work. He contends that Schemp's testimony that his review of production was part of the basis for his decision not to recall Ankrom is inconsistent with Schemp's testimony that he laid off the entire night shift because of their lack of productivity. PDR at 3 ¶ 7. Ankrom also relies on Schemp's testimony that there are no specific records in the foremen's log that reflect individually on Ankrom. *Id.* In addition, Ankrom argues that there is testimony suggesting that there may not have been any witnesses to Schemp's counseling of Ankrom, and that there are inconsistencies in Schemp's testimony regarding the number of times that Schemp counseled Ankrom. PDR at 3 ¶¶ 8, 9.

WS&G responds that substantial evidence supports the judge's determination that it established its affirmative defense. WS&G Br. at 2. It argues that Ankrom would not have been recalled to work in any event because of his poor work performance. WS&G FOF at 4, 9. Thus,

although WS&G does not specifically rely on *Bradley* factors to justify its decision not to recall Ankrom, it appears that it effectively relies upon the factor of “the miner’s unsatisfactory past work record.” *Bradley*, 4 FMSHRC at 993.

Schemp testified that he found after the lay-off, from approximately November 12 to December 5, the day shift was very efficient without a night shift, which led him to believe that he had problems with the night shift and its personnel. Tr. 228. As noted by Ankrom, Schemp testified that there were no specific figures in the foremen’s log or elsewhere that he relied upon in his decision not to recall Ankrom, and that the production figures reflected on the entire night shift. Tr. 241, 255. Although he could not point to any specific figures, however, Schemp explained that Ankrom’s performance would have impacted the shift he worked with just like any employee’s performance would have. Tr. 239. Schemp testified that he attributed the negative production of the night shift to Ankrom and Jackson because when he moved Ankrom and Jackson to day shift, and left Daniel and David Gay on night shift, he got “results.” Tr. 242. Although Schemp later transferred Ankrom from day shift to night shift, it appears that Schemp was not fully aware of Ankrom’s impact on productivity until he reviewed operations after the close of the season. Tr. 230. Schemp explained that he was not completely sure he made the right decision not to recall Ankrom until he reviewed production figures at the end of March and saw improvement in production. *Id.*

In addition, there is unrebutted testimony in the record regarding Ankrom’s unsatisfactory work performance. Schemp testified that Ankrom could not maintain a flat pit floor, which caused severe rutting and water run-off problems, or keep a clean floor through which vehicles could drive. Tr. 229. In addition, he was dissatisfied with the amount of time that it took Ankrom to fill the front-end loader’s bucket. Tr. 292. Schemp also testified that Ankrom was “mediocre on maintenance.” Tr. 230. Schemp’s testimony was corroborated by Dan Gay, who testified that Ankrom always left the pit floor in an uneven state. Tr. 322. Gay testified that Ankrom did not reach the same levels of production as Gay on the second shift, and that he observed Ankrom fail to inspect and maintain his front-end loader. Tr. 322-23. Schemp also testified, without rebuttal, that the miner hired to operate the loader in Ankrom’s place was more qualified and experienced, particularly with the screening applications that were being done at the mine.⁵ Tr. 237.

Moreover, there is unrebutted testimony that Schemp counseled Ankrom more than any other employee in an effort to improve his performance. Tr. 291-92. Schemp testified that he counseled Ankrom on the performance of his work about every week regarding maintaining a flat and level pit floor, keeping a clean floor when working around the stockpiles, and about the amount of time that he took filling a bucket and the method that he used. Tr. 291. Schemp

⁵ Ankrom did, however, rebut Daniel Gay’s testimony that Gay observed Ankrom “hang up” his front-end loader on berms two or three times per week. Tr. 323. Ankrom testified that he had two instances in which he hung up his loader, which occurred in foggy conditions with inadequate berms. Tr. 208.

testified that Ankrom's performance did not improve after such counseling. Tr. 238. Similarly, Dan Gay testified that he informed Schemp that Ankrom was having trouble on the loader, and indicated that it might be due to his vision or lack of ability. Tr. 326-27. Gay stated that Schemp had replied that he would speak to Ankrom, and that the next day, Gay observed Schemp talking to Ankrom in Schemp's office. Tr. 329-30. Ankrom did not dispute that he was counseled about his performance. Rather, on review Ankrom disputed the frequency with which he was counseled, and whether there were witnesses to his counseling.⁶ PDR at 3 ¶¶ 8, 9.

We note that an affirmative defense requires more than a plausible showing of business necessity. The Commission has previously held that an operator bears the burden of proving an affirmative defense to a discrimination complaint. *Haro*, 4 FMSHRC at 1937. The question raised here is whether oral testimony alone supporting the operator's affirmative defense (alleged unsatisfactory work performance by Ankrom) is sufficient to carry the operator's evidentiary burden. The Commission has previously found that testimony regarding an employee's unsatisfactory work performance, if rebutted by contrary evidence, is insufficient to establish an operator's affirmative defense. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1481 (Aug. 1982) (noting that an operator who had presented such self serving testimony "failed to present any evidence as to what its usual practices and policies were with respect to bad operators of equipment.").

This case, however, is distinguishable from the Commission's decision in *Moses* because the record here clearly establishes that no rebuttal testimony regarding the complainant's work performance was presented. *Compare* Tr. 117-220 *with* Tr. 229, 238, 292-93. *See also* Ankrom's Reply to WS&G's FOF at 2 ¶ 9 (lacking citations to record). Consequently, the judge correctly credited the testimony offered by the operator supporting its affirmative defense that it would not have recalled Ankrom to work based on his unsatisfactory work performance alone.⁷

⁶ Specifically, Ankrom states that in his deposition, Schemp testified that he counseled Ankrom five times, while at the hearing, Schemp testified that he counseled Ankrom weekly (Tr. 291). PDR at 3 ¶ 9. Ankrom also notes that Daniel Gay testified only that he observed Ankrom in Schemp's office, and that Gay had no personal knowledge regarding whether Ankrom was counseled. *Id.* at 3 ¶ 8. In addition, he notes that at the hearing, Schemp testified that McKitrick observed the counseling (Tr. 302), but that Schemp stated in his deposition that there were no witnesses to the counseling. PDR at 3 ¶ 8. Schemp's deposition does not appear to be included in the official record. In any event, even accepting Ankrom's arguments, Ankrom does not dispute that he was counseled on his performance.

⁷ We note that the judge's discrediting of Schemp's denial that he told Inspector Kidd that part of the reason for downsizing was due to safety complaints did not require the judge to discredit Schemp's testimony on other matters. As the Commission has previously recognized in rejecting the "false in one, false in everything" rule of testimonial evidence, "it is not uncommon, and certainly not reversible error, for the trier of fact to find a witness to be credible on some, but not other, matters." *Faith Coal Co.*, 19 FMSHRC 1357, 1372 (Aug. 1997).

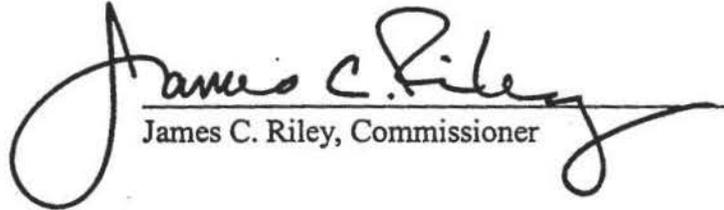
20 FMSHRC at 1191. Because of the failure to introduce any contrary evidence to rebut WS&G's affirmative defense, we cannot take the extraordinary step of overturning the judge's credibility determinations in this regard. See *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (stating that the Commission's role is limited to searching for "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion") (quoting *Consolidated Edison*, 305 U.S. at 229). Thus, we affirm as supported by substantial evidence the judge's determination that the operator proved its affirmative defense.⁸

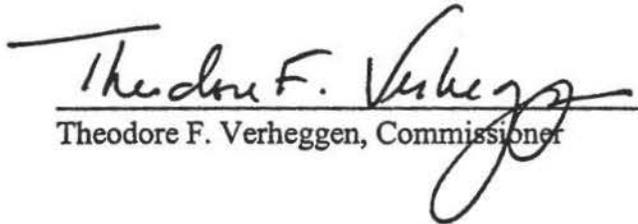
⁸ We reject our dissenting colleagues' conclusion that the judge failed to explain his crediting of Schemp's testimony that Ankrom would not have been recalled in any event based upon his poor work performance. Slip op. at 1. The judge explained that Schemp's testimony regarding Ankrom's poor work performance was corroborated by Daniel Gay, who worked with Ankrom, and that Ankrom did not rebut the evidence. 20 FMSHRC at 1191. We note that Jackson, Ankrom's supervisor, also did not rebut evidence that Ankrom's work performance was poor and that he was counseled more than any other employee in an effort to improve his performance. Overturning the judge's credibility determination absent such rebuttal testimony would amount to substituting a competing view of the facts, which we decline to do. See *Phelps Dodge*, 709 F.2d at 92 (stating that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached"); see also *Consolidation Coal Co.*, 20 FMSHRC 227, 238 (Mar. 1998) (separate opinion of Commissioners Riley, Verheggen) ("[T]he Commission's review [is] limited to whether the ALJ's findings of fact were supported by substantial evidence. The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'") (citation omitted), *aff'd*, No. 98-1613, 1999 WL 394191 (4th Cir. May 27, 1999).

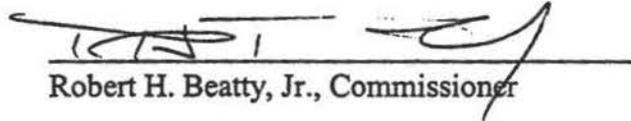
III.

Conclusion

For the reasons discussed above, we affirm the judge's determination that WS&G established its affirmative defense.


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Because we conclude that the record in this case establishes that WS&G failed to meet its burden of establishing an affirmative defense and that it discriminated against Ankrom in violation of the Mine Act, we write separately from our colleagues and dissent.

Once a prima facie case of discrimination has been found, as the judge did in the instant case, the operator must prove by a preponderance of the evidence that it would have taken the adverse action in any event because of unprotected activity alone. *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1556 (Sept. 1992). The record in this case does not support the judge's conclusion that WS&G would have failed to recall Ankrom for reasons unrelated to protected activity.

The judge based that conclusion primarily on evidence of WS&G's dissatisfaction with the quality of Ankrom's work (20 FMSHRC at 1191), and the majority finds substantial evidence to support the judge's finding on this point. Slip op. at 8-10. The analysis of the judge and the majority only answers half of the question, however, for to establish the affirmative defense, WS&G was required to show, *by a preponderance of the evidence*, that its dissatisfaction with Ankrom's work was *linked* to the discipline it meted out to him. *Donovan ex rel. Anderson v. Stafford Const. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (rejecting affirmative defense because, while there was record evidence supporting operator's claim that the complainant had a personality conflict with a manager, the evidence was "entirely too meager to permit the conclusion" that the employee was disciplined by the operator for that reason). A review of the record demonstrates that WS&G provided only scant evidence that its dissatisfaction with Ankrom's work was the reason it failed to recall him. We find WS&G's justification singularly unconvincing.

The record evidence of WS&G's dissatisfaction with Ankrom's performance is dubious since WS&G never attempted to inform Ankrom that his performance could or would merit his termination. WS&G's superintendent, Schemp, bluntly admitted that "I have never stated that Gilbert was a lousy employee to Gilbert." Tr. 235. Indeed, WS&G never even told Ankrom that it was terminating him because of work performance. Tr. 235. Instead, WS&G led Ankrom to believe that he was going to be re-hired. Tr. 186-87. Furthermore, WS&G conceded that it could point to no written documentation detailing Ankrom's alleged faulty performance, much less documentation that it was the reason for his termination. Tr. 237, 255. It strains credulity that WS&G decided not to recall a miner for poor work performance but never informed the miner of this so-called overriding reason.

The only evidence WS&G presented that its dissatisfaction with Ankrom's work was the reason it terminated him was Schemp's testimony to that effect. However, the judge's apparent crediting of Schemp on the issue (20 FMSHRC at 1191) lacks a required explanation. Earlier the judge had directly discredited Schemp's testimony. *See id.* at 1190. The judge therefore should have explained why he found Schemp's testimony credible in one respect, but not in another. *See Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813

(Apr. 1981).¹ Absent such an explanation here, we are not prepared to accept the judge's crediting of Schemp, especially when the testimony in question is the sole source of the operator's evidence on an issue on which the operator has the burden of persuasion and which has become the dispositive issue in the case.

WS&G also did not provide sufficient support for Schemp's claim that production concerns were the reason Ankrom was not recalled. In fact, upon careful examination, WS&G's production rationale appears to be nothing more than a pretext for failing to rehire Ankrom. On November 10 and 11, 1997, Schemp notified Ankrom and Jackson that he was going to operate with only a day shift until the weather broke, and that they were therefore laid off until further notice. 20 FMSHRC at 1187; Tr. 91, 186. In his testimony and written submissions, Schemp made it very clear that he laid off the night crew when he did because he could not get "any productive work . . . from those particular four people." Tr. 316; WS&G FOF at 3, 7.

When the night shift resumed on March 20, 1998, Ankrom and night shift foreman Dennis Jackson were not recalled to work. 20 FMSHRC at 1188. Former night shift employees Dan and David Gay were called back, however. *Id.* Although four allegedly "unproductive miners" were laid off in November, two were recalled in March. Schemp claims that he decided not to recall Ankrom and Jackson after he reviewed the production reports over the winter. Tr. 227-28, 253-54. On its face, this rationale appears implausible, since the two night crew miners Schemp did rehire were, by his own testimony, not producing satisfactorily at the time he laid them off. The assertion regarding Ankrom's low productivity is further undercut because WS&G could point to no specific figures in the foremen's log or elsewhere in the record that would allow one to draw any conclusions regarding any individual miner's impact, either positive or negative, on productivity. Tr. 239, 241, 255-56. In fact, Ankrom testified that just before he was

¹ In *Robinette*, the Commission stated:

[w]here it is apparent that a witness has testified untruthfully in part, the judge should ordinarily explain how that fact affects the credibility of the witness with respect to his remaining testimony. . . . [F]ailure to [provide such an explanation] is not necessarily reversible error[] [when] the remainder of a questionable witness' testimony is corroborated by other credible evidence, or is otherwise inherently believable

3 FMSHRC at 813 (citation omitted). Here, some of the remainder of Schemp's testimony — on his belief that Ankrom's poor performance adversely impacted the productivity of the night shift — is not only uncorroborated, but is inconsistent with his decision to return Ankrom to the night shift, as is discussed in further detail below. Given the judge's discrediting of some of Schemp's testimony and that another part of that testimony was inconsistent, the judge's decision to credit without explanation Schemp's claim that he terminated Ankrom because of his work performance was clear reversible error.

laid off, Schemp informed him that he was being transferred from the day to the night shift in part because Schemp needed to increase productivity. Tr. 166, 168.

That Schemp's productivity justification is merely a pretext becomes all the more apparent when one considers the fact that the two miners who were not recalled — Ankrom and night shift foreman Dennis Jackson — were the two miners who, prior to the layoff (1) made safety complaints to supervisory personnel, (2) made safety complaints to state personnel that resulted in the issuance of correction orders (20 FMSHRC at 1186), and (3) made or assisted in making safety complaints to MSHA that resulted in several inspections and numerous citations being issued in the two-month period prior to the layoff. Perhaps more significantly, after the layoff and prior to the recall, Ankrom and Jackson had filed formal complaints with MSHA alleging discrimination in violation of section 105(c).

Schemp's asserted productivity rationale is all the more suspect because of the hostility he showed towards safety complaints. While the judge concluded there was a "lack of significant animus" on the part of Schemp (20 FMSHRC at 1191), this finding is contradicted by the overwhelming weight of the evidence. The judge relied on the fact that another miner, David Blank, had submitted a written safety complaint to WS&G and was not laid off or discharged. *Id.* Blank's complaint, however, was submitted to WS&G after the operator distributed forms and requested employees to note their concerns. Tr. 285, 287. In contrast, Ankrom made a complaint to the state authorities, not just to WS&G, and also filed a formal discrimination charge with MSHA claiming his layoff violated the Mine Act. Tr. 177-79; C. Ex. 7A. Schemp received a copy of this discrimination complaint in December 1997, prior to his decision not to recall Ankrom. Tr. 226-27.

Schemp reacted angrily when formal safety complaints were made to MSHA. 20 FMSHRC at 1190. After several inspections of WS&G in the 2-month period prior to Ankrom's layoff, Schemp told Ankrom he intended to downsize the company because he was tired of all the inspections that were taking place as a result of safety complaints.² *Id.* WS&G suspected that Jackson was responsible for these inspections. Tr. 307.³ Jackson was Ankrom's foreman and Ankrom assisted him in making these complaints. Tr. 61, 133. Even if Schemp may not have suspected Ankrom of making formal safety complaints to MSHA or state mining authorities until the time of the hearing (another highly questionable claim of Schemp's which the judge

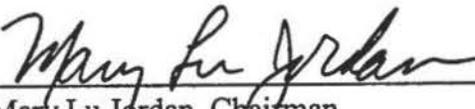
² Although at the hearing Schemp denied making the statement, the judge found the denial not credible in light of similar statements Schemp had made to the federal inspector. 20 FMSHRC at 1190.

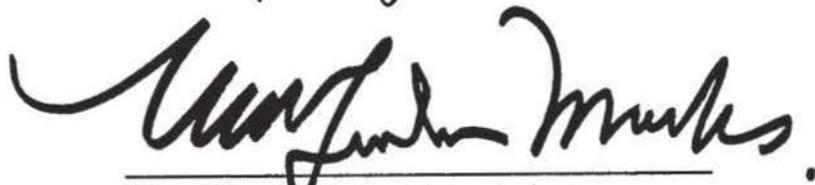
³ As with Ankrom, WS&G claims Jackson was not recalled because of the quality of his work. 20 FMSHRC at 1188; Tr. 238.

appears to credit (20 FMSHRC at 1191)),⁴ WS&G was aware that Ankrom had filed a formal discrimination complaint to MSHA between the time of layoff and the decision not to recall him. Tr. 226-27.

The judge's finding that Schemp lacked sufficient animus is further undermined by his earlier determination that Schemp was hostile towards Ankrom and hung up on him when Ankrom complained, on November 9, 1997, that "a lot of things" do not comply with state or federal safety standards. See 20 FMSHRC at 1190. Ankrom was laid off the day after this heated safety discussion (Tr. 185-86), which is itself a strong indicia of discriminatory motive. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In sum, the justifications that WS&G offered to try to establish that it would not have recalled Ankrom for his unprotected activity alone are inadequately substantiated and implausible. In the absence of any valid justification for the adverse action, WS&G fails in its attempt to defend against the prima facie case of discrimination. Accordingly, we conclude that the record compels the conclusion that WS&G discriminated against Ankrom, and would reverse the judge.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner

⁴ As the judge acknowledged, Ankrom's complaints about inadequate berms resulted in an MSHA inspection and citations for that condition in October of 1997. 20 FMSHRC at 1186. The judge also recognized that Schemp soon thereafter quizzed employees regarding the reason for the inspection without success, and that on October 31, 1997, WS&G distributed forms on which employees were asked to note any of their safety concerns. *Id.* Although it is undisputed that Ankrom was the only miner to use his form to note the inadequacy of the berms (*id.* at 1186; Tr. 285, 287), the judge inexplicably drew no connection between these series of events. The only safety concern noted by a miner other than Ankrom — Blank's concern about the conveyors — was not connected to an MSHA inspection. In these circumstances, the judge should not have blindly accepted Schemp's contention that he did not know of Ankrom's connection to the MSHA inspections, and the judge clearly should not have drawn an inference favorable to WS&G based on the differing treatment between Ankrom and Blank.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 22, 2000

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|--------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| on behalf of | : | |
| LEVI BUSSANICH | : | |
| | : | |
| v. | : | Docket No. WEST 2000-99-D |
| | : | |
| CENTRALIA MINING COMPANY | : | |
| | : | |

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”), the Secretary of Labor on behalf of Levi Bussanich has filed a petition for review of Administrative Law Judge Richard Manning’s January 27, 2000 order denying temporary reinstatement issued pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and 29 C.F.R. § 2700.45. 22 FMSHRC 107 (Jan. 2000) (ALJ). We grant the Secretary’s petition for review and, for the reasons that follow, affirm the judge’s order denying the temporary reinstatement of Bussanich.

I.

Factual and Procedural Background

Centralia Mining Company (“Centralia”) operates the Centralia Mine, a surface coal mine in Lewis County, Washington. 22 FMSHRC at 108. Bussanich was employed at the mine for 14 years and worked as a welder for 5 years. *Id.* Before filing the complaint which is the subject of this proceeding, Bussanich filed three other complaints with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) alleging discrimination in violation of section

105(c) of the Mine Act on February 11, 1997, February 19, 1999, and August 26, 1999.¹ *Id.* at 110-11.

On October 10, 1999, Bussanich injured his back at work and was placed on workers' compensation ("L&I leave"). *Id.* at 108. On November 4, 1999, after he had been absent more than two weeks, Rachel Woolley, Centralia's Human Resources Administrator, sent Bussanich a memorandum, pursuant to regular company policy, to determine whether he was taking leave subject to the Federal Family and Medical Leave Act ("FMLA"), and to ask him to complete an attached Department of Labor ("DOL") medical form. *Id.* When she did not receive a response from Bussanich, on November 17, 1999, she sent him a letter reminding him to have his physician complete the DOL medical form. *Id.*; Tr. 91; R. Ex. 2.

On November 30, 1999, Woolley received a phone call at her office. 22 FMSHRC at 108. According to Woolley, the caller identified himself as Bussanich, stated that he was on L&I leave rather than FMLA leave, that he "got another job, so [he] quit," that he would later pick up his tools, and that he needed his "401(k) money." *Id.* Woolley immediately discussed the call with Centralia's safety director, Ralph Sanich, and typed a brief memorandum describing her recollection of the conversation based in part on notes she took during the conversation. *Id.* at 108, 112.

Sanich telephoned Centralia's attorney, Thomas C. ("Tim") Means, who already represented Centralia with respect to Bussanich's other discrimination complaints. *Id.* at 113; Tr. 122. Means asked whether the mine accepted oral resignations from employment, and Sanich answered in the affirmative. 22 FMSHRC at 113. Means then advised him to treat Bussanich in the same manner that Centralia would treat any other employee. *Id.* Near the end of the conversation, Dave Kendrick, Bussanich's foreman, entered the room and was instructed to escort Bussanich to get his tools when he arrived at the mine that day. Tr. 131. Bussanich never came to retrieve his tools. Tr. 131-32.

On December 3, 1999, Sandy Wallace, Centralia's Senior Benefits Specialist, sent Bussanich a letter, acknowledging that he had quit on November 30, asking him to make arrangements to retrieve his tools, and reminding him to schedule an exit interview. 22 FMSHRC at 108. She enclosed with the letter Bussanich's final paycheck, and a check for his accrued vacation pay. *Id.* Bussanich deposited the checks on approximately December 9, 1999. *Id.*

¹ Although section 105(c)(3) requires the Secretary to inform a miner of the results of her investigation of the miner's complaint within 90 days after receiving the complaint, MSHA has not completed its investigation of these complaints. 22 FMSHRC at 110-11.

On December 7, 1999, Bussanich sent a letter to Wallace stating that he was under a doctor's care for an on-the-job injury, that he did not quit, and that he did not call Woolley on November 30. *Id.* Marjorie Taylor, the Senior Human Resources Administrator for Centralia, sent Bussanich a letter in reply, stating that Centralia considered him to have quit on November 30. *Id.* at 109.

On December 18, 1999, Bussanich filed a discrimination complaint with MSHA. *Id.* The complaint refers to Wallace's December 3 letter, his December 7 letter, and the reply he received from Taylor. *Id.* In addition, his complaint stated that "this is another attempt by the company to terminate my employment due to my earlier complaints due to safety at the mine." *Id.*

On or around December 21, 1999, Bussanich telephoned the mine to participate in an exit interview with Wallace. *Id.*; Tr. 166, 175; R. Ex. 7. That same day, Wallace signed a paper documenting the issues discussed during the exit interview and sent it to Bussanich, who signed it on December 23. Tr. 166, 175; R. Ex. 7. During the exit interview, Bussanich expressed interest in obtaining the funds from his 401(k) account and pension plan. 22 FMSHRC at 109. At the hearing, Bussanich testified that he elected to take the entire proceeds from his 401(k) account in cash because he could not withdraw only a portion of the funds due to two outstanding loans on the account, and because he needed the money to pay off household debts and support himself. *Id.*; Tr. 54, 68-69, 202. On approximately December 28, 1999, Bussanich received a check in the amount of \$61,792, which were the net proceeds from his 401(k) account. 22 FMSHRC at 109. Although Bussanich testified that he used these proceeds for household debts and to support himself, he acknowledged that he also owed Bradley Whisnant, his business partner in an adult video store, \$75,000. Tr. 45, 60-61, 210, 213.

On December 30, 1999, the Secretary filed an application for temporary reinstatement of Bussanich. Prior to filing the application, MSHA interviewed Bussanich and John Gift, Jr., another Centralia welder. 22 FMSHRC at 109. Centralia requested a hearing within 10 days of receipt of the Secretary's application, and the matter proceeded to hearing before Judge Manning on January 21. *Id.* at 107.

After the case was filed, Centralia served a subpoena on U.S. West, the local phone company, in order to determine the originating phone number of the call received by Woolley on November 30, as well as the originating number for another call on August 18, 1999,² relating to Bussanich's third, pending complaint. *Id.* at 109; Tr. 225; R. Ex. 12-13. Based on the information provided by U.S. West and GTE Northwest, another phone company, both calls

² This call was made to the mine on the same day and during the approximate time-frame that the mine received an anonymous call suggesting a search of Bussanich's truck for a stolen citizen's band radio. Tr. 186, 194, 224-25; R. Ex. 13. This search constituted the adverse action which formed the basis for one of Bussanich's earlier discrimination complaints. Ex. B-3 to Application for Temp. Reinstatement.

originated from a phone registered to Kim Whisnant, Bradley Whisnant's wife. 22 FMSHRC at 109; Tr. 196-97; R. Ex. 11-14. Centralia served subpoenas on Bradley and Kim Whisnant to testify at the temporary reinstatement hearing, but neither of the Whisnants complied with the subpoenas.³ 22 FMSHRC at 109, 110.

At the hearing, Bussanich testified that Mr. Whisnant subsequently called him because he was upset about the subpoena. *Id.* at 110. Bussanich stated that Whisnant informed him that he (Whisnant) called the mine in November to inquire about Bussanich's employment status, and that he obtained Woolley's phone number from her FMLA correspondence, which Bussanich had thrown in the trash at the video store which Whisnant and Bussanich operated as partners.⁴ *Id.*; Tr. 49-50, 212-13.

The judge concluded that the Secretary failed to establish that Bussanich's complaint had not been frivolously brought. 22 FMSHRC at 113. The judge noted that the parties had stipulated that Bussanich had engaged in protected activity, and that the sole issue for the hearing was whether there was a colorable claim that Bussanich had been discharged. *Id.* at 112. The judge assumed, for purposes of the proceeding, that Bussanich had not called Woolley to quit his job on November 30. *Id.* at 113. The judge found, however, that uncontroverted evidence established that Centralia sincerely believed that Bussanich had voluntarily quit his job on November 30, and that all of its actions from November 30 to the present were based on that belief. *Id.* The judge reasoned that, because Centralia understood that Bussanich quit his job, there was no colorable claim that he was discharged by Centralia because of his protected activity. *Id.* Finally, the judge rejected the argument that Centralia discriminatorily failed to rehire Bussanich after it received his December 7 letter. *Id.* at 113-14. The judge noted that the discrimination complaint does not contain such an allegation, the Secretary did not raise such an argument, and the record contained no evidence to support it since Centralia treated Bussanich in the same manner that it treated other employees who orally quit their jobs. *Id.* Accordingly, the judge denied the application and dismissed the proceeding.

On February 2, 2000, the Commission received from the Secretary on behalf of Bussanich a petition for review of the judge's order denying temporary reinstatement. First, the Secretary argues that the judge's finding that there is uncontroverted evidence which establishes that Bussanich voluntarily quit his job is not supported by the record. Pet. at 7-9. Second, the Secretary contends that Bussanich's December 7 letter should have been considered by the judge in the context of whether Centralia reasonably believed that Bussanich had quit his job. *Id.* at 9-10. Third, the Secretary argues that the record raises a colorable question concerning Centralia's

³ At the hearing, the Secretary opposed Centralia's motion to enforce the subpoenas. 22 FMSHRC at 110 n.1.

⁴ Bussanich owned three businesses at the time he was working at the mine: a real estate business, a video store, and a welding business. Tr. 66.

motivation, and that the November 30 phone call was a pretext for discharging Bussanich. *Id.* at 10-14.

On February 9, the Commission received a response from Centralia, disputing the Secretary's arguments. C. Resp. at 13-22. In addition, it maintains that the judge's decision should be affirmed on the basis that the judge alternatively should have made a credibility determination against Bussanich, and on the basis that the Secretary failed in her duty to sufficiently investigate whether Bussanich's complaint was frivolously brought. *Id.* at 22-26.

II.

Disposition

As the Commission has previously recognized, “[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990). The phrase “not frivolously brought” is not defined in the Mine Act. The Mine Act’s legislative history defines the “not frivolously brought” standard as indicating that a miner’s “complaint appears to have merit.” S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624. The Commission and courts have approved the description of the “not frivolously brought” standard as being indistinguishable from the “reasonable cause to believe” standard applied in other statutes. *Secretary of Labor on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1350 (separate opinion of Commissioners Holen and Riley), 1352 (separate opinion of Chairman Jordan and Commissioner Marks) (Aug. 1996); *Jim Walter Resources*, 920 F.2d at 747. In reviewing a judge’s temporary reinstatement order, the Commission has applied the substantial evidence standard.⁵ See *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (applying substantial evidence standard); *Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993) (same); *cf. Jim Walter Resources*, 920 F.2d at 750 (applying court’s traditional substantial evidence standard to Commission’s order).

⁵ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The judge recognized that the parties entered into several stipulations that narrowed the focus of the hearing. 22 FMSHRC at 112. Specifically, the judge noted that the parties had stipulated that Bussanich had engaged in protected activity. *Id.* In addition, he reiterated the parties' stipulation that "if there is a reasonable evidentiary basis that Centralia . . . has discharged Mr. Bussanich, then the allegation that Centralia . . . did so on account of Mr. Bussanich's protected activities is not frivolous. That, therefore . . . is the sole issue for hearing, whether there is a colorable claim that Bussanich was discharged." *Id.*

We conclude that substantial evidence supports the judge's conclusion that "there is no colorable claim that [Bussanich] was discharged by Centralia." *Id.* at 113. The evidence is undisputed that Woolley received a phone call on November 30 from his partner Whisnant's residence.⁶ Tr. 91, 186-87; R. Ex. 12. Woolley testified that she believed that she had spoken with Bussanich because he had referred to FMLA leave, which had been the subject of her previous correspondence to him, and had spoken knowingly about his 401(k) plan and tools. Tr. 91-92, 95, 106. In addition, she believed that she recognized his voice. Tr. 95. After the phone call, it is undisputed that Woolley discussed the call with Sanich, Means, and subsequently with Taylor. Tr. 98, 102, 119, 180. On December 9, despite his contention in his December 7 letter that he had not quit, Bussanich deposited the final pay and accrued vacation checks sent to him by Centralia. Tr. 58, 183; R. Ex. 10. In addition, on December 21, Bussanich engaged in an exit interview during a phone call that he initiated, and he made additional calls to Centralia's record keeper about obtaining the proceeds from his 401(k) account. Tr. 166, 170-71; R. Ex. 8. On December 23, Bussanich signed and returned an exit interview checklist sent to him by Centralia with no indication he was signing the checklist under protest. Tr. 166, 174-75; R. Ex. 7. In addition, Bussanich deposited the proceeds from his 401(k) account after they were disbursed to him on December 22. Tr. 45, 69.

In light of all of the record evidence regarding the events of November and December, we conclude that substantial evidence supports the judge's finding that there was no colorable claim that Bussanich was discharged. With the one exception of his letter of December 7, Bussanich's actions were consistent with those of an employee who quit.⁷ He proceeded to obtain nearly all

⁶ We note that Bussanich's testimony that Bradley Whisnant called him on January 18 and informed him that Whisnant had called the mine in November to inquire about Bussanich's employment status (Tr. 50-51), was contradicted by Paul Buchanan, local counsel for Centralia. Tr. 205. Buchanan testified that Whisnant had informed him that Whisnant had not told Bussanich about his phone call to the mine. Tr. 214.

⁷ Although the judge considered the December 7 letter in the context of whether Centralia failed to rehire Bussanich, we nevertheless agree with the Secretary that the judge should also have considered the letter in the context of whether Bussanich had been discharged. Pet. at 9-10. The application for temporary reinstatement filed by the Secretary and Bussanich's initiating complaint filed with MSHA include in their allegations of discharge and disparate treatment, references to Bussanich's December 7 letter. *See* Ex. A., Aff. of Sandra Yamamoto at

of the financial proceeds to which an employee who resigned was entitled (at the time of the hearing, Bussanich had applied for but not received his pension funds, Tr. 46), never once stating that he was accepting them under protest or that he in fact wanted to return to work. His actions belie his claim that he did not wish to resign. Seen in the entire context of his actions over this period of time, his testimony and his December 7 letter are not sufficient to detract from all the evidence supporting the judge's finding. Substantial evidence supports the judge's conclusion that the Secretary failed to prove that the complaint was not frivolously brought.⁸ Accordingly, we affirm the judge's denial of the Secretary's application.⁹

¶ 3f; Ex. B-4. Our consideration of the letter, however, does not alter our conclusion that substantial evidence supports the judge's determination that Bussanich did not make out a colorable claim of discharge.

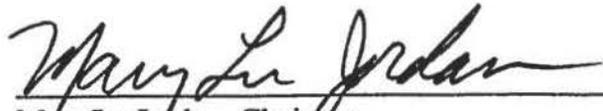
⁸ We emphasize that our holding is limited to the unusual facts of this case, and the narrow issue it presents, as stipulated by the parties. In addition, we note, as did the court in *Jim Walter Resources*, that “[w]e are required to uphold the [judge’s] findings if we determine that they are supported by substantial evidence. . . . However, because our review . . . must be evaluated against the ‘not frivolously brought’ standard, this opinion has no bearing on the ultimate merits” of the case. 920 F.2d at 750 n.15.

⁹ Given our holding, we need not reach the Secretary's argument that the record raises a colorable question concerning Centralia's motivation (Pet. at 10-14), or the operator's arguments relating to alternative grounds for affirming the judge's decision (C. Resp. at 22-26).

III.

Conclusion

For the reasons set forth above, we affirm the judge's order denying the temporary reinstatement of Bussanich.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Commissioners Marks and Beatty, dissenting:

We dissent from the decision of the Commission majority to affirm the judge's denial of temporary reinstatement to miner Levi Bussanich based on his determination that there was no colorable claim that Bussanich was discharged by Centralia. In our view, the majority's decision is flatly inconsistent with the language and spirit of the provision for temporary reinstatement in section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and further contributes to an unwarranted expansion of the scope of temporary reinstatement proceedings beyond the intent of Congress or the requirements of due process. In addition, we believe that the majority errs in affirming a judge's decision that fails to adequately consider the sole issue presented for his resolution, recognize the clear testimonial conflict presented on that question, comply with Commission precedent that prohibits the resolution of such conflicts at this preliminary stage of the proceedings, and that is not supported by the record evidence.

We begin our analysis with the express language of section 105(c)(2) of the Mine Act, which is omitted from the majority's decision. Section 105(c)(2) provides in part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as [she] deems appropriate. . . . *[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.*

30 U.S.C. § 815(c)(2) (emphasis added).¹

The provision for temporary reinstatement that later became part of section 105(c)(2) first appeared in section 106(c) of the bill reported out of the Senate Committee on Human Resources, S. 717, 95th Cong., *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 543-46 (1978) ("*Legis. Hist.*"). The report accompanying S. 717 explained:

Upon determining that the complaint appears to have merit, the Secretary shall seek an order of the Commission temporarily

¹ The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (amended 1977) ("Coal Act"), the Mine Act's predecessor, contained no temporary reinstatement provision. *See* Coal Act § 110(b)(2).

reinstating the complaining miner pending final outcome of the investigation and complaint. The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

S. Rep. No. 95-181, at 36-37 (1977), *reprinted in Legis. Hist.* at 624-25. A report by the Conference Committee on the legislation further explained that temporary reinstatement was intended “[t]o protect miners from the adverse and chilling effect of loss of employment while [a discrimination complaint is] being investigated.” S. Conf. Rep. No. 95-461, at 52 (1977), *reprinted in Legis. Hist.* at 1330.

Thus, the express language of section 105(c)(2) provides that temporary reinstatement *shall* be ordered “if the Secretary finds that [the] complaint was *not frivolously brought*.” 30 U.S.C. § 815(c)(2) (emphasis added). In recognition of this express delegation of authority to the Secretary, Commission Procedural Rule 44 provided “a procedure for reinstatement of miners whose complaints of unlawful discrimination, discharge, or interference have been found by the Secretary not to have been frivolously brought.” 44 Fed. Reg. 38,226, 38,226 (1979) (codified at 29 C.F.R. § 2700.44). Under the former Rule 44, an operator had no right to a hearing on an application for temporary reinstatement *before* an order of reinstatement was issued (commonly referred to as a “pre-deprivation hearing”). The rule also lacked any procedures for appealing a judge’s temporary reinstatement order to the Commission. It included a standard of review under which an application for temporary reinstatement would be granted so long as the Secretary’s “not frivolously brought” finding was not arbitrary and capricious.

The Commission subsequently revised its rules governing temporary reinstatement proceedings in response to due process concerns. In *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, the Commission, with no accompanying explanation, held that an operator’s due process rights were violated by the “arbitrary and capricious” standard in Rule 44 governing Commission review of judges’ orders. 3 FMSHRC 1707, 1708 (July 1981). In response to the *Gooslin* decision, the Commission switched the focus of Rule 44 to whether the complaint on which the Secretary’s application is based was “frivolously brought.” 46 Fed. Reg. 39,137, 39,137 (1981). In 1985, the Sixth Circuit held that the lack in Rule 44 of even “a minimal opportunity [for employers] to present their side of the dispute before temporary reinstatement is forced upon them” violated the due process rights of mine operators. *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 705 (6th Cir. 1985), *amended by* 781 F.2d 57 (6th Cir. 1986) (“*SOCCO*”). In response to the Sixth Circuit’s decision, the Commission once again revised Rule 44 to include the “opportunity for an expeditious pre-reinstatement hearing that insures due process to all [affected] parties.” 51 Fed. Reg. 16,022, 16,022 (1986). At the same time, the Commission added a new provision to the rule — subpart (e), the predecessor to the

current Rule 45(f) — affording parties the rights to appeal to the Commission a judge’s order granting or denying an application for temporary reinstatement. *Id.* at 16,024.²

Following the 1981 and 1986 rules revisions, the U.S. Supreme Court issued its decision in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). In *Roadway Express*, the Court considered a due process challenge to a section of the Surface Transportation Assistance Act on temporary reinstatement similar to section 105(c)(2) of the Mine Act. Although the provision examined by the Court in *Roadway Express* did not provide for pre-deprivation hearings, the Court held that it satisfied due process. The Court reasoned that “[s]o long as the preinstatement procedures establish a reliable ‘initial check against mistaken decisions,’ and complete and expeditious review is available,” due process rights are not violated and “a prior evidentiary hearing is not otherwise constitutionally required.” *Id.* at 263 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)). The Court stated that “the minimum due process for the employer in this context requires notice of the employee’s allegations, notice of the substance of the relevant supporting evidence, . . . and an opportunity to meet with the investigator and present statements from rebuttal witnesses.” *Id.* at 264. It further explained that “presentation of the employer’s witnesses need not be formal, and cross-examination of the employee’s witnesses need not be afforded at this stage of the proceedings.” *Id.* A very good argument could be made that *Roadway Express* implicitly overruled the Sixth Circuit’s 1985 *SOCCO* decision, and made the 1986 amendments to the Commission’s rules adding a requirement for a pre-reinstatement hearing unnecessary to satisfy due process requirements. *See Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987) (“The Commission’s temporary reinstatement procedures exceed the constitutional minimum sanctioned in *Roadway Express*.”), *aff’d*, 920 F.2d 738 (11th Cir. 1990).

While we recognize the need to provide some check against erroneous decisions in temporary reinstatement proceedings, and to afford adequate due process to mine operators, we believe that the procedure followed by the judge and sanctioned by the majority in resolving the issue of eligibility for temporary reinstatement in this case improperly expands the scope of the proceedings envisioned by section 105(c)(2), and thereby undermines the underlying purpose of temporary reinstatement. While the majority pays lip service to the well-established principle that “[t]he scope of a temporary reinstatement hearing is narrow” (slip op. at 5), they affirm a judge’s decision that is flatly inconsistent with that concept. In the underlying temporary reinstatement hearing held in this case, Centralia was afforded an opportunity to cross-examine Bussanich, subpoena other potential witnesses, introduce voluminous exhibits, and call at least ten witnesses, including an attorney who initially represented Centralia in this matter. This type of hearing far exceeds the minimum due process requirements established by the Supreme Court in *Roadway Express* and, by essentially providing for a preliminary adjudication of the merits of

² In a subsequent rulemaking finalized in March 1993, the Commission redesignated Rule 44 as Rule 45, and added, without comment, the following clause to the end of Rule 45(f): “In extraordinary circumstances, the Commission’s time for decision may be extended.” 58 Fed. Reg. 12,158, 12,169 (1993).

the underlying discrimination case, makes a mockery of the “not frivolously brought” standard set forth in the language of section 105(c)(2). In essence, it amounts to a “mini-trial” of the merits of the underlying discrimination claim that, as here, poses the risk of turning any subsequent investigation and litigation of the merits of that claim into a pointless formality.³ It is fair to assume that any alleged discriminatee whose complaint is found by the judge and the Commission to have been “frivolously brought” for purposes of temporary reinstatement is not likely to prevail on the merits of his claim before the same trier of fact. Indeed, such a determination is likely to also discourage the Secretary from continuing to fully investigate and prosecute the miner’s discrimination claim.

The most troublesome aspect of the judge’s decision in this case, now endorsed by the Commission majority, is its resolution of a clear testimonial conflict as to the dispositive issue in the underlying proceeding — whether Bussanich was discharged or quit his job. While the judge

³ It is noteworthy that this was a potential danger identified by commenters on the Commission’s 1981 amendments to its rule governing temporary reinstatement proceedings. For instance, the Office of the Solicitor warned that:

the application of a test of frivolousness can result in a “mini-hearing,” where the demarcation between questions going to the issue of frivolousness and questions going to the ultimate merits of the case becomes blurred. . . .

. . . .

. . . At this early stage of an investigation it would be inappropriate and contrary to the purpose of Section 105(c) to turn a temporary reinstatement proceeding into an in-depth inquiry into the merits of the case.

Comments submitted by Cynthia L. Attwood, Associate Solicitor, Division of Mine Safety and Health, dated September 28, 1991, at 2. The United Mine Workers of America expressed similar concerns, and identified another potential problem:

Under the Commission’s new procedural approach, however, it will be very difficult to have a hearing on whether a particular claim was frivolously brought, without getting into the merits of the entire case. . . . The operator should not be able to use the hearing as a fishing expedition to find out the basis for the Secretary’s determination to issue a complaint.

Comments submitted by Attorney for United Mine Workers of America, dated September 28, 1991, at 9-10.

ostensibly assumed, for purposes of the temporary reinstatement proceeding, that Bussanich did not call Centralia and quit his job on November 30 (22 FMSHRC at 113), his finding that “there is no colorable claim that [Bussanich] was discharged by Centralia” (*id.*) necessarily involves a discrediting of Bussanich’s testimony that he did not quit his job, but rather was discharged. This resolution of credibility conflicts, particularly as to dispositive issues, in the context of preliminary temporary reinstatement proceedings directly contravenes applicable precedent. The Commission itself has recognized that it “was not the judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary stage of proceedings.” *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). See generally *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988) (in the context of temporary relief, stating that a court “need not concern itself with resolving conflicting evidence if facts exist which could support the [agency’s] theory of liability” where the standard is merely one of frivolousness of the claim of liability). Likewise, the Supreme Court indicated in *Roadway Express* that the resolution of credibility conflicts is not appropriate in the context of temporary reinstatement proceedings, but rather appropriately reserved for a subsequent trial on the merits. 481 U.S. at 266. The Court explained:

[T]he primary function of the investigator is not to make credibility determinations, but rather to determine simply whether reasonable cause exists to believe that the employee has been discharged for engaging in protected [activity.] . . . Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge [in a subsequent trial on the merits], before whom an opportunity for complete cross-examination of opposing witnesses is provided.

Id.

By affirming the judge’s denial of temporary reinstatement to Bussanich, our colleagues in the majority are in essence departing from, and expanding, the “not frivolously brought” standard set forth in section 105(c)(2) and reflected in Commission Procedural Rule 45(d). Although the Secretarial burden for meeting that standard is very low, it reflects Congressional intent 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; 29 C.F.R. § 2700.45(d) (“In support of [the] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant.”). As the court explained in *Jim Walter Resources*, “the erroneous deprivation of an employer’s right to control the makeup of his workforce . . . is only a *temporary* one that can be rectified by the Secretary’s decision not to bring a formal complaint or a decision on the merits in the employer’s favor.” 920 F.2d at 748 n.11 (emphasis in original).⁴

⁴ If temporary reinstatement was granted and the Secretary were to subsequently determine, after investigating Bussanich’s complaint, that the provisions of section 105(c)(1) of

In addition to our concerns that the temporary reinstatement process has mutated far beyond that necessary to satisfy constitutional due process requirements and contemplated by Congress in the Mine Act, we cannot uphold the judge's denial of the merits of the temporary reinstatement application the Secretary brought on behalf of Bussanich. The record simply does not support the judge's determination that the complaint had been "frivolously brought."

As the majority recognizes, the "frivolously brought" standard is an extremely low one. *See* slip op. at 5. The term "frivolous" as it is used in a similar context — Federal Rule of Appellate Procedure 38's provision for damages and costs in the case of a "frivolous" appeal — has been interpreted by a number of courts to mean "*wholly* without merit." 20A James Wm. Moore, Moore's Federal Practice ¶ 338.20[1], at 338-7 & n.1 (3d ed. 1999) (emphasis added). A low standard is plainly appropriate, given that, at this preliminary stage of the proceedings, the Secretary has not even completed an investigation into whether a violation of section 105(c) occurred. Moreover, the standard reflects Congressional intent that employers bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. *See* authorities cited *supra*, at 13.

The majority correctly recognizes that the stipulations of the parties narrowed the focus of the "frivolousness" inquiry to but a single issue: Bussanich's claim that he no longer is employed by Centralia as a result of adverse action taken against him by Centralia. Slip op. at 5-6. It is important to remember that the Commission has defined adverse action to be "an act of *commission or omission* by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984) (emphasis added). Moreover, "[d]eterminations as to whether an adverse action was taken must be made on a case-by-case basis." *Id.* at 1848 n.2.

The judge, while he initially acknowledged the frivolousness of Bussanich's claim as the sole issue before him (22 FMSHRC at 112), did not so limit his determination. Instead, the judge went to the ultimate merits of the adverse action claim, and made a finding of fact that Bussanich's separation from employment was not the result of his termination by Centralia. *Id.* at 113. We believe the judge's approach was improper as a matter of law and should be reversed.

The Commission majority, however, not only fails to recognize this error but compounds it by limiting its examination of the evidence to the evidence supporting Centralia's claim that it

the Mine Act have not been violated, the Commission's procedural rules provide that the judge would be so notified, and that he would enter an order dissolving the order of reinstatement. 29 C.F.R. § 2700.45(g).

did not discharge Bussanich. *See slip op.* at 6. Such a review is of little value,⁵ given that the issue before the Commission is whether it is “frivolous” for Bussanich to claim that the contrary is true, and that he was discharged by Centralia. The majority further errs by making its own credibility findings⁶ and drawing conclusions from the evidence that contradict the undisputed evidence.⁷

Unlike the majority, we limit our inquiry to the only issue that Bussanich’s application presents, and conclude that, when *all* of the evidence is considered, Bussanich’s claim of discharge was not shown to be frivolous. Weighed against the evidence found by the majority to support the conclusion that Bussanich quit is the following: (1) in testimony that the judge did not discredit, Bussanich explained that he did not call Centralia’s employee Woolley nor did he quit on November 30, and no one was authorized to call on his behalf (22 FMSHRC at 113; Tr. 26, 30, 47); (2) Woolley acknowledged on cross-examination that there was a possibility that she did not speak with Bussanich on November 30 (Tr. 107); (3) telephone records indicate that the November 30 phone call originated not from Bussanich’s residence, but from the Whisnant’s phone in Portland, Oregon (Tr. 195-97); (4) Bussanich testified that Bradley Whisnant had

⁵ The majority couches its analysis as one of whether “substantial evidence” supports the judge’s decision. *See slip op.* at 6-7. However, because the judge did not properly limit his decision, the substantial evidence standard is hardly applicable. In any event, as the majority acknowledges, on review, the Commission is required to consider the entire record, especially anything in it that fairly detracts from the weight of the evidence that supports a challenged finding. *Slip op.* at 5 n.5 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁶ *See slip op.* at 7 (Bussanich’s “actions belie his statements that he did not wish to resign”). As discussed above, the Commission and the courts, including the Supreme Court in *Roadway Express*, have clearly indicated that it is not appropriate at this preliminary stage of proceedings to resolve conflicts in evidence.

⁷ Apparently in reaction to Bussanich’s late December receipt of all of his net section 401(k) account funds, the majority alleges that Bussanich “obtain[ed] nearly all of the financial proceeds to which an employee who resigned was entitled . . . , never once stating that he was accepting them under protest or that he in fact wanted to return to work.” *Slip op.* at 6-7. The majority completely ignores Bussanich’s explanation that he took the 401(k) funds at that point only because Centralia was treating him as having quit, thus leaving him without a means to support himself. Tr. 45. Moreover, as Bussanich explained, he had no other choice but to take all of the 401(k) funds; taking just a portion was not an option. Tr. 45, 54. In second guessing Bussanich for not accepting his final pay and retirement checks and signing an exit interview checklist “under protest” (*slip op.* at 6), the majority unfairly imputes a level of legal knowledge not common among lay individuals. Finally the majority, like Centralia, ignores the import of Bussanich’s December 7 letter. How many times should Bussanich have reiterated that he had not quit before Centralia was required to listen to him? The answer to that question is not provided by the majority.

informed him that he had called the mine in November to inquire about Bussanich's employment status, and that Whisnant had obtained Woolley's number from her November 4 FMLA correspondence, which Bussanich had thrown in the trash (Tr. 50);⁸ (5) Bussanich testified that he had no reason to quit because he was receiving workers' compensation, was getting four weeks of vacation per year, had 401(k) and retirement accounts, and was working on the day shift after 12 years of working on the night shift (Tr. 40); (6) Woolley and Centralia foreman Kendrick conceded that miners typically quit their employment by speaking to their foremen and that Bussanich never indicated to Kendrick that he had quit or was quitting (Tr. 105, 132-33); and (7) Bussanich never came by to pick up his tools, and his tools remained at the mine at the time of the hearing (Tr. 131-32).

It is also impossible to ignore the import of Bussanich's December 7 letter and how Centralia responded to it.⁹ In the December 7 letter, Bussanich stated that he did not speak with Woolley on November 30, and that he did not quit. Gov't Ex. 1. It is undisputed that Centralia responded to Bussanich's December 7 letter by refusing to consider his allegations, and instead continued to rely upon the November 30 telephone call. Tr. 28, 164-65, 200; S. App. for Temp. Reinst., Ex. B-4.¹⁰

⁸ Further, Paul Buchanan, local counsel for Centralia, testified that Mr. Whisnant had informed him that Bussanich had not been in Whisnant's apartment on November 30, and that Mr. Whisnant may have made the call. 22 FMSHRC at 109; Tr. 212. He explained that Whisnant had obtained the mine number from the trash, called the mine, and ascertained that Bussanich was still employed. Tr. 213-14.

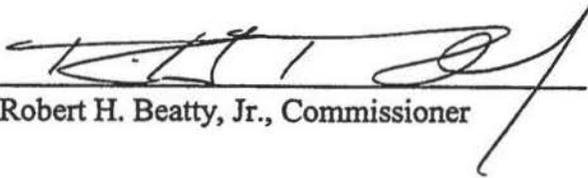
⁹ As even the majority concedes, not only the events of November 30, but also evidence relating to the entirety of the employment separation process is relevant here. *See slip op.* at 6 & n.7. It is undisputed that Bussanich's separation from employment occurred over a period of time, beginning on November 30 and extending through at least the completion of his exit interview on December 23, 1999. We agree with the majority that the judge clearly erred in considering such evidence only in terms of Centralia's failure to rehire Bussanich. *See* 22 FMSHRC at 113-14.

¹⁰ Tellingly absent from the 15 exhibits Centralia introduced below is the letter it sent Bussanich in reply to his December 7 letter.

At the very least, there are significant facts in this case supporting the notion that Bussanich's separation from employment ultimately resulted not from Centralia's belief that he was quitting, but rather from Centralia's adverse "act[s] of commission or omission." *Hecla-Day Mines*, 6 FMSHRC at 1847. Consequently, there is clearly more than enough evidence to establish that Bussanich's claim of discharge is not wholly without merit, and is therefore not frivolous. Based upon the parties' stipulations that if a colorable claim of discharge were found, Bussanich should be temporarily reinstated (22 FMSHRC at 112), we would reverse the judge's decision and order temporary reinstatement.



Marc Lincoln Marks, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 29, 2000

BRYCE DOLAN :
 :
 v. : Docket No. CENT 97-24-DM
 :
 F & E ERECTION COMPANY :

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman concluded that complainant Bryce Dolan engaged in a work refusal protected by section 105(c) of the Act, 30 U.S.C. § 815(c), and granted the complaint of discrimination brought by Dolan against his employer, F & E Erection Company ("F&E"). 20 FMSHRC 591 (June 1998) (ALJ). In a subsequent decision on relief awarding back pay, attorney's fees, and litigation expenses, the judge determined that Dolan's unavailability for work due to his claimed physical disability constituted a willful loss of earnings inconsistent with Dolan's duty to mitigate damages, and he consequently excluded the period of unavailability from the calculation of back pay. 20 FMSHRC 847 (Aug. 1998) (ALJ). The Commission granted the petition for discretionary review filed by F&E challenging the judge's conclusion that F&E discriminated against Dolan, and directed for review sua sponte the issue of whether Dolan failed to mitigate his damages. For the reasons that follow, we vacate the finding of discrimination, the determination that Dolan failed to mitigate damages, and the award of relief, and remand for further proceedings.

I.

Factual and Procedural Background

The complainant, Bryce Dolan, was an iron worker employed by F&E, a construction contractor that performed work at an alumina smelter in Point Comfort, Texas operated by the Aluminum Company of America ("Alcoa"). 20 FMSHRC at 594-95. In September or October

19, 76. Dolan's work involved welding "stiffeners"¹ on trusses that support large storage tanks. 20 FMSHRC at 595. In order to ensure a good weld on the stiffeners, Dolan and the five to six other members of his crew would remove paint from the angle iron of the trusses before affixing the stiffeners. *Id.*; Tr. II 141-42. The crew removed the paint by burning it off using a cutting torch. 20 FMSHRC at 591. From late 1994 until March 1996, Dolan's crew was not furnished with any personal protective equipment or clothing. *Id.* at 595.

In March 1996, Dolan learned that Alcoa employees performing similar work in the R35 tank farm were furnished with protective clothing and respirators and that the entire R35 tank farm was to be treated as a lead abatement area. 20 FMSHRC at 596; Tr. I 45-46. Dolan complained to safety man Dennis Spears, crew foreman Howard Talbert, and general foreman Steve Whitehead about the health hazards of removing lead-based paint without wearing personal protective gear, and about symptoms of lead poisoning that he and members of his crew were experiencing.² 20 FMSHRC at 596; Tr. I 24, 47-48, 54-56, 78-80, 95-96, 153-54, 347, 397; Tr. II 146-47. From March 18 to March 22, 1996, F&E contracted with Health and Safety Management Inc. ("HSM") to perform air sample monitoring on crew members who, in the meantime, had been provided with Tyvek suits³ and half-face respirators.⁴ 20 FMSHRC at 596. Based on lead exposure levels measured,⁵ HSM recommended that the crew member using the

¹ "Stiffeners" are 4-inch-wide pieces of channel iron welded onto the trusses to "stiffen" or strengthen them to prevent bending. Tr. II 141-43.

² Lead can be absorbed into the body by inhalation and ingestion of dust and fumes. 20 FMSHRC at 593; RX-1 (29 C.F.R. § 1926.62 App. A., part II.A). Symptoms of lead over-exposure include loss of appetite, constipation, nausea, excessive tiredness, weakness, insomnia, headache, muscle and joint pain or soreness, fine tremors, numbness, and dizziness. 20 FMSHRC at 593; RX-1 (29 C.F.R. § 1926.62 App. A., part II.B). Overexposure to lead can result in severe damage to blood-forming, and nervous, urinary, and reproductive systems. *Id.*

³ Tyvek suits are thin, disposable coveralls made of spun olefin. 20 FMSHRC at 597; CX-6.

⁴ Half-face respirators are air purifying respirators with high efficiency filters that provide protection up to 500 micrograms per cubic meter of air (" $\mu\text{g}/\text{m}^3$ "). 20 FMSHRC at 593; Tr. II 44; RX-1 (Table 1).

⁵ The March 1996 air sample monitoring measured lead levels ranging up to $467 \mu\text{g}/\text{m}^3$. 20 FMSHRC at 596; CX-3. The standard regulating exposure to airborne contaminants issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") limits lead exposure to an average of $150 \mu\text{g}/\text{m}^3$. 30 C.F.R. § 56.5001(a); RX-3; Tr. I 518-21. The construction industry lead standard issued by the Department of Labor's Occupational Safety and Health Administration ("OSHA"), a copy of which was provided to F&E employees (Tr. I 521-22), requires that employers provide respiratory protection, protective clothing,

cutting torch wear a full-face respirator,⁶ while the remaining crew members could continue to wear half-face respirators. 20 FMSHRC at 596. F&E implemented this recommendation. *Id.* at 597; Tr. I 405-08.

On or about March 25, 1996, Dolan complained that the entire crew should wear full-face respirators due to their close proximity to each other, and that the Tyvek suits were inadequate to prevent lead contamination because they were easily torn and sparks from the cutting torch readily burned holes in the suits. 20 FMSHRC at 597; Tr. II 155-56. In response, F&E provided a large quantity of Tyvek suits so that the crew could replace them as needed. 20 FMSHRC at 597. In addition, F&E required the crew to vacuum their clothing with high efficiency vacuums before leaving the work area. *Id.*; Tr. I 513.

Dolan continued to complain about the inadequacy of the half-face respirators and Tyvek suits. 20 FMSHRC at 597. On April 16, 1996, F&E held a meeting to address Dolan's concerns. *Id.* At this meeting, Whitehead stated that F&E was going to continue using the half-face respirators and Tyvek suits and he offered to transfer any employee who wanted to perform non-lead work. *Id.* at 598. No employees accepted Whitehead's offer of reassignment. Tr. I 417-19. At the conclusion of this meeting, Dolan quit his job due to his belief that the personal protective gear was inadequate to prevent lead exposure to himself and his family. 20 FMSHRC at 598.

After quitting on April 16, 1996, Dolan looked for work and received unemployment compensation. *Id.* at 598; Tr. I 113-14; CX-7. He began seeing Dr. Arch Carson on May 17, 1996. CX-8. According to Dr. Carson, Dolan's symptoms included "muscle and joint pains, tremor, severe headache, and additional neurologic symptoms which are disabling in nature." *Id.* Dr. Carson stated in a memorandum dated June 5, 1996, that Dolan was "currently unable to engage in employment in his usual trade, or in any other usual form of employment." *Id.* On or about August 11 and 12, 1996, Dolan worked for United Kensington Group as a construction worker. 20 FMSHRC at 598, 849; Tr. I 114-15, Tr. II 166, 280. He quit on or about August 12 due to severe pains in his legs. 20 FMSHRC at 598, 849; Tr. I 115. He testified that he has been disabled from working since that date. 20 FMSHRC at 598, 849; Tr. I 115-16. Dolan did not look for work thereafter. 20 FMSHRC 598, 849.

Dolan filed a discrimination complaint with MSHA on May 20, 1996. MSHA subsequently informed Dolan that, because F&E had taken appropriate remedial actions, his complaint did not merit litigation. On December 27, 1996, Dolan filed a complaint of discrimination on his

housekeeping, and hygiene facilities to employees who are exposed to lead above the permissible exposure limit of 50 $\mu\text{g}/\text{m}^3$ averaged over an 8-hour period. 20 FMSHRC at 596; 29 C.F.R. § 1926.62(c), (f) - (i).

⁶ Full-face respirators provide lead protection up to either 2,500 or 100,000 $\mu\text{g}/\text{m}^3$, depending on the type of full-face respirator used. 20 FMSHRC at 593; Tr. II 42-43; 29 C.F.R. § 1926.62(f)(3) (Table I).

own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). Evidentiary hearings were held in San Antonio, Texas on April 15 and 16, 1997, and April 14 and 15, 1998.

Analyzing the case as a work refusal, the judge concluded that Dolan's work refusal was protected (20 FMSHRC at 606) and that, accordingly, Dolan should be awarded back pay, attorney's fees, and litigation expenses. *Id.* at 847. First, the judge found that Dolan's complaints were made in good faith and that his concerns were reasonable in light of F&E's admission that "it should have taken protective measures prior to the time of the complaints." *Id.* at 599. He further found that Dolan adequately communicated his complaints to F&E personnel. *Id.* at 600. The judge found that F&E's continued use of the half-face respirators and Tyvek suits failed to provide "a meaningful response" so as to quell Dolan's fears. *Id.* at 604. He also noted that F&E's offer to transfer employees "did not address the hazardous conditions complained of by Dolan" and "thwart[ed] the Mine Act's purpose of encouraging a safe workplace" by continuing to expose any employees who remained at the R35 tank farm to lead poisoning. *Id.* at 604-05.

Concerning back pay eligibility, the judge noted that "whether Dolan is disabled is beyond the scope of this proceeding," and that he did not claim back pay from July 25, 1997, the date Dolan began receiving temporary lost wage payments under the Texas workers' compensation program. *Id.* at 849. The judge rejected Dolan's claim of back pay for the period August 12, 1996 to July 25, 1997, on the basis that Dolan "removed himself from the labor market as of [August 12, 1996]." *Id.* at 849-50. Noting that it is appropriate to reduce back pay where an employee incurs a "willful" loss of earnings, the judge determined that, in the absence of a medical finding of disability for the relevant time period, "Dolan's loss of earnings due to his decision not to look for work must be characterized as voluntary." *Id.* Excluding the period from August 12, 1996 to July 25, 1997, the judge ordered F&E to pay Dolan \$12,094.60 in back pay, less applicable deductions. *Id.* at 850.

II.

Disposition of Issues

F&E argues that Dolan "voluntarily quit his job" and that substantial evidence does not support the judge's finding of a protected work refusal. PDR at 1, 8-10, 18; F&E Br. at 2, 13-20. It contends that Dolan's work refusal was not reasonable because (1) Dolan knew that his blood lead level was well below that recognized as safe by the OSHA standard; (2) there was no evidence that Dolan's family was exposed to lead and, in any event, the protection of family members is beyond the scope of the Mine Act; (3) the protective measures implemented by F&E following Dolan's complaint were adequate; and (4) F&E offered to transfer Dolan to a non-lead job. *Id.* F&E also argues that the judge erred in applying the wrong legal standard by focusing on Dolan's subjective concerns and not whether a reasonable person standing in Dolan's place would be justified in refusing to work. PDR at 10; F&E Br. at 21-22.

Dolan responds that substantial evidence supports the judge's finding that his work refusal was protected. D. Br. at 9-19. He points to evidence of faulty monitoring, inadequate personal protective gear, and health hazards to himself and his crew, as well as his fears about "bringing lead home to his family." *Id.* Dolan asserts that, prior to giving blood samples, workers were usually assigned to non-lead jobs for 2 weeks or longer, which casts doubt on the significance of his blood lead level test results. *Id.* at 9. In addition, Dolan argues that the judge applied the correct legal standard by considering whether, viewed from Dolan's perspective, he had a good faith, reasonable belief of a hazardous condition. *Id.* at 19-22.

We conclude that the judge erred by failing to analyze this case as a constructive discharge. There is no dispute that Dolan was not disciplined, but rather quit his job. Under our precedent, a finding that an operator took adverse action against a miner engaged in protected activity is a necessary element of the complainant's case. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Thus, unless Dolan was forced to resign, i.e., constructively discharged, there was no adverse action here, and hence no finding of discrimination could be made.

By contrast, a work refusal is a form of protected activity. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). Not all work refusals lead to a termination of the employment relationship, even where they are not protected. *See, e.g., National Cement Co. v. FMSHRC*, 27 F.3d 526 (11th Cir. 1994). In the work refusal context as well, a finding of adverse action is a prerequisite to a determination that the operator violated section 105(c). *See id.* at 534. Thus, in proceeding directly from his finding of protected work refusal to his conclusion that F&E discriminated against Dolan, the judge erred.

In declining to consider the constructive discharge claim, at trial the judge purported to distinguish the concepts of constructive discharge and work refusal, stating:

I don't see any issue of constructive discharge in this case.
I don't view the circumstances of Mr. Dolan's employment as being created for the specific purpose of creating intolerable conditions to encourage him to quit his employment.

So really what we have to do is focus in on the issue of work refusal. Mr. Dolan refused to work under the conditions that F&E was requesting him to work under and the issue is whether or not that work refusal is covered under the Mine Act.

Tr. II 8 (emphasis supplied). The judge further stated:

A work refusal is where an employee refuses to continue working under the conditions that he's been working under because of a perceived hazard.

....

A constructive discharge is where when the employee complains about a perceived hazard, *the employer then creates working conditions that are so intolerable, unrelated to the perceived hazard, that he wants the employee to quit.*

Tr. II 9 (emphasis supplied).

It thus appears that the judge's failure to analyze the constructive discharge question was based on his view that the complainant must show that, in retaliation for the miner's protected activity, the operator intended to create the conditions prompting the resignation. The judge's statements regarding constructive discharge reflect a misunderstanding of our constructive discharge jurisprudence. In light of this error, we find it necessary to review our analytical framework for constructive discharge cases.

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. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988). Contrary to the judge's statement at trial, in determining whether a constructive discharge has occurred, the focus is not on whether the operator has retaliated against a miner's engaging in protected activities by deliberately causing hazardous conditions in an explicit effort to get the employee to resign. In *Simpson*, the D.C. Circuit specifically rejected any requirement that a miner establish retaliatory motivation to establish a constructive discharge. *Id.* at 462-63. Rather, the key inquiry in a constructive discharge case is whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign. It is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action. *See Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210-13 (Nov. 1994) (affirming conclusion of constructive discharge in the absence of finding that operator deliberately created intolerable conditions to provoke miner's resignation). The question whether conditions are intolerable is "viewed from the perspective of a reasonable employee alleging such conditions." *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 276 (Mar. 1999), *pet. for review docketed*, No. 99-4278 (6th Cir. Oct. 22, 1999). The *Simpson* court also explained that "[w]hether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact." 842 F.2d at 463.

In cases involving claims of constructive discharge, the Commission has first examined whether the miner engaged in a protected work refusal, and then whether the conditions faced by

the miner constituted intolerable conditions. *See Bowling*, 21 FMSHRC at 272-81; *Nantz*, 16 FMSHRC at 2210-13. The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Price*, 12 FMSHRC at 1514; *Cooley*, 6 FMSHRC at 520. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Secretary of Labor on behalf of Bush v. Union Carbide Co.*, 5 FMSHRC 993, 998-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *See Bush*, 5 FMSHRC at 998-99.

There is no doubt that Dolan's initial fears in March 1996, at a time when F&E had provided no personal protective gear to Dolan's crew, were reasonable. As the judge noted, F&E conceded as much at the hearing. 20 FMSHRC at 599-600. Nor is it disputed that Dolan made protected safety complaints to F&E based on his fears. The question is whether a reasonable miner in Dolan's position would have had his fears quelled by the measures taken by F&E in response to Dolan's initial complaint.⁷ We find that substantial evidence supports the judge's

⁷ We reject F&E's suggestion that the judge erroneously adopted a subjective test to determine the work refusal issue. In fact, the standard under which work refusals are analyzed includes the *subjective* element of a miner's "honest *belief* that a hazard exists," as well as the objective requirement that the miner's belief be reasonable. *Robinette*, 3 FMSHRC at 810 (emphasis added). In contrast, a constructive discharge analysis requires a determination of whether the conditions faced by the miner were so intolerable that a *reasonable miner* would have felt compelled to quit. On this question, the sine qua non of a constructive discharge, we employ a purely *objective* standard and view the conditions faced by the miner from the perspective of a reasonable employee alleging such conditions. *Bowling*, 21 FMSHRC at 276.

Here, as the judge correctly noted, the issue is whether F&E addressed Dolan's concerns "in a way that should have alleviated" his fears. 20 FMSHRC at 592. Whether Dolan's fears were in fact quelled is relevant to the determination of this question. *See Secretary of Labor on*

conclusion that F&E failed to address Dolan's concerns in a way that should have alleviated his fears.⁸

Concerning the half-face respirators provided to the crew, Dolan testified that, due to the close proximity of the crew members (all working within a 10-foot square area) and exposure to what Dolan believed was the same air, the entire crew should wear full-face respirators. Tr. II 154-56. Dolan's concerns about the half-face respirators were shared by Robert Miller, an industrial hygienist called to testify as an expert witness on Dolan's behalf. Miller testified that welders, as well as those using the cutting torch, should be issued full-face respirators with supplied air, in part based on air monitoring readings showing a high lead content in the air sampled by a welder. Tr. II 245-48, 251-52; CX-9, 28. The judge credited Miller's testimony that respirators may leak due to a poor fit or perspiration. 20 FMSHRC at 601.

With regard to the Tyvek suits, Dolan testified that sparks from the cutting torch readily burned holes in the suits and they were easily torn, thus exposing the crew to lead contamination. Tr. I 32, 44, 69, 88, 111. Crew members Kenneth Tam and Troy Stewart also testified that the Tyvek suits were inadequate. Tr. I 203-08, 217, 225, 292-93. Although F&E further made available a quantity of Tyvek suits for replacement and provided a high efficiency vacuum following Dolan's subsequent complaints, the record indicates that the availability of replacement Tyvek suits was inadequate to protect workers because rips and holes exposed underlying clothing to lead contamination. 20 FMSHRC at 600. Moreover, the vacuuming of body parts that were not covered by the Tyvek suits before departing the work area did not prevent lead contamination to the underlying clothing. *Id.* at 597.

Miller also testified that the Tyvek suits were inadequate. He stated that "[t]he use of Tyvek suits when welding or cutting or any use of flame producing situation . . . is not an optimal solution because of the propensity for spun olefin materials to develop holes . . . from the heat of particulate hot particles hitting the suits [T]he concern . . . would be with potential contamination of clothing underneath the coverall" Tr. II 233-34. Miller further testified:

[t]he particles are so small in a fume [created by burning lead-based paint] that they readily penetrate most mechanical barriers.

behalf of James Johnson v. Jim Walter Resources, Inc., 18 FMSHRC 841, 848-49 (June 1996) (discussing operator's failure to quell discriminatee's fears).

⁸ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

For example, the spun olefin Tyvek suits are designed to block large particulate material. However, a fume would find very little problem in finding its way through the suit, even if they . . . didn't have holes as a result of the burning activity, which would certainly raise concerns for potential contamination of clothing underneath the Tyvek suit itself, because you're dealing with such small particulates.

Tr. II 239. Noting that Dolan was required to take home the clothing he wore underneath the Tyvek suit, Miller further testified that, because of "both the holes as well as the size of the fume particles, [the Tyvek suit] doesn't necessarily represent an appropriate particulate protection system for the clothing he wore underneath." Tr. II 263. Finally, Miller added that, unlike the Tyvek suits, "there are several [fire resistant] materials that are job appropriate" as a protective coverall for torch burning and welding. Tr. II 276. Miller's testimony about the inadequacy of the Tyvek suits was uncontradicted.⁹

A major shortcoming in our dissenting colleagues' opinion is that it fails to recognize the importance in the distinction between the largely *subjective* legal standard applied in the protected work refusal context, and the *objective* standard used in determining if intolerable conditions existed in the workplace. The dissenters collapse these separate and distinct legal standards into a single inquiry by asserting that there is no basis for drawing "a distinction between a miner who is engaged in a protected work refusal with no end in sight and a miner who quits under the same conditions." Slip op. at 13. In our view the merging of these two legal constructs into a single analytical framework creates a legal hodgepodge that is inconsistent with Commission case law. More importantly, however, the collapsing of these standards is also a venturesome legal maneuver that may lead to unintended and inconsistent results.

As we stated above, the issue of whether a miner has engaged in a protected work refusal is determined by whether the miner has a "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812. From a practical standpoint, this means that miners are able to make decisions removing themselves from potentially hazardous conditions without the concern of having to prove that the condition actually existed. *Id.* This is an extremely important legal construct, particularly in the mining industry, where hazards often appear

⁹ The judge discussed, at length, the propriety of burning paint with a cutting torch, rather than chipping it with a needle gun and grinder, as a method of lead abatement, concluding that burning "was contrary to industry standards and maximized worker exposure to lead fumes." 20 FMSHRC at 600-04. However, Dolan complained about the lack of personal protective gear, not about the method of lead abatement. Tr. II 69-70. Moreover, the burning method is not prohibited by OSHA or MSHA regulations. Tr. II 96-97; 29 C.F.R. § 1926.62(d)(2)(iv)(D); see 30 C.F.R. §§ 56.5001 - 56.5006. Thus, while the method of lead abatement is relevant for purposes of evaluating the adequacy of F&E's protective measures in response to Dolan's complaint, we agree with F&E that it is not in and of itself an issue in this case.

instantaneously and a miner's decision to remove him or herself from a dangerous situation could be the difference between life and death.

We see a further problem with our colleagues' approach collapsing these two different standards into a single inquiry. As we have stated, once a miner engages in a protected work refusal based on his or her good faith, reasonable belief in the existence of a hazard, the operator must take steps to reasonably quell the miner's concerns. A situation could arise, however, where an operator has taken such measures, but the miner clings to his or her belief in the existence of a hazard and quits. In this situation, resorting to the largely subjective standard applied to work refusals would almost certainly turn the miner's quitting into a constructive discharge — and this is essentially what our dissenting colleagues do in this case. In other words, a miner's continuing belief in a hazard would establish a constructive discharge even where the operator took reasonable steps to address the miner's concern. At its worst under this approach, a miner could prove a constructive discharge even where the hazard in which he or she believed was illusory and where the operator could not address his or her concerns because the hazard did not exist.

As illustrated above, the distinction between these separate legal constructs is more than semantic. Under our colleagues' line of reasoning, it is unclear which legal standard would apply to a miner's protected work refusal, and which would apply to a determination of intolerable conditions. We are extremely reluctant to adopt a mode of legal analysis that serves to confuse a clear area of Commission case law, particularly one that has the potential to have such important ramifications on a miner's safety rights.

In sum, substantial evidence supports the judge's conclusion that Dolan's refusal to perform lead abatement work was protected. However, because the judge erred in failing to analyze the constructive discharge issue, we remand for the judge to determine whether Dolan faced intolerable conditions as of the date of his resignation.¹⁰ In so doing, the judge must consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs. On this issue, we have held that a short-term reassignment, which the miner reasonably believes would soon be followed by his return to duties subjecting him to intolerable conditions, is not an adequate response to a miner's complaint involving such conditions. *Nantz*, 16

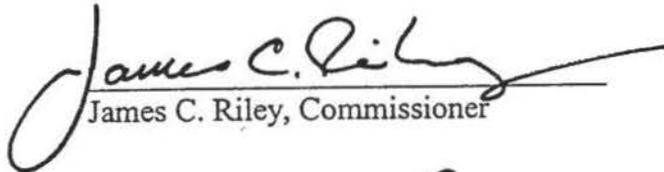
¹⁰ While we are sympathetic to our dissenting colleagues' desire to avoid a remand of this case, we believe that such a result is necessitated by the judge's fundamental error in not analyzing this case as a constructive discharge. We are troubled by our colleagues' attempt to derive the necessary elements of a constructive discharge from factual findings made by the judge in his opinion below, since those findings were made in the context of applying an admittedly incorrect legal standard. Given our perspective that a judge's factual findings are often colored by the legal standard applied, we believe that the more appropriate course here is to remand so that the judge can base his factual findings upon application of the correct (i.e., constructive discharge) standard.

FMSHRC at 2214. Because the record contains evidence on both sides of this question,¹¹ it is the judge in the first instance who must resolve the parties' dispute over whether Dolan reasonably believed that the transfer offered by Whitehead would only last for a short period of time before he would again be returned to intolerable conditions. Unlike our dissenting colleagues, we are unwilling to usurp the province of the judge, as the initial finder of fact, on this and the other significant factual issues he must resolve on remand.

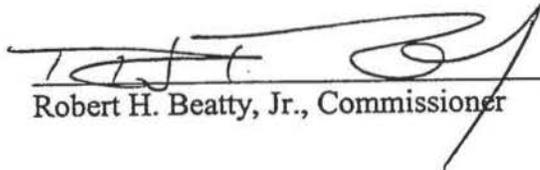
III.

Conclusion

For the foregoing reasons, we vacate the judge's finding of discrimination and remand the case for further proceedings consistent with this opinion.¹²


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

¹¹ Dolan, Tam and Whitehead testified that at times, F&E moved crew members to non-lead work for short periods of time. Tr. I 72-73, 221-23, 478-83. Dolan testified that he understood F&E's reassignment offer to be a short-term reassignment similar to past transfers. Tr. I 72-73. Whitehead, Talbert and F&E foreman Gary Smith testified that in the April 16 meeting, Whitehead did not state any limitations on the reassignment offer. Tr. I 348-49, 368, 382-83, 417-19. Whitehead also testified that, at the time he made the offer, there were about 300 F&E employees at Point Comfort, and that Dolan's crew was the only one doing lead abatement work. Tr. II 44, 64-67.

¹² Given our decision remanding the discrimination issue to the judge, we do not believe it is appropriate at this time to decide the mitigation of damages issue the Commission directed for review sua sponte.

Chairman Jordan and Commissioner Marks, concurring in part and dissenting in part:

We agree with the majority that the judge erred when he ruled that in a constructive discharge case a complainant must show that the operator acted in retaliation against his or her protected activity. The majority is correct that the D.C. Circuit resolved this question in *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988), holding that a complainant need not prove retaliatory motivation. However, because the evidence demonstrates that Dolan was subjected to intolerable conditions and constructively discharged, we believe that a remand is unnecessary, and would instead affirm the judge's finding of discrimination.

The majority remands this case because the judge failed to apply a constructive discharge analysis. But the very evidence relied on by our colleagues to support the judge's finding of a protected work refusal — coupled with additional evidence already in the record — shows that Dolan met his burden of showing that he faced intolerable conditions and thus was forced to quit.

The analyses of a work refusal and a constructive discharge often overlap, as they do in this case. This is because, at the heart of a work refusal case is the existence of a "hazardous condition" (*Robinette*, 3 FMSHRC at 812), while a successful constructive discharge claim requires "that conditions be 'intolerable'" (*Simpson*, 842 F.2d at 463). It is not surprising that the intersection between these two concepts and the evidence needed to prove each is sometimes blurred. This is especially true when, as is the case here, the intolerable condition is the continued exposure to the hazardous condition prompting the work refusal.

The case of *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208 (Nov. 1994) is instructive in this regard. In *Nantz*, the complainant was routinely exposed to dust after the window of his enclosed-cab bulldozer was broken. He complained about the dust exposure, and when the situation was not remedied, he quit. The Commission upheld his discrimination claim, finding that he had engaged in protected activity when he refused to operate the bulldozer based on his good faith, reasonable belief that the dust conditions were hazardous. *Id.* at 2211-13. In upholding this finding, the Commission relied on *Nantz's* testimony and the testimony of his co-workers. *Id.*

After an extensive analysis of this work refusal, the Commission disposed of the question of whether conditions reached an intolerable level in one brief paragraph, in which it upheld the judge's findings that the dust conditions were in fact severe, and thus intolerable. The judge based his determination on *Nantz's* testimony and the corroborating testimony of his co-workers — undoubtedly, the same evidence the Commission used to find a protected work refusal. With a general reference to that testimony, the Commission simply held that substantial evidence supported the judge's finding that the dust reached an intolerable level. *Id.* at 2213. Thus, the Commission relied on identical evidence for both findings.

An even more explicit illustration of the overlap between the evidence of a work refusal and a constructive discharge was provided in the decision of the administrative law judge in

Simpson v. Kenta Energy, Inc., 6 FMSHRC 1454 (June 1984) (ALJ).¹ In *Simpson*, the complainant refused to work because of dangerous conditions. The judge stated that “[t]he intolerable conditions which caused him to quit his employment are the same conditions justifying his work refusal.” *Id.* at 1461.

Although the judge here did not analyze the evidence in terms of a constructive discharge, he found that the operator failed to adequately respond to Dolan’s concerns, and that Dolan’s work refusal therefore retained its protected status. 20 FMSHRC at 604-05. If a judge finds a miner justified in refusing to work under certain conditions and there is no dispute that those conditions are not going to improve, then the judge has conferred protected status on an indefinite work refusal. We fail to see why we would make a distinction between a miner who is engaged in a protected work refusal with no end in sight and a miner who quits under the same conditions. In determining that a work refusal remains protected even though the operator had ample opportunity to address the concerns motivating the refusal, a judge necessarily concludes that the miner does not have to tolerate the conditions under which the employer is requiring him or her to work. The conditions have, therefore, been deemed intolerable.

In this case, although the judge never used the word “intolerable,” he found that the working conditions facing Dolan were objectively intolerable, and that Dolan was therefore justified in quitting his job. The judge found that F&E completely ignored Dolan’s legitimate complaints about lead exposure and continued to employ inadequate protective measures. *Id.* The judge’s implicit finding of intolerable conditions is amply supported by the record. For instance, the judge concluded that the frequent replacement of Tyvek suits (relied on heavily by the operator to prove that its response to Dolan’s complaints was adequate) “does not prevent contamination.” *Id.* at 600. This finding is supported by Dolan’s testimony that he was constantly forced to keep changing the Tyvek suits and taking off his clothes in a contaminated area. Tr. I 69. He stated that sometimes he had to use 15 Tyvek suits in one day. Tr. I 146. He also testified that when he complained that there were no full-face respirators Whitehead simply told him “just keep your face out of the smoke and everything will be okay.” Tr. I 53.

In addition, the dangers of lead contamination were unequivocally described in a pamphlet from the Texas Department of Health admitted into evidence as Complainant’s Exhibit 2. This handout, which Dolan testified he had received from other employees who took a lead abatement course in 1996 (Tr. I 38), outlined in detail the potential hazards of lead, characterizing it as a “strong poison,” with detrimental effects ranging from fatigue and numbness to reproductive problems and brain disorders. CX-2; *see also* RX- 9 at 5.

The judge’s finding that the Tyvek suits did not prevent lead contamination, coupled with the dire warning in the pamphlet that lead poisoning could lead to a “decreased life span,” and

¹ Although unreviewed decisions of administrative law judges are not binding Commission precedent (29 C.F.R. § 2700.72), we nonetheless find it helpful to examine how constructive discharge was analyzed in the *Simpson* case.

that extreme cases “can result in convulsions, coma, or death,” (CX-2 at 5), supports the judge’s conclusion that Dolan’s continued work refusal was reasonable. As we explained above, this is, in fact, an implicit finding that Dolan faced intolerable conditions and thus was constructively discharged. *See Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150 (10th Cir. 1991) (walking off job because of exposure to inadequate ventilation of welding fumes and noxious gases constituted constructive discharge). Consequently, remanding the case to the judge to address this issue is not warranted.²

Nor is it necessary to remand the case to the judge to determine whether the employer’s offer to transfer Dolan to a non-lead job defeats Dolan’s claim that he faced intolerable conditions. Although Whitehead did not place a restriction on his offer, prior transfers had invariably resulted in only a short-term reassignment. Tr. I 72, 221-22, 478-83. The judge found that “the sincerity of F&E’s offer of reassignment as a permanent solution to Dolan’s complaints is suspect.” 20 FMSHRC at 604-605. The judge also acknowledged that the offer of reassignment “was not a permanent solution.” *Id.* at 605. We believe, therefore, that the judge has already made a finding that the transfer would be temporary, and that consequently there is no need to remand this issue back to him. *See Nantz*, 16 FMSHRC at 2214 (miner’s refusal to accept temporary job was inextricably connected to his initial work refusal and also qualified as protected activity).

Because we would affirm the judge’s ruling that F&E discriminated against Dolan, we next turn to the question of how Dolan’s damages should be computed. Specifically at issue is whether he should be compensated for the period August 12, 1996 (when he left a construction job due to pain in his legs) to July 25, 1997 (when he began to receive temporary lost wage payments under the Texas workers’ compensation program).

As the judge noted, he was not required to decide in the Mine Act proceeding whether Dolan was actually disabled during this period. That determination had yet to be made by the appropriate Texas agency at the time the parties submitted their evidence on back pay to the judge. 20 FMSHRC at 849; Tr. I 184-86. If in fact Dolan was disabled, then his failure to look

² The majority hypothesizes that the foregoing analysis would permit a finding of constructive discharge where, even though the operator has taken reasonable steps to address the complaining miner’s concern, the miner continues to believe in the existence of a hazard and quits. Slip op. at 10. As the majority recognizes, however, it is unlikely that a miner who continues to refuse to work after an operator has taken reasonable steps to dissipate his fears or ensure the safety of the challenged task or condition will be considered to be engaging in a work refusal protected by the Mine Act. *See* slip op. at 7 (citing *Bush*, 5 FMSHRC at 998-99). The miner’s reasonable belief in the hazard remains a central component of the work refusal test. Thus, the majority’s fears that we would somehow dilute the constructive discharge standard because we are adopting the findings the judge made in concluding that this work refusal was protected are unfounded.

for work could hardly be called “voluntary.” Therefore the judge erred in concluding that Dolan’s failure to look for work after August 12 was “willful.”

F&E is correct in asserting the general proposition that when a miner is disabled, he or she is not entitled to back pay for the period the disability renders the miner unavailable for work. Although this appears to be a question of first impression under the Mine Act, it is well settled under the National Labor Relations Act, a statute to which the Commission has referred in other cases involving mitigation of damages,³ that back pay is generally not awarded for periods when an employee is unavailable due to a disability. *NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987); *American Mfg. Co.*, 167 NLRB 520, 522 (1967). However, this does not settle the question of Dolan’s mitigation of damage, because under the NLRA an exception to this general rule is recognized “[w]here an interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally.” *Id.*; see also *Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 476-77 (7th Cir. 1982) (upholding award of back pay to union steward disabled by his supervisor, but shortening time period of award) (citing cases). In *Becton-Dickinson Co.*, 189 NLRB 787 (1971), the NLRB awarded back pay to an employee for a period during which she was disabled due to an acute anxiety reaction which the Board concluded the employer had induced or to which it had substantially contributed. Concluding that “[t]o withhold a backpay order in these circumstances would permit [the employer] to escape all liability for the loss of wages which [the employee] may have suffered because of factors [the employer] unlawfully set in motion, contrary to the remedial purposes of the Act.” *Id.* at 789.

Under Title VII as well, a causation analysis has been applied to determine whether periods of disability are to be included in a back pay calculation. *Martin v. Department of Air Force*, 184 F.3d 1366 (Fed. Cir. 1999). In *Martin*, a Back Pay Act case, the Federal Circuit awarded back pay to an employee for a period of time when he was disabled as a result of an interim job he was forced to take after his unlawful termination from his government job. The Court ruled that, taking into account the Congressional intent in passing the Back Pay Act and the requirement of a causation analysis in connection with the back pay provisions of similar federal laws, denying an employee back pay for a period of disability without reviewing the cause of the disability would be unreasonable. *Id.* at 1371. The court explained that “equity and reason require that if such an employee is unable to work because of an accident or illness closely related or due to interim employment or arises because of the unlawful discharge, the period of disability should be included in a back pay period.” *Id.* at 1372.

We agree with the NLRB that “the practice of disallowing back pay without inquiry as to the nature of the physical disability, [and] the cause thereof, . . . may be convenient but is not always equitable.” *American Mfg. Co.*, 167 NLRB at 522. Therefore, we would adopt the exception discussed above to ensure that miners disabled due to the conditions which gave rise to their employer’s discriminatory conduct can still receive redress. Thus, if his exposure to lead

³ See, e.g., *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-32 (Feb. 1984).

caused Dolan's disability, Dolan should be entitled to back pay for the period of time at issue. Because the Commission had not explicitly adopted this principle prior to the trial in this case, we would remand and reopen the record for the submission of evidence relevant to this issue.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 1, 2000

| | | |
|-------------------------|---|-------------------------------|
| ROSEBUD MINING COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. PENN 2000-21-R |
| | : | Citation No. 7042925; 10/5/99 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. PENN 2000-22-R |
| ADMINISTRATION (MSHA), | : | Citation No. 7042926; 10/5/99 |
| Respondent | : | |
| | : | Josephine No. 3 |
| | : | Mine ID 36-08719 |

DECISION

Appearances: Joseph A. Yuhas, Esq., Northern Cambria, Pennsylvania,
for the Contestant;
Pam E. DiFillippo, Esq., Merna Butkovitz, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner.

Before: Judge Feldman

Before me for consideration is a notice of contest with respect to Citation Nos. 7042925 and 7042926 filed by Rosebud Mining Company (Rosebud) against the Secretary of Labor (the Secretary) and the Mine Safety and Health Administration (MSHA) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815. Rosebud challenges the propriety of the subject citations that allege violations of the mandatory safety standard in section 75.1710-1(a), 30 C.F.R. § 75.1710-1(a).¹

The citations were issued because the tram station canopy and the roof bolting station canopy installed on the Long-Airdox roof bolting machines, serial numbers 62-873 and 62-874, model LRB-15-AR, operating in low seam coal in the first north butt 002-0 working section, allegedly were not protecting certain operators from falls of the roof/ribs when the operators were at the operating controls. The Secretary characterized the cited conditions as significant and substantial (S&S) in nature.

¹ Section 75.1710-1(a) provides, in pertinent part, that “canopies . . . [shall be] installed in such a manner that when the operator is at the operating controls of [self-propelled face] equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.”

The operators of the cited Long-Airdox roof bolting machines remain under supported roof at all times, even when under the cited canopies. As a general proposition, the canopies in question were adequate to protect roof bolt operators of average build. However, portions of the bodies of stouter roof bolt operators extended beyond the perimeters of the canopies. Consequently, the degree of negligence attributable to Rosebud for the cited violative conditions was considered to be low because the alleged violations were not obvious unless a physically larger roof bolter operator was operating the machine.

The Secretary concedes that her mandatory safety standards do not prohibit miners from traversing, without the protection of any canopies, the vicinity of the supported roof areas where the cited roof bolting machines were operating. In fact these areas are traversed on a daily basis during pre-shift and on-shift examinations.

Rosebud's contest is based on its assertion that the Long-Airdox model LRB-15-AR roof bolting machines have been in operation for more than 15 years without incident. Rosebud is reluctant to install extensions on the canopies because it believes larger canopies extending beyond the frame of the roof bolting machines will hamper the machines' maneuverability in low seam coal mining.

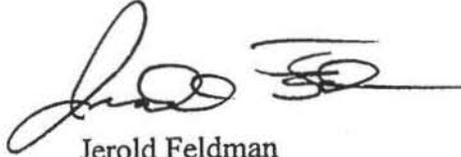
A hearing in these contest proceedings was conducted in Pittsburgh, Pennsylvania, on December 16, 1999. Upon completion of the Secretary's direct case, a settlement conference was conducted with the parties' counsel. After conferring with their clients, counsel advised that they had reached a settlement agreement. The terms of their agreement was presented and approved on the record. (Tr. 227-50). This decision formalizes the settlement terms.

Rosebud has agreed to withdraw its notices of contests for Citation Nos. 7042925 and 7042926. In addition, on or before March 16, 2000, Rosebud will install extended tram station canopies and roof bolting station canopies on the cited Long-Airdox roof bolting machines. Specifically, the tram station canopy will be extended by approximately 10 inches, and the roof bolting station canopy will be extended by approximately 9 inches. In addition, the drill controls on both machines will be moved forward approximately 10 inches to afford the operator with more overhead protection from the canopy.

In return, MSHA has agreed to extend the abatement period for the subject citations until March 16, 2000. In addition, the Secretary has agreed not to impose any civil penalty for these citations. Finally, MSHA reserves the right to evaluate these modifications to ensure that they provide adequate protection.

ORDER

In view of the above, the contestant's withdrawal of its notices of contest for Citation Nos. 7042925 and 7042926 **IS GRANTED** and the terms of the settlement agreement specified above **ARE APPROVED**. Accordingly, the contest proceedings in Docket Nos. PENN 2000-21-R and PENN 2000-22-R **ARE DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a horizontal line extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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February 3, 2000

| | | |
|-------------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 99-137-M |
| Petitioner | : | A.C. No. 05-02357-05516 |
| | : | |
| v. | : | |
| | : | Whitewater #81. |
| WHITEWATER BUILDING | : | |
| MATERIALS CORPORATION, | : | |
| Respondent | : | |

DECISION

Appearances: Edward Falkowski, Esq., Jennifer A. Casey, Esq.,
Office of the Solicitor, U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Nathan A. Keever, Esq., Dufford, Waldeck, Milburn & Krohn,
Grand Junction, Colorado;
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Whitewater Building Materials Corporation with the violation of five mandatory safety standards. Two of the violations were alleged to be S&S. The total proposed penalty was \$393.00.

In the prehearing conference that preceded opening the record for the requested hearing, the parties advised the judge that they were unable to reach a settlement of any of the citations, thus confirming their negative response to the judge's prehearing order instructing the parties to attempt to negotiate a settlement.

At the hearing, the parties were able to agree on the following stipulations which Secretary's counsel read into the record.

1. Respondent is engaged in the mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.
2. Respondent is the owner and operator of the HM2 Crusher mine, I.D. #390315.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* ("the Mine Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place 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 the parties 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 the ability of Respondent's ability to continue in business.
8. Respondent is a mine operator with 1,327 hours worked at the HM2 Crusher mine (I.D. #3901315) in 1997 and 7,452 total hours worked by Respondent in 1997.
9. 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 citation.

The issues were the existence of each of the five violations and the inspector's S&S designation of two of the alleged violations.

There were a large number of potential witnesses in the courtroom so the Judge, off-the-record, inquired as to who would be testifying. Secretary's counsel stated that he would be presenting the testimony of two MSHA inspectors. Inspector George Rendon would be testifying as to the violative conditions he observed as set forth in the two citations Inspector Rendon wrote. Inspector Gary Grimes would testify as to his observations of the violative conditions he observed as set forth in the three citations he wrote.

Respondent's Vice-President, Edward M. Gardner, indicated he would testify to the facts and contentions he set forth in his letter of April 30, 1999, which reads as follows:

Whitewater requests that the following citations, under the above Docket No., be vacated.

Citation Nos. 7921947 and 7921949 (lights for caterpillar truck and front-end loader). These citations do not violate Section 56.14100b, Title 30 CFR. Non-use or non-operating lights do not affect safety during daylight hours. Whitewater does not operate and has not operated during hours of darkness or low visibility. A safety hazard is not created as the lights were not required to be used at the time of the inspection.

Citation No. 7921948 (pulley belt guards for haul truck, alternator and condenser). The area cited is in an area that is isolated and accidental contact can not happen. The left front wheel and the truck frame isolate this item from contact. It is not in the normal work area of the operator and is not in arm's reach of any one checking the engine fluids. The only time this area would be entered by workmen would be during shut down for maintenance of the item. Fan guards were in place at the time of inspection. See enclosed photo exhibits Nos. 1 and 2.

Citation No. 4669758 (side panels for tail pulley). Whitewater believes that it had this area guarded properly at the time of inspection and that accidental contact could not have happened. The Inspector so notes that a person would have to reach in to make contact. Guards were so placed as to allow spill clean-up to be accommodated and still protect the workmen from accidental contact with the danger area. Also we believe that even if the guards did not satisfy the inspector that the citation was not an S & S citation. If the citation is upheld we request that the S & S designation be removed. See enclosed photo exhibits No. 3 and 4.

Citation 4669383 (hand railings on haul truck); We are not sure what the inspector saw or intended with this citation. This (haul truck) unit is equipped with handholds and guards rails in all areas above the ground and utilized by the operator to mount, dismount and check the unit. These safety rails were installed by the manufacturer and have not been altered, removed or changed by Whitewater. The cab door will not open beyond hand rail. See enclosed photo exhibits No. 5 and 6.

Having reviewed the entire file and participated in off-the-record discussions of the issues, I told the parties that the proposed penalties were quite modest and that they should be able to negotiate a settlement that would resolve all issues satisfactorily to both parties. With the assistance and recommendations of the Judge, the parties, off-the-record, negotiated an agreed disposition of all issues.

The agreement did not reduce the MSHA proposed penalty of \$393.00. It did, however, provide for a modification of Citation Nos. 4669758 and 4669383 by deleting the S&S designation of the two violations charged in those citations. Having considered the entire record, the essence of the proposed testimony and contentions of the parties and the statutory criteria in

section 110(i) of the Mine Act, I found the agreed disposition of the issues appropriate and approved the settlement on the record.

ORDER

Citation Nos. 7921947, 7921948 and 7921949 are **AFFIRMED**; Citation No. 4669758 and 4669383 are **MODIFIED** by deleting the "significant and substantial" designation and, as so modified, are **AFFIRMED**.

Whitewater Building Materials Corporation is **ORDERED TO PAY** a civil penalty of \$393.00 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of timely payment, this case is dismissed.



August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

February 9, 2000

| | | |
|------------------------|---|------------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 99-184-M |
| Petitioner | : | A. C. No. 41-00906-05503 CX2 |
| v. | : | |
| | : | |
| HOLT COMPANY OF TEXAS, | : | |
| Respondent | : | Sherwin Plant |

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas, on behalf of Petitioner;
William M. Knolle, Esq., Knolle, Livingston & Holcomb, Austin, Texas, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” charging the Holt Company of Texas (Holt) with two violations of mandatory standards and proposing civil penalties of \$50,000.00 for those violations. The general issue before me is whether Holt violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

On August 1, 1998, Holt mechanic Benny Duncan suffered fatal injuries when the bucket of a Caterpillar 990 front end loader collapsed pinning him between the lift arms and the main body of the loader. Duncan had been working on the main hydraulic valve assembly of the loader but failed to block the lift arms prior to disengaging the hydraulic lines. Reynolds Metal Company (Reynolds) operated the subject mine and had engaged independent contractor Holt to repair and maintain the loader and other equipment at its mine.

Citation No. 7852384

This citation, issued pursuant to Section 104(d)(1) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14211(c) and charges as follows:¹

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

A fatal accident occurred at this operation on August 1, 1998, when a mechanic was crushed between the bucket assembly and the frame of the loader. The bucket lift arms had not been blocked or supported to prevent accidental lowering of the component. The employer received supplemental information from the manufacturer that detailed safe work procedures which included the necessity to block or support the bucket lift arms whenever these types of repairs are made. The employer, however, did not pass the information on to the field technicians. Management engaged in aggravated conduct constituting more than ordinary negligence in that they had received information on safe work procedures that could have prevented this accident and did not distribute the information to the persons responsible for carrying out the tasks.

The cited standard, 30 C.F.R. § 56.14211(c), provides that “[a] raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.”

Since it is undisputed that Holt employee Benny Duncan failed to secure the bucket on the 990 front end loader while exposed to the hazard of the accidental lowering of the bucket, the violation is proven as charged. The violation herein was also “significant and substantial.”

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

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

Coal Co., 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

See also *Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Since there is no dispute that the violation caused Duncan's death I find that the violation was clearly "significant and substantial."

The Secretary also maintains that the violation was the result of high negligence and "unwarrantable failure." In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

The instant case is similar to the case of *Secretary v. Whyne Supply Company*, 19 FMSHRC 447 (March 1997). The victim in that case was, as was the deceased in this case, performing only the routine duties of a rank-and-file field mechanic. The Commission held that the deceased mechanic therein was not therefore an agent of the operator whose negligent conduct could be imputed to the operator. As in the *Whyne* case, Duncan's conduct in this case similarly cannot be imputed to Holt on the basis of an agency theory. The Commission also noted in *Whyne* however that although an operator is not liable for aggravated conduct based on

the actions of a rank-and-file miner it may nevertheless be held responsible for an unwarrantable failure based on its own conduct. It therefore held that in the context of evaluating operator conduct for purposes of both civil penalty assessment and unwarrantable failure determinations that “where a rank-and-file employee has violated the Act, the operator’s supervision, training and discipline of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Wayne Supply Company* at pages 452 and 453.

In this regard the Secretary argues in her post-hearing brief that Holt provided no supervision of its employees at the subject plant. In support of her claim the Secretary cites the testimony of Holt heavy equipment operator Domingo Flores, who stated that his supervisor, Charlie Burnham, had never inspected his work or supervised him at the Sherwin Plant. Burnham was also a supervisor for the deceased, Benny Duncan. While one cannot clearly infer from Flores’ testimony that Benny Duncan himself had not been properly supervised, the testimony nevertheless suggests some absence of direct on-site supervision over field service technicians. However, the Commission intimidated in the Wayne case that supervision of field technicians may occur in ways other than direct review of the employee’s work, such as evaluation based on feedback from customers and coworkers, See *Wayne Supply Company*, fn.7 at page 452. As Respondent observes in its brief there is ample record evidence that Holt received nothing but positive reports from its customers, including Reynolds, and other employees about Duncan’s competence and safety consciousness.

Moreover, in contradiction of the observations of Domingo Flores, Richard Barton, former shop supervisor and field service dispatcher for Holt, testified that he frequently visited the field technicians including those at the Reynolds Plant to consult and assist them. In addition, technical service manager Bill Kammer, testified that he had occasionally acted as a supervisor and observed the work of Benny Duncan in the field. Kammer further explained that when a person advances to the level of a field service technician he has already had years of supervision and has demonstrated he is qualified to make decisions on his own. Kammer indicated it was the accepted industry practice for field technicians to work without supervision in the field. The Secretary herself apparently recognizes this reality in that she did not, as a condition of abatement, require any closer supervision of Holt’s field technicians.

Under the circumstances and within the framework of the *Wayne* case, I do not find that the lack of day-to-day direct supervision of field technicians such as Benny Duncan, constituted, in itself, such aggravated conduct as demonstrating high negligence or unwarrantable failure.

The Secretary next contends as grounds for high negligence and unwarrantability, that Benny Duncan failed to receive adequate training on blocking the 990 loader and, specifically, that he did not receive information necessary for him to safely to remove the main control valve on that loader. In this regard it appears to be undisputed that Duncan had never received any formal training in blocking procedures specifically for the Caterpillar 990 loader. There is credible record evidence however, that Duncan had received general classroom training in

blocking procedures and had in fact properly utilized blocking procedures while working on the hydraulics of Z-bar linkage loaders similar to the Caterpillar 990 loader. Robert Yell and other coworkers had observed Duncan demonstrate proper blocking techniques. Richard Barton recalled specifically that Duncan had, only shortly before the fatal accident, properly blocked a Caterpillar 950 loader while working on the main control valve. According to Barton, the Caterpillar 950 loader has the same Z-bar linkage as the Caterpillar 990 loader. Holt field technician Domingo Flores, had also seen Duncan working on a properly blocked Caterpillar 992 loader shortly before the accident at issue.

Thus, even assuming, *arguendo*, that Duncan had no formal training on blocking the 990 loader, the fact that he had been observed shortly before the accident at issue properly utilizing blocking procedures on similar equipment, attenuates any causal link between the absence of such training and the incident herein. In reaching this conclusion I have not disregarded the hearsay testimony of MSHA inspector Mike Davis that he was told by Reynolds maintenance supervisor Guy Asher, that a month prior to the fatality he saw Duncan attempting to work under the loader without properly blocking it and that Asher purportedly sent Duncan off the Reynolds property to obtain proper stands to block the loader. While hearsay testimony is admissible in Commission proceedings I find that the testimony proffered herein, not subject to the scrutiny of cross examination, can be given but little weight.

In a related argument the Secretary appears to contend that Holt did not supply Duncan with the blocking instructions contained in the Caterpillar 990 Assembly and Disassembly Manual. Indeed, according to the charging document, this claim was the basis for the Secretary's unwarrantability finding. However, Richard Barton, a technical communicator who assisted the field technicians with information obtained from Caterpillar's computerized Service Information System (SIS), credibly testified that he commonly conferred with Duncan regarding particular problems and furnished Duncan data from the SIS. According to Barton, approximately one week before Duncan's accident, Duncan consulted him about continuing problems on the Reynolds' Caterpillar 990 loader. In response, Barton, had printed-out and provided Duncan the pages from the Caterpillar 990 manual regarding work on the 990 main control valve including blocking instructions. Under the circumstances it is clear that, contrary to the Secretary's allegations, Duncan did have in his possession only a week before the accident herein the most up-to-date information for blocking the Caterpillar 990 loader.

Under all the circumstances I cannot find Holt chargeable with significant negligence. Accordingly, I find that the violation was not the result of Holt's unwarrantable failure.

Citation No. 7852386

This citation alleges a "significant and substantial" violation of the training standard at 30 C.F.R. § 48.26 and charges as follows:

A fatal accident occurred at this operation on August 1, 1998, when a mechanic was crushed between the bucket assembly and the frame of a front end loader. The employee had not received comprehensive training in accordance

with 30 C.F.R. Part 48.26. The Federal Mine Safety and Health Act of 1977 declares an untrained miner is a hazard to himself and others. The contractor was aware of these training requirements.

The Secretary alleges that Holt failed to provide training to Duncan under 30 C.F.R. § 48.26. There is no dispute that Holt did not provide this training. The violation is accordingly proven as charged. Holt argues however that the Secretary has not established that Section 48.26 training would have required any specific training for blocking the Caterpillar 990 loader or that the failure to provide Section 48.26 training contributed to the accident. Indeed, the Secretary has not established that the Section 48.26 training would have included training specific to blocking the Caterpillar 990 loader. Moreover, in light of the credible evidence that Duncan knew that blocking was required and knew how to block a 990 loader, the failure to have provided Section 48.26 training would not appear to have been a causative factor in the accident herein. The Secretary has offered no rationale nor cited any evidence in her brief to support her gravity and "significant and substantial" findings. Under the circumstances I find that the Secretary has failed to establish that this violation was "significant and substantial" or of significant gravity.

In assessing a civil penalty herein I have also considered the evidence that Holt was of modest size, has a minimal history of violations, that it abated the violations in good faith and that the proposed penalties herein would not effect its ability to stay in business.

ORDER

Citation No. 7852384 is hereby modified as a "significant and substantial" citation issued under "Section 104(a)" of the Act. Citation No. 7852386 is modified to delete the "significant and substantial" findings. Holt Company of Texas is further directed to pay civil penalties of \$2,000.00 and \$300.00 respectively for the violations charged in the above citations within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 9, 2000

| | | |
|--------------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 99-90 |
| Petitioner | : | A. C. No. 15-02263-03551 |
| v. | : | |
| | : | Darby Fork No. 1 |
| LONE MOUNTAIN PROCESSING INC., | : | |
| Respondent | : | |

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, and Anne Wathen O'Donnell, Esq., Arch Coal, Inc., St. Louis, Missouri, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lone Mountain Processing, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$655.00. A hearing was held in Gate City, Virginia. For the reasons set forth below, I modify the citation and assess a penalty of \$1,000.00.

Background

The Darby Fork No. 1 Mine is a large, underground coal mine operated by Lone Mountain, a subsidiary of Arch Coal, Inc., in Harlan County, Kentucky. On October 10, 1998, a fatal roof fall accident occurred at the mine. Among the many inspectors who went to the mine in the late night on October 10 and the early morning of October 11, was MSHA Coal Mine Inspector William R. Johnson. Johnson's assignment was not to investigate the accident, but to conduct a "spot" inspection of the rest of the .002 unit where the accident occurred. Since the accident happened in the No. 4 heading, he inspected the Nos. 1, 2 and 3 headings.

As a result of his inspection, Inspector Johnson issued Citation No. 7456174, alleging a violation of section 75.207(c)(2) of the Secretary's regulations, 30 C.F.R. § 75.207(c)(2), in that:

The approved pillar plan was not being followed on the .002 unit inby the pillar line because the roadway leading from the solid pillar to the final stump in the No. 2 and No. 3 headings, had not been narrowed down to sixteen feet. The timbers set for the roadway in the No. 2 heading were twenty feet apart. The right side timbers needed to establish the sixteen foot roadway in the No. 3 heading had not been installed.¹

(Jt. Ex. 2.)

Findings of Fact and Conclusions of Law

Section 75.207(c)(2) provides, in pertinent part, that:

Pillar recovery shall be conducted in the following manner, unless otherwise specified in the roof control plan:

....

(c) Before mining is started on a final stump--

....

(2) Only one open roadway, which shall not exceed 16 feet wide, shall lead from solid pillars to the final stump of a pillar.

Concerning this citation, the company argues that, with regard to the No. 2 heading, there was no violation at all, and with regard to the No. 3, the violation was neither “significant and substantial” nor an “unwarrantable failure.” I find that the Secretary has failed to prove that there was a violation of the regulation in the No. 2 heading and that the violation in the No. 3 was not the result of an “unwarrantable failure” on the part of the operator.

It should be noted at the outset, that there is no dispute that the Respondent was conducting pillar recovery or that the roadways in question led from a solid pillar to the final stump. Likewise, the parties agree that the company’s roof control plan did not specify a different method of conducting pillar recovery from the regulation.

No. 2 Heading

Inspector Johnson testified that he determined that the roadway in the No. 2 heading was 20 feet wide by standing against the outby corner of the intersection of the No. 2 heading and the

¹ This is an edited version of the text of the citation. It originally included findings concerning the No. 1 heading which were removed by a subsequent modification. (Jt. Ex. 3.)

crosscut, and running his tape measure along the ground, diagonally across the intersection, until it touched what he believed to be the middle roadway post (the No. 3 timber). He stated that Brad Sears, the mine superintendent, was with him and observed the measurement. He further claimed that "I just told him what I measured and what I found," and that Sears made no response. (Tr. 57.)

On the other hand, Sears maintained that when Johnson took the measurement, "I saw 16 feet and two inches is what I saw." (Tr. 342.) He further declared that: "The only thing that I remember him saying that it looked like it may widen out. No, he didn't say anything about us having a citation or anything of that nature." (Tr. 344.)

Gaither Frazier, the mine manager, testified that when he was informed by the mine's safety manager that the company was receiving a citation for the wide roadways, he went to the No. 2 heading to measure the roadway. He stated that: "I lined myself up best I could outby the corner and measured over to the timbers on the left with a metal tape. And I measured 16 feet two inches" (Tr. 375.)

After taking this measurement, he went and got some other people and went back to the heading two or three times to have them witness his measurement. Among the people that he had go with him were Sears, Dale Jackson (a fire-boss at the mine), Dennis Cotton (the MSHA inspector conducting the fatality investigation), Gary Harris (another MSHA inspector) and George Johnson (a Kentucky mine inspector). He asserted that every time he measured the roadway, it was sixteen feet, 2 inches. He stated that after showing the measurement to Inspector Cotton, "I came away from the thing feeling that he didn't think there was a violation there." (Tr. 379.)

Sears corroborated Frazier's testimony. He said that when the company learned that the Nos. 1 and 2 headings were included in the violation, he went back to the headings with Frazier, Cotton and, possibly, Jackson because "we couldn't really see how there was anything wrong with it, you know, that it should be included." (Tr. 347.) He related that when they measured the roadway in the No. 2 heading, it measured "16 feet or close to 16 feet." (Tr. 348.)

Inspector Cotton, who apparently could have resolved the issue one way or another, gave testimony that can only be described as evasive. He admitted accompanying the others to witness the measurement of the roadway in the No. 2 heading and he admitted that he observed a measurement of 16 feet, but claimed that he did not know what the measurement represented because:

I wasn't sure what they wanted me to observe, but I had my mind on the accident scene. As to the lead investigator, I have a lot of responsibility on me, and I wanted to do that job to the best of my ability. I had a lot of people that --- my primary concern was this accident scene, the area over there.

(Tr. 252.) He even admitted that in observing the 16 feet measurement he actually observed the numbers on the tape measure, but he never was specific as to exactly what he observed being measured.²

I find Inspector Cotton's testimony distressing. While his reluctance to contradict his colleague is understandable, such reluctance should not, and cannot, override his obligation to provide the hearing with the facts, as he observed them, in a clear and concise manner.

Operators are frequently reproached in decisions for not having brought a fact or disagreement to the attention of the inspector at the time of the inspection, and then bringing it up for the first time at the hearing. Here the company questioned the citation, made its own measurements and then attempted to bring the discrepancy to MSHA's attention as soon as possible. While the best course would have been to bring it to Inspector Johnson's attention, contacting Inspector Cotton was not unreasonable. Now the Respondent, instead of having taken care of the matter appropriately, finds that its inspector witness' testimony has become more imprecise the nearer the hearing gets.³

If Inspector Cotton really was so involved in the accident investigation that he could not pay attention to anything else, he should have informed the company's representatives that he could not go with them. Once he agreed to accompany them, it was his duty as an inspector to give the matter his complete and undivided attention, to ascertain exactly what he was being asked to do, and to report the facts as he observed them, "letting the chips fall where they may."

I find that the Secretary has failed to prove that the roadway in the No. 2 heading was more than 16 feet wide. In making this finding, I accept the testimony of the company over that of Inspector Johnson. I can think of no explanation for the inspector's mistaken measurement, nor do I believe that he has been deliberately misleading. However, the weight of the evidence supports the testimony of Frazier and Sears. In this regard, I note that Sears, although when he testified about the width of the roadway was testifying on cross examination, was the Secretary's witness. Further, while Frazier was the company's witness, he ceased working for Lone Mountain or any of its related companies on June 7, 1999, and, thus, would not have been under any apparent pressure to testify in the company's favor. Finally, vague as Inspector Cotton's testimony was, it tends to corroborate the testimony of Frazier and Sears, more than refute it, and certainly adds nothing to Inspector Johnson's testimony.

Consequently, I conclude that the company did not violate its approved pillar plan, or section 75.207(c)(2), when it set its roadway posts in the No. 2 heading. The citation will be modified accordingly.

² Cotton's colloquy with the judge, set out in the Appendix, demonstrates the elusive nature of his testimony on this issue.

³ He evidently was more specific when he gave his deposition. (Tr. 304-05.)

No. 3 Heading

As noted above, the Respondent agrees that none of the required roadway posts had been installed on the right side of the roadway leading to the final stump in the No. 3 heading. The company argues, however, that this violation was neither "significant and substantial" nor an "unwarrantable failure." I find that the violation was S&S, but not an "unwarrantable failure."

Significant and Substantial

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Everyone agrees that the hazard created by failing to narrow the roadway to 16 feet with timbers is an increased danger of roof falls. Nevertheless, the Respondent argues that in this case there was no hazard created in the No. 3 heading because the company was not going to mine the final stump. If the final stump had not, in fact, been mined, this might be a valid argument. The evidence indicates, however, that not only was this a dangerous area even if no mining were performed, but also that the company did mine at least part of the final stump.

Ricky Clark, the continuous miner operator, testified that he unilaterally decided not to set the roadway timbers on the right side of the No. 26 pillar (final stump) because he was not going to mine the pillar. He said that the bottom was bad and he was afraid he would get the miner stuck. He admitted, however, that he did mine two cars worth of coal, which he estimated to be about two feet of the pillar, in the hopes that it would cause the roof to fall.

Frazier testified that when he observed the No. 26 cut, after the citation was issued, that: "It looked short. It looked like maybe from the corner that probably ten feet may have been taken out of it." (Tr. 383.) Conversely, Inspector Johnson testified that in his opinion the entire cut had been taken. He based this on the fact that when he looked into the cut he could not see the back of it with his cap light and the fact that if all, or almost all, of the cut had not been taken, he would not have been able to see into the No. 24 cut. I credit his testimony for the following reasons.

Since the company's defense is that the violation was not S&S because the cut was not mined, its witnesses would not want to admit that it had been. However, both Clark and Frazier acknowledged some of it had been mined. Therefore, the next best defense is to minimize the extent of the cut. Since Clark decided not to place the roadway posts on his own, without consulting or informing the foreman, it was clearly in his interest to claim that only a few feet were mined. But his testimony is contradicted by Frazier, who admitted that at least ten feet had been cut. Thus, the Respondent's own evidence supports a finding that a minimum of ten feet of the No. 26 pillar had been mined.

Inspector Johnson's reasons for concluding that the No. 26 cut had been entirely made were logical. Obviously, no one could go in and accurately determine the exact depth of the cut. When comparing the inspector's testimony with the company's obvious interest in minimizing the amount of coal taken, I find the Inspector's testimony to be more credible.

Turning to whether there was a reasonable likelihood of injury, I note that pillar recovery is inherently dangerous under the best of circumstances. When the final pillar is removed, the roof is supposed to fall. Thus, mining the final stump is one of the more dangerous, if not the most dangerous, activities performed in underground coal mining.⁴ Moreover, in this case, the best of circumstances did not exist. The floor was "heaving" so badly that Clark wanted to get his continuous miner out of there.⁵ Yet, instead of installing the roadway posts, he attempted to mine coal from the No. 26 stump, which, without the roadway posts, made an unstable situation even worse.⁶

I have little difficulty in concluding that a serious, probably fatal, injury was reasonably likely to occur in these circumstances. The company was fortunate that it did not. But the fact that it did not, does not mean that a serious injury was not reasonably likely. As the Commission

⁴ The Secretary offered into evidence accident reports involving two fatal roof falls at mines that occurred during mining of the final stump. Both reports concluded that failure to install the required roadway posts contributed to the accident. (Govt. Ex. 2 & 3.)

⁵ Inspector Johnson testified that pressure from the roof comes down through the pillars and causes the bottom to "heave up." (Tr. 79.)

⁶ In fact, Clark testified that the reason he mined in the No. 26 pillar was to try "to get that intersection to fall where it wouldn't hurt us later on." (Tr. 196.)

has long held: “The question of whether a violation is S&S must be resolved on the basis of conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations. *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (February 1991); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).” *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1382 (August 1996). Accordingly, I conclude that the violation was “significant and substantial.”

Unwarrantable Failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). “Unwarrantable failure is characterized by such conduct as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference’ or a ‘serious lack of reasonable care.’ [Emery] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991).” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

The Secretary’s argument that this violation involved an unwarrantable failure is based on the theory that Ricky Clark, the continuous miner operator, was a *de facto* supervisor. If Clark were a supervisor, the violation would clearly be an unwarrantable failure, since he intentionally decided not to install the roadway posts and then went ahead and mined coal anyway. However, he was not a supervisor, *de facto* or otherwise.

The Commission has long held that the negligence of a “rank-and-file” miner cannot be imputed to the operator for penalty assessment purposes. *Fort Scot Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982) (*SOCCO*). To determine whether such a miner was an agent of the operator, whose negligence can be imputed to the operator, “the Commission examines whether the miner was exercising managerial or supervisory responsibilities at the time the negligent conduct occurred. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995).” *Wayne Supply Co.*, 19 FMSHRC 447, 451 (March 1997).

It is the Secretary’s position that the following factors made Clark a supervisor: (1) He was certified as a foreman in the state of Kentucky; (2) In his prior employment he had worked as a foreman for six years; (3) On occasion he had filled in as a foreman for the Respondent; (4) He had authority to shut down the mine if methane was encountered; (5) He had the authority to make decisions that affected the safety of miners; (6) He could determine how much of a cut should be made when operating his continuous miner; and (7) The foreman and he worked together and the foreman relied on him to make safety tests.

In *Whayne Supply* the Commission rejected a similar argument by the Secretary as “lacking legal and evidentiary support” because “[a]lthough the record evidence indicates that . . . was a highly experienced repairperson who needed little supervision and helped less experienced employees, this does not convert him into a supervisor, much less a manager.” *Id.* The Commission further found that there was no evidence that he “exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees. Nor was there any evidence that . . . ‘controlled’ the mine or a portion thereof; rather he merely carried out routine duties involving the repair of Caterpillar machinery.” *Id.*

Likewise, in this case there is no evidence that Clark exercised any of the traditional indicia of supervisory responsibility. While the record demonstrates that he was an experienced continuous miner operator who needed little supervision, he did not “control” the mine or any part of it, but merely carried out routine duties involving the operation of a continuous mining machine. Among those routine duties were being alert for methane and shutting down the miner when it was encountered and determining how much of a cut to make, or not make, based on the conditions encountered. There is no evidence to support the Secretary’s claim that he had the authority to make decisions affecting the safety of other miners, or that he had any more authority than any miner has when encountering hazardous conditions.⁷

Consequently, I conclude that Clark was not a supervisor whose aggravated conduct can be imputed to the operator. However, that does not end the inquiry because the Commission has further held that: “[W]here a rank-and-file employee has violated the Act, *the operator’s* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *SOCCO* at 1464. While this standard is normally applied in determining the operator’s negligence for penalty purposes, the Commission has also confirmed that it applies in determining whether an operator can be held responsible for an unwarrantable failure. *Whayne Supply* at 452-53.

Nonetheless, the Secretary did not present any evidence concerning Lone Mountain’s supervision, training and disciplining of its employees. Nor is there sufficient evidence in the record to make such a determination. Since the Secretary has failed to show that the Respondent’s supervision, training and discipline of its employees was deficient, it must be concluded that the company had taken reasonable steps to prevent the violative conduct.

⁷ This claim is apparently based on the following question and answer:

Q. Does the company intrust you with the authority to make decisions which effect [*sic*] the safety of miners?

A. I would think so.

(Tr. 194.)

Finally, it is uncontroverted that no supervisor was present when the violation was committed. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997). Accordingly, inasmuch as Clark's negligence cannot be imputed to Lone Mountain and there is no evidence that the company engaged in aggravated conduct, I conclude that the violation was not the result of an "unwarrantable failure." I will modify the citation appropriately.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$655.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With regard to the penalty criteria, the parties have stipulated, and I so find, that the penalty will not adversely affect the company's ability to continue in business and that the Darby Fork No. 1 Mine is a large-sized coal mine. (Tr. 20-21.) I also find that Lone Mountain is a large company. (Jt. Ex. 6.) Based on the company's Assessed Violation History Report, I find that the company has a relatively good history of previous violations. (Jt. Exs. 1 and 6.) I further find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Turning to the question of gravity, I find this to be a serious violation. As previously noted, pillaring is dangerous under the best of circumstances and mining the final stump is the most dangerous aspect of pillaring. Mining the final stump without putting in the required roadway posts is a situation fraught with the gravest consequences.

Notwithstanding the fact that the miner operator's negligence cannot be imputed to the Respondent and that there is no evidence that the operator engaged in aggravated conduct, I find that the operator was moderately negligent. The inspectors testified that while there is no requirement in the regulations that the foreman be present when the final stump is being mined, it is good mining practice for him to be present to monitor the mining and the roof conditions. Indeed, they maintained that in their experience the foreman had always been present in such a situation. In this case, the foreman was not present, but was off on another matter. It may be that the miner operator got to the final stump sooner than anticipated, but I find that the company was not blameless in not having someone in authority present.

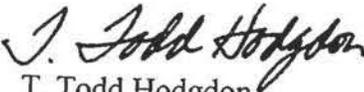
Taking all of the penalty criteria into consideration, I conclude that a penalty of \$1,000.00 is appropriate for this violation.

Order

Citation No. 7456174 is **MODIFIED** by deleting the words "No. 2" and the words "the timbers set for the roadway in the No. 2 heading were also twenty feet apart" from section 8, by

reducing the level of negligence from “high” to “moderate,” by deleting the “unwarrantable failure” designation and by making it a 104(a) citation, 30 U.S.C. § 814(a), instead of a 104(d)(1) citation, 30 U.S.C. § 814(d)(1). The citation is **AFFIRMED** as modified.

Lone Mountain Processing, Inc., is **ORDERED TO PAY** a civil penalty of **\$1,000.00** within 30 days of the date of this decision.


T. Todd Hodgdon
Administrative Law Judge

Appendix

Q. Mr. Cotton, when you went up to review this measurement, did they tell you what they were measuring?

....

A. They said they were lined up with the timbers.

Q. Okay.

A. That's what I --- .

Q. And then what were they measuring?

A. They said they were going to measure over to the next row of timbers over here, sir.

Q. And did they measure over to the next row of timbers?

A. I don't know for --- I mean, I didn't do it, I was just standing there.

Q. You watched them do it?

A. As far as I know that's what --- they said they did that.

Q. Could you tell whether they were or not?

A. I didn't --- I didn't check it myself[.] I just watched them do it.

Q. Yes. But when I see somebody measuring something I could see where the end of the tape measure is and where it's going to?

A. Well, like I said if it gets into this, to me, since I didn't evaluate this area, this plan calls for timbers up in here.

Q. I want to know what they were measuring.

A. From what I understood that's what they said they were measuring and I believe I even told them which I didn't get to say on the record that was according to Mr. Johnson and the company because I was very concerned about coming back here.

Q. You did see the tape measure that said 16 feet; right?

A. It was some point down --- back in --- .

Q. Wherever it was down there --- was it 16 feet from the timbers across the intersection to that?

A. To these over here?

Q. Yes. Was it the red one?

A. Their 16 foot was in this area right here.

Q. But it wasn't to the timbers?

A. Like I said I didn't come over here and make sure that it was those timbers. I just assume they did what they were saying they were doing. And like I said I didn't know, I just --- .

(Tr. 318-22.)

Distribution:

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/nj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 2000

| | | |
|-------------------|---|---------------------------|
| GARY D. MORGAN, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| v. | : | Docket No. LAKE 98-17-D |
| | : | VINC CD 97-02 |
| ARCH OF ILLINOIS, | : | |
| Respondent | : | Conant Mine |
| | : | Mine ID 11-02886 |

DECISION ON REMAND

Before: Judge Weisberger

This case is before me based upon a decision issued by the Commission, *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (December 23, 1999), vacating the decision that was issued by me on June 10, 1998, (20 FMSHRC 571) and remanding the case for "further consideration".

In this discrimination case, Gary D. Morgan alleged that Arch of Illinois (Arch) took adverse action against him in not recalling him for a position after he had failed a hands on test regarding the operation of a bolter. It was Morgan's contention that the adverse action taken against him by Arch was motivated, in any part based on his protected activities. In the original decision, *20 FMSHRC supra*, it was found that Morgan did engage in protected activities, and that Arch did take action that was adverse to him. However, in the decision, it was concluded that John Cotter, a shift foreman, who administered the hands on test, and made the decision to fail him, which resulted in his not being rehired, was the only agent of Arch to have taken adverse action against Morgan, and that it was not established that he had any animus towards Morgan relating to his protected activities. In the decision, it was found that Ben Williams, Morgan's immediate supervisor, did have some animus toward Morgan in part due to Morgan's complaints of dust violations. However, it was further found that Williams was not involved in any decisions relating to an evaluation of hands on testing, or whether to recall him. The basis for this finding was the lack of evidence in the record that Williams had communicated his animus to either Cotter or Bob Blaylock, who made these decisions. Specifically, Williams' testimony that he did not tell Cotter to fail Morgan, did not talk to Cotter prior to the time Morgan took the hands on test, and did not tell anyone to fail Morgan on the hands on testing, was accepted because it was not contradicted or impeached.

In addition, it was found that although the version of events testified to by Morgan and Gerald Shelby another miner who worked with Morgan, establishes animus on the part of Harry Riddle, the mine Manager, who had knowledge of Morgan's safety complaints, it was concluded that there was no evidence that this animus formed the basis, in any part, for the adverse action taken against Morgan. This conclusion was based upon Riddle's testimony that he was not involved in the testing procedures, did not ask or tell Cotter or anyone else to fail Morgan, and that he did not tell Cotter that Morgan had filed dust complaints with MSHA. Riddle's testimony was accepted because I observed his demeanor and found his testimony credible in these regards. A further basis for the acceptance of Cotter's testimony was that it was noted that there was no direct evidence contradicting or impeaching his testimony.

In its remand the Commission directed to "more fully consider the record evidence that [I] did not address." (21 FMSHRC 1393) Specifically, the Commission remanded for consideration of "additional evidence" which is summarized as follows: that Morgan had complained about dust to Williams and that Riddle was aware of these complaints, that Arch's supervisors were angry at Morgan for dust complaints, that Riddle told Shelby, according to Shelby but denied by Riddle, that Morgan would never work at Arch's Minerals mine again, that I had discredited both Williams' and Riddle's testimony that Riddle was not aware of Morgan's complaints about dust violations, that in crediting Williams testimony that he did not tell Cotter to fail Morgan I did not look at the entire body of evidence regarding his hostility towards Morgan referring to miners having kidded Williams about the possibility that Morgan be rehired onto Williams' section, that the superintendent at the Conant Mine, Whykoff testified that when he was presented with a list of panel applicants for employment at the Conant Mine he usually tried to talk to their ex-supervisors, and that he had admitted that he attended a meeting at which Williams stated that he did not want Morgan on his crew and that he did not recall making any response or follow-up to Williams criticism, and finally that the small size of the mine supports an inference that the operator knew of protected activity. The Commission also indicated that I could have relied on Morgan's testimony of evidence of disparate treatment i.e. that he was not given time to warm up on the bolter, that he was denied the assistance of a helper, and did that he did not bend a steel, as evidence of disparate or inconsistent treatment of Morgan versus other similarly laid off miners who were tested.

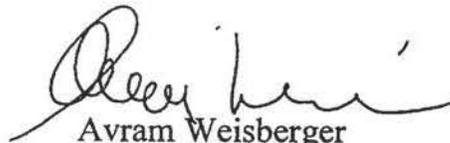
Upon reconsideration the entire record, and weighing the testimony of Williams, Riddle and Cotter against the above summarized factors and also taking into account inconsistencies in the record noted by the Commission (21 FMSHRC 1393) as to whether Cotter timed miners when they were tested on the roof bolter, and Cotter's inability to explained why he gave Morgan non-satisfactory ratings on aspects of the roof bolter test, and "the conflicting" testimony of Cotter regarding warm up time or a helper, I conclude that whereas the above summarized evidence could possibly support some inferences adverse to Arch, I find it of insufficient weight to outweigh the above referenced testimony of Riddles and Cotter whose demeanor I carefully observed and found to be credible. I further find that the evidence and "inconsistencies" are not

of such weight as to constitute an impeachment or contradiction of the direct testimony of Williams, Cotter and Riddle whom I found credible based upon observations of their demeanor.

For all the above reasons, on reconsideration, I reiterate my earlier conclusion as set forth in the initial decision 20 FMSHRC at 581, that it has not been established that Cotter, the only agent of Arch to have taken adverse action against Morgan, had any animus toward Morgan relating to protected activities, or even knew of Morgan's protected activities on or before of October 1996 when the adverse actions were taken. I thus reiterate my initial conclusion that it has not been established that the adverse actions taken by Arch, acting through Cotter, were in part motivated by Morgan's protected activities. Thus, I reiterate my earlier conclusion that it has not been established that Morgan was discriminated against in violation of Section 105(c) of the Act.

ORDER

It is **ORDERED** that Morgan's complaint be **DISMISSED**, and that this case be **DISMISSED**.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

February 18, 2000

| | | |
|--------------------------|---|-------------------------------|
| BOWIE RESOURCES LIMITED, | : | CONTEST PROCEEDING |
| Contestant | : | |
| | : | Docket No. WEST 99-120-R |
| | : | Citation No. 7018205; 1/27/99 |
| v. | : | |
| | : | |
| SECRETARY OF LABOR, | : | Bowie No. 2 Mine |
| MINE SAFETY AND HEALTH | : | Id. No. 05-04591 |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | |

DECISION

Appearances: R. Henry Moore, Buchanan Ingersoll P.C., Pittsburgh, Pennsylvania, for Contestant;
Mark W. Nelson, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a notice of contest filed by Bowie Resources Limited (“Bowie”) against the Secretary of Labor pursuant to sections 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d)(the “Mine Act”). Bowie¹ contested a citation issued on January 27, 1999, at the Bowie No. 2 Mine alleging a violation of the Secretary’s safety standard at 30 C.F.R. § 75.202(a). A hearing was held in Delta, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND

The Bowie No. 2 Mine is an underground coal mine in Delta County, Colorado. On December 14, 1998, two miners were killed when a portion of the mine roof fell as they were mining a pillar. The miners were conducting retreat mining in a conventional mining section when the roof above the pillar they were mining fell. The men were under supported roof at the time of the accident.

¹ The name “Bowie” is pronounced 'bauē so it rhymes with “Howie.”

At the conclusion of MSHA's investigation, the Secretary issued one citation under section 104(d)(1) of the Mine Act alleging a violation of section 30 C.F.R. § 75.202(a). The condition or practice section of the citation alleges a violation as follows:

The mine roof was not adequately supported to protect persons from hazards related to falls of roof in the Number 22 coal pillar and intersection of the 002-0 MMU, an active working section where persons worked and traveled. On the evening of December 14, 1998, retreat mining was in progress on the No. 22 Coal Pillar. Statements obtained during the accident investigation revealed that ground conditions had been deteriorating over a period of two separate working shifts. During this period, unusual amounts of heaving in the mine floor had been observed, some timbers had dislodged or broken and been reset, however no additional support was added. At least once during each of the last two shifts prior to the accident, the continuous mining machine and crew had retreated for safety to an outby location. Despite these conditions being present, mining was resumed without installing additional or supplemental support. The section foreman was present during earlier mining activity, however had left the area immediately prior to the accident. As the final cut was taken from the coal pillar, the mine roof fell, extending from the Number 22 pillar continuing into the outby intersection, crushing the remainder of the coal pillar, covering the continuous mining machine, and fatally injuring both the machine's operator and his helper. This violation was determined to be a contributing factor to the occurrence of the fatal accident.

MSHA determined that the violation was serious, was of a significant and substantial nature ("S&S"), and was a result of Bowie's unwarrantable failure to comply with the safety standard. The safety standard provides, in pertinent part, that 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 roof, face or ribs"

It is important to understand that the Secretary is not contending that Bowie failed to follow its MSHA-approved roof-control plan. Rather, she is arguing that unusual conditions were present in and around Pillar 22 on the day of the accident and during the previous shifts. These conditions should have put Bowie on notice that additional measures were needed to support or control the roof. The Secretary contends that Bowie continued to mine the pillar in its normal fashion despite these warning signs. She maintains that Bowie's failure to take additional steps to support the roof created a serious hazard of a roof fall in the area and contributed to the death of two miners. The Secretary argues that Bowie's conduct constitutes a serious violation of section 202(a) and that Bowie was highly negligent in failing to adequately support or control the roof.

Bowie argues that the information available to its experienced personnel did not indicate that additional support was necessary. Bowie states that it was following its approved roof-control plan and that its supervisors had carefully instructed the crew on how to safely mine the pillar at the start of the shift. It contends that the Secretary improperly relies on hindsight to establish her case. It argues that the conditions that existed in the area on the evening of December 14, 1998, did not indicate that additional support was necessary. Bowie maintains that the roof fell because of the presence of an undetectable anomaly in the roof near the corner of Pillar 22. Bowie maintains that it did not know about this anomaly because it was virtually undetectable.

II. DISCUSSION WITH FINDINGS OF FACT

The Bowie No. 2 Mine is a relatively new mine that was still being developed at the time of the accident. A longwall section was being developed, but the accident occurred in the First East Submains where continuous mining machines were being used to extract the coal. The submains had already been advanced and retreat mining was taking place. Bowie's roof-control plan included provisions for partial pillar recovery. (Ex. G-18 pp. 23-24). The plan for partial pillar recovery was approved by MSHA on November 19, 1998. Under the plan, Bowie could make five cuts into each pillar in a preestablished order and was required to leave several stumps. The plan also set forth the sequence for installing timbers as supplemental support. The roadways² in this section were about 8 feet high and 18 feet wide. The pillars were on 85-90 foot centers. The basic plan is illustrated in Exhibits G-3A and B-14. A portion of Exhibit B-14 is attached to this decision as Illustration No. 1.

Bowie pulled Pillars 1-20 between November 20 and December 5, 1998. This was the first time that pillar mining was conducted at the Bowie No. 2 Mine. Additional rooms were developed between December 6 and 12, 1998. On December 13, 1998, Bowie resumed pillar extraction on Pillar 21. Thus, between December 6 and December 12, 1998, no retreat mining occurred in the area. The most inby row of pillars left standing during that period, Pillars 21 - 25, is referred to as the "standing row." Since this pillar row was immediately adjacent to the gob for that seven-day period, Bowie anticipated that roof and rib conditions could make mining more difficult.

A number of conditions were present along the standing row on December 13, 1998. First, a substantial amount of floor heaving occurred in the area. Such heaving produced a significant amount of loose coal in the roadways between the pillars along the standing row. Second, cutters developed at a number of locations along the standing row. "Cutters" are cracks along the roof immediately adjacent to a pillar. Third, some of the ribs developed sloughage problems along the standing row. Sloughage is fairly common at the mine because of the way the coal cleaves. All of these conditions developed, at least in part, as a result of the pressure

² I use the term "roadways" to refer to entries and crosscuts.

from the roof. This area is under about 750 feet of overburden. The roof is relatively strong at the mine and the pressure was at least partially relieved by the floor heaving.

Bowie took a number of steps to ensure roof stability before it resumed retreat mining on December 13. First, it cleaned up the loose coal produced by the floor heave. Bowie believed that the presence of floor heave indicated that much of the pressure that built up in the standing row had been relieved. It indicated to them that the roof was strong and solid. The pressure pushed the pillars down and the floor up. Some support timbers were cracked. Bowie replaced these timbers. Bowie also bolted the cutters with eight-foot roof bolts. Bowie uses six-foot roof bolts in the roadways, but it uses eight-foot bolts to support cutters.

Prior to the beginning of his shift on December 14, 1998, Keith McFarland, the section foreman, talked with D. Richard Kendall, the supervisor on the previous production shift. Mr. Kendall told Mr. McFarland that his crew had a tough time mining Pillar 21. Kendall said that cap rock fell while his crew was mining the pillar. Cap rock is a hard layer of rock, usually sandstone, just above the coal seam. *See A Dictionary of Mining, Mineral, and Related Terms 2nd ed*, 83 (1997). The cap rock fell in the unsupported area being mined.

McFarland's shift began at about 4:30 p.m. on December 14. At the beginning of the shift, McFarland conducted a safety talk. He reviewed an MSHA safety bulletin entitled "Best Practices — Retreat Mining." (Ex. G-20). It deals specifically with safe practices to follow when removing pillars. Rocky Gallob was late arriving to work that day and was not present during this safety training.

The crew followed Bowie's normal procedures when mining Pillar 22. The cuts were made in sequence and all of the timber supports were installed at the appropriate time. As the crew made each cut, the continuous miner operator frequently backed the continuous miner out to wait and watch the roof. Sometimes he backed out because it looked like cap rock was going to fall. At other times, he backed out to observe and listen to the roof. The continuous miner was operated by remote control, so the crew was under supported roof at all times and could observe the roof from the outby roadways adjacent to the pillar and from the outby intersection. The Secretary agrees that backing out the continuous miner to observe the roof is "a common practice in retreat mining." (Tr. 78).

Mr. McFarland was present during much of the shift, but he was absent from the immediate area some of the time. After the fourth cut was made, McFarland consulted with the continuous miner operator and his helper and he determined that it was safe to take the fifth (final) cut. Because it was near the end of the shift, many people were in the area to watch the roof. As the fifth cut was started, Mr. McFarland, Barry Schreckengost, Richard Ungaro, Rocky Gallop, and Hector Camacho were near the outby intersection between Pillars 22 and 23. Denis Linman was near the outby intersection between Pillars 21 and 22. Before the cut was made, Mr. Ungaro walked around Pillar 27 to stand near Mr. Linman. Messrs. McFarland and Schreckengost left the area just before the roof fell. Mr. Schreckengost was the shift foreman.

A massive roof fall occurred as the fifth cut was being made shortly after Mr. McFarland left the area. The roof fell from the unsupported area of Pillar 22 out into the outby intersection between Pillars 22 and 23. The diagram of the roof fall included in MSHA's accident investigation report, Exhibit G-1, is attached to this decision as Illustration No. 2. The fall came with some warning. Mr. Linman heard timber break and saw roof material fall. Mr. Linman waived his cap light and blew his whistle, which are warnings to immediately vacate an area. Mr. Ungaro ran around Pillar 27 to provide assistance. Unfortunately, the continuous miner operator, Rocky Gallob and his helper, Hector Camacho, did not escape in time. They were in the outby intersection between Pillars 22 and 23 when the roof fell. It appears that the roof fall started in the corner of the unsupported area in Pillar 22 and spread into the supported roof of the outby intersection adjacent to Pillars 22 and 23. The roof separated above the six-foot roof bolts that were installed in the intersection. The outby stump of Pillar 22 was crushed. The Secretary believes that if Gallob and Camacho had an additional second or two to escape, they would not have been under the roof fall. For reasons that are not entirely clear, Messrs. Gallob and Camacho did not immediately leave the area but apparently tried to back the continuous miner into the intersection before attempting to retreat outby.

A. Factors Relied Upon by the Secretary to Establish a Violation

The Secretary argues that Bowie knew or should have known that the roof was deteriorating, thereby risking a potential roof fall. Consequently, Bowie should have provided supplemental support to protect persons working in the area. She relies on a number of conditions that developed in the area and she described the steps that Bowie should have taken to control the roof. She states that these measures may not have been sufficient to prevent the roof from falling, but that they might have given Messrs. Gallob and Camacho more time to escape.

1. Conditions that Developed along the Standing Row

The Secretary relies on a number of physical factors that occurred along the standing row to support her position. The Secretary believes that one of the most significant events that indicated that the roof was deteriorating was the fact that the floor was heaving in the roadways. There is no dispute that there was a significant amount of heaving in several areas immediately adjacent to the standing row. The heaving occurred between Pillars 22 and 23, 23 and 24, and 24 and 25. Some of the loose coal that was observed in the roadway between Pillars 22 and 23 was material that had been pushed up with a scoop from outby roadways rather than coal that had heaved up in the area. Nevertheless, the heaving was greater than had ever been experienced during pillar mining at the Bowie No. 2 Mine. It must be kept in mind, however, that Bowie had been pillar mining at Bowie No. 2 for only two weeks. Significant heaving also occurred at the adjacent Bowie No. 1 Mine and in other areas of the Bowie No. 2 Mine.

The Secretary maintains that another significant event was the development of cutters along the standing row. There is no dispute that cutters were present along Pillars 22, 23, 24, and

25.³ She contends that, as with the floor heave, the presence of cutters indicated that the roof was deteriorating and that additional support was required in the roadways. The Secretary acknowledges that Bowie installed eight-foot roof bolts at the cutters before mining was commenced, but argues that the presence of the cutters should have alerted management that additional measures were required.

The Secretary also points to the fact that there was a significant amount of rib sloughage in the vicinity of the standing row. The Secretary maintains that this fact also shows that the pillars were taking weight and that the roof could be unstable. She characterizes the amount of sloughage as abnormal. Bowie does not dispute that there was more rib sloughage along the standing row than was typical at the mine.

The Secretary contends that the presence of floor heave, cutters, and rib sloughage evidenced increased stress created by the weight of the roof bearing down on the pillars and floor. She argues that these warning signs should have alerted Bowie to the danger and that Bowie should have added additional support or mined only the first four cuts. Bowie contends that it cleaned up the rib sloughage and floor heave, and also repaired the cutters. It also maintains that it believed that these factors showed that the stress on the roof had been relieved, reducing the danger of a fall of roof. It also points to the fact that the standing row was stable at the time Pillar 22 was mined. The floor heaving had stopped; it did not appear that the ribs were continuing to slough; and the condition of the cutters had not changed. It states that there is no evidence that additional cutters were forming.

Finally, the Secretary contends that Bowie failed to take into account the fact that an old abandoned coal mine, the King Mine, is approximately 260 feet below the Bowie No. 2 Mine. Maps show that pillar remnants were located below Pillar 22. She contends that Greg Hunt, Bowie's geology consultant, advised Bowie that it could experience difficult conditions in areas above such remnant pillars. Bowie argues that Mr. Hunt merely stated such conditions were a "possibility" and that his concerns related to the longwall section. It also noted that pillar remnants were also present under many of the 20 pillars originally mined and no roof-control problems were encountered there. The roof fall in this case was the first reportable roof fall that occurred at the Bowie No. 2 Mine.

2. Conditions During the Previous Production Shift

The Secretary also contends that the crew on the previous production shift had a difficult time mining Pillar 21 and the adjacent barrier. She argues that the problems that developed on that shift should have alerted Bowie that additional roof support was required beyond that set forth in the roof-control plan. The barrier and Pillar 21 were the first areas mined in the standing

³ Bowie maintains that these "cutters" were cracks rather than true cutters in the sense that a mining engineer would use that term. As stated above, I find that a cutter is a crack along the roof immediately adjacent to a pillar. I reject Bowie's argument.

row. In addition to the floor heave, rib sloughage, and cutters that were present, the Secretary points to evidence that Pillar 21 was difficult to mine. She relies upon Mr. Kendall's statement to MSHA that cap rock fell as Pillar 21 was mined and that it took longer to mine the pillar than is typically the case.

Bowie contends that although it anticipated that conditions along the standing row would pose some roof and rib-control problems, it took those conditions into account. Christopher Barker operated the continuous mining machine during the previous production shift. He testified that he had to back out his machine two or three times to watch the roof because of the presence of cap rock. He testified that backing out was not unusual in retreat mining and that mining Pillar 21 was no more difficult than normal. (Tr. 636, 641).

3. Conditions Encountered while Mining Pillar 22

As stated above, Mr. Kendall warned Mr. McFarland that there had been a lot of cap rock in Pillar 21. The Secretary maintains that Mr. McFarland demonstrated his knowledge of the poor roof conditions when he provided safety training to his crew at the start of the shift. In his statement to MSHA following the accident, McFarland said that he told his crew to "keep an eye out" for bad conditions and that he instructed them to install additional breaker posts at any indication of bad roof; watch the mine floor for evidence of heaving; and not to mine the final cut if conditions did not look safe. The Secretary argues that this instruction evidences McFarland's knowledge that additional roof control measures were necessary in the standing row.

The crew began mining Pillar 22 at about 6 p.m. The crew cleaned up loose coal in the roadway between Pillars 22 and 23, and reset timbers in the turn row for the first cut. These were the only timbers that had to be reset at Pillar 22. The first cut was then made. The continuous miner was backed out twice to observe cap rock in the roof. After some cap rock fell, the crew watched the roof to see if it was stable. Before starting the second cut, the crew installed four turn row timbers across the roadway as required by the roof-control plan. The crew pulled the mining machine back at least twice while making this cut. Once the second cut was completed, four danger row timbers were installed across the mouth of the roadway between Pillars 22 and 23. That roadway would no longer be used during retreat mining.

As the crew began making the third cut into the pillar, the continuous miner was pulled back due to cap rock. Upon completion of the fourth cut, four turn row timbers were installed across the roadway between Pillars 22 and 27. The fourth cut was then made. Sometime after the crew started making the fifth cut, Mr. Gallob pulled the continuous miner back to watch and listen to the roof. Apparently, he did this because the crew saw some cap rock fall in the area mined during the first cut. At that time Mr. McFarland, Mr. Schreckengost, Mr. Camacho, and Mr. Gallob were in the outby intersection. After examining the roof, Messrs. McFarland and Schreckengost determined that it was safe to continue mining the fifth cut. Soon after both supervisors left the area, the roof above the pillar collapsed.

The Secretary believes that the conditions that unfolded as the pillar was mined gave notice to Bowie that additional roof support was necessary or that the fifth cut should not be completed. She states that Messrs. Schreckengost and McFarland “effectively abandoned the crew during the most critical and potentially most dangerous sequence of mining...” (S. Br. 13). She contends that after the continuous miner was pulled back during the fifth cut, Bowie management should have instructed the crew to add more timber⁴ or ordered them to withdraw from the pillar.

Bowie maintains that roof conditions looked stable when the crew resumed mining the fifth cut. The timbers and the caps above the timbers were not deforming. The roof bolts in the intersection looked secure and the roof-bolt plates were not deformed from roof pressure. The floor was not heaving and the pillar stump was not being crushed. Bowie contends that there was no indication that supplemental roof support was necessary or that the fifth cut should not be made. It contends that the evidence shows that the fall of roof occurred because of an anomaly in the roof that was not detected during the installation of the bolts to control the cutter. It points to the testimony of Mr. McFarland that an examination of the roof after the fall revealed that there was no separation in the rock structure where the roof fell. (Tr. 762-63). Thus, it maintains that a miner drilling roof bolts or test holes would not have detected the condition.⁵

B. Alleged Violation of Section 75.202(a)

The Secretary’s roof-control standard at 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission held that “the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987)(cited in *Harlan Cumberland Coal Co.* 20 FMSHRC 1275, 1277 (December 1998).

Although my resolution of the issues raised in this case has some bearing on the cause of the fatal accident, the purpose of this proceeding is not to determine the cause of the accident or the steps that could have been taken to prevent it. Some of the evidence presented in this case has little to do with roof control. For example, the Secretary’s position that management “effectively abandoned the crew” when the fifth cut was made has little to do with the issue in this case. I have not considered these peripheral issues in my analysis.

⁴ The Secretary contends that, if Bowie had used one roadway rather than two for access by the ram cars that off-loaded the coal, there would have been more room to add supplemental timber support. Bowie used two roadways for cuts 3 through 5.

⁵ The Secretary also argues that Bowie should have drilled additional test holes in the area to obtain more information about the condition of the roof.

I find that the Secretary did not establish a violation of section 75.202(a). The factors relied upon by the Secretary to establish the violation are not sufficient to show that a reasonably prudent person would have provided additional support. I reach this conclusion for a number of reasons, as discussed below.

First, I agree with the Secretary that the conditions that developed along the standing row should have raised concerns about the safety of retreat mining in that area. Nevertheless, I find that Bowie addressed those concerns and continually monitored the conditions to make sure that the roof and ribs were not deteriorating. It cleaned up the coal that heaved up into the roadways and it continued to monitor the roadways for additional heaving. Bowie reasonably believed that the floor heaving demonstrated that the roof was strong and that the pressure on the roof had been reduced as a result of the heaving. The cutters along the pillars were bolted. There is no evidence that these cutters were expanding or that additional cutters developed. Rib sloughage was rather common at the mine due to the cleavage of the coal. Rib sloughage occurred in other areas of the mine without creating a hazardous condition. I find that these factors did not indicate that the roof around Pillar 22 was deteriorating. Bowie management was concerned about these conditions but it reasonably believed that it had addressed them and that it was safe to mine the standing row using the roof support contained in the approved roof-control plan. Bowie did install additional roof support in other areas of the mine when conditions warranted, but it did not believe that supplemental support was necessary to protect persons at Pillar 22 .

The Secretary's evidence on the effect of the underlying King Mine is not convincing. Although it is true that the maps show that a pillar remnant may have been under Pillar 22, it is just as likely that this remnant had given way. Moreover, many of the pillars that were previously mined were on top of similar pillar remnants. Thus, it is highly speculative that the abandoned mine had any effect on the stability of the roof in the Bowie No. 2. It was reasonable for Bowie to continue following the approved roof-control plan without adding supplemental support due to the presence of the King Mine.

The Secretary's arguments concerning the events that occurred during the previous production shift also do not indicate that additional roof support was necessary. Cap rock was present when mining Pillar 21, but otherwise the roof appeared to be stable. There was no evidence of deterioration in the pillar or the roof. Mr. Barker, one of the miners who operated the continuous miner during that shift, testified that Pillar 21 was not particularly difficult to mine. (Tr. 636). He also stated that he pulled the mining machine back two or three times, which was not an abnormal amount. *Id.* He said that it is up to the crew to determine when to pull out. The crew will often pull out when anyone sees or hears something that makes him uncomfortable, such as timber taking weight. (Tr. 639-41). The miner operator and his helper constantly watch the roof and the roof-support system to make sure that it is safe to continue mining the pillar. *Id.*

With respect to the events that occurred on the evening of December 14, the Secretary relies heavily on the statements of miners given to MSHA's investigators rather than on testimony produced at the hearing. Indeed, she relies on these interviews to establish her entire

case. (Exs. G-4 through G-14). The Secretary did not use these interview statements to supplement the testimony of eyewitnesses. In fact, she did not call as witnesses any miners who observed the conditions along the standing row or any miners who were present on the evening of December 14. There was no showing that these miners were unavailable to testify. As justification for this approach, counsel for the Secretary argued that the events on the night of December 14, 1998, were still fresh in the minds of these individuals at the time of the interviews so that the interview transcripts were more reliable than live testimony. I admitted the interview transcripts over the objection of Bowie. (Tr. 260-61).

Although I agree with the Secretary that the interviews were conducted when the events were still fresh in everyone's minds, the interviews suffer from other infirmities. There was no opportunity for cross-examination. In a number of instances, the question asked by the MSHA investigator and the answer given by the miner are ambiguous. Bowie was not afforded the opportunity to clarify the facts. For example, the Secretary cited the interview transcript of Mr. Linman to argue that three or four support timbers broke while Pillar 22 was mined and that one of the stumps for this pillar crumbled as mining progressed, with the result that the roof was not adequately supported. (S. Br. 8 citing Ex. G-8 pp. 46-49). As Bowie points out in its reply brief, this portion of Mr. Linman's interview is ambiguous. It appears that Mr. Linman was referring to timbers in the gob that usually give way as pillars are mined. It also appears that Linman was referring to Pillar 21 when he stated that the pillar was crumbling. There was no opportunity to clarify this testimony.

In addition, many of the questions asked by the MSHA investigator relate to how such accidents could be avoided in the future. For example, Mr. Schreckengost was asked "looking back on what you've seen and what you know about this accident, what additional support ... would you have installed to prevent this accident" (Ex. G-7, p. 46). Mr. Schreckengost answered that double breaker rows could have been added. The Secretary cites this answer for the proposition that Mr. Schreckengost realized that additional roof support should have been added. (S. Br. 12). This argument ignores the fact that the question was directed at future protection. What I must examine in this case is the adequacy of the roof support measured against what a reasonably prudent person would have provided to meet the protection intended by the standard. I must look at the conditions that were present as Pillar 22 was being mined without taking into consideration the fact that the roof fell. MSHA interviews miners during accident investigations for a wide range of reasons. In pursuing the Secretary's mission of reducing the number of fatal accidents, MSHA must know what can be done to prevent similar accidents. Thus, the questions asked often do not lend themselves to resolving issues raised in enforcement actions.

It appears that the Secretary's approach in this case was to establish that, because it conducted a competent investigation of the accident, the citation should be affirmed. Most of the first day of the hearing consisted of testimony of the MSHA investigators describing, in detail, how they conducted their investigation. (Tr. 39-263). These witnesses described the information that they relied upon in reaching their conclusions. Much of the Secretary's evidence on the second day of the hearing consisted of testimony of other MSHA officials concurring in these

conclusions. (Tr. 318-396). As stated above, the Secretary did not call any miners who were eye witnesses to the events on December 13-14, 1998. The Secretary has the burden of proof in this *de novo* proceeding. The Secretary does not meet her burden by establishing that MSHA's investigation was thorough and competent. Commission administrative law judges do not affirm or vacate citations based on an evaluation of the adequacy of MSHA's investigation. If the Secretary believes that a violation occurred, she must present evidence to establish that fact to the trier of fact. She may seek to use interview transcripts as part of her proof but, given the nature of such interviews, she runs the risk that such evidence will fall short of establishing a violation.

The interviews presented by the Secretary are evidence in this case and I have considered them in rendering my opinion. Nevertheless, I principally rely on the live testimony presented at the hearing. The testimony at the hearing was specifically directed to the issues in this case; there was an opportunity for cross-examination; and I was able to observe the witnesses.

I find that Mr. McFarland advised the crew at the start of the shift that cap rock had fallen on the previous production shift. He also reviewed with the crew MSHA's safety instructions setting forth precautions to be followed when mining pillars. He instructed the crew to install additional timber if it appeared that the roof was weakening. He told them to watch for evidence of floor heaving. He also told them not to mine the final cut if it could not be done safely.

The evidence establishes that the crew had to pull back the continuous miner a number of times as it mined the pillar. The crew was instructed to pull back the miner whenever they believed that they needed to closely watch the roof. This procedure was in place for safety reasons, but also to protect the continuous mining machine from being damaged by falling cap rock. Although it was a common practice at the mine to pull back the miner when recovering pillars, the crew pulled back more frequently than is typically the case.

The crew was instructed to constantly examine the roof for any indications of instability as mining occurred and between cuts. I credit the testimony of Messrs. McFarland and Schreckengost that the roof appeared stable on the evening of December 14. The roof and roof-bolt plates were not deformed; the timber supports were not showing signs of unusual pressure; and there were no signs of deterioration in the roof. (Tr. 622, 694-95, 698, 715, 752-53, 754).

The fact that cap rock was falling within the mined portion of the pillar does not indicate that the roof was deteriorating. Mr. Ungaro, the roof bolter on the crew, testified that "you want the cap rock to fall" and you expect the roof to cave where you have mined the coal. (Tr. 632-33). Mr. Ungaro also testified that although the crew expected a "cave" to develop in unsupported areas, "we never expected the intersection" to cave in. (Tr. 633).

I find that the Secretary did not establish that a reasonably prudent person, familiar with the mining industry and the protective purposes of section 202(a), would have provided additional roof support at Pillar 22 or would have stopped mining Pillar 22 in the face of the conditions that existed on the evening of December 14, 1998. In reaching this conclusion, I have considered all of the factors submitted at the hearing, including the conditions that developed

along the standing row, the events during the previous production shift, and the events on the evening of December 14. It is not clear why the roof fell. The roof fell in the outby corner of the pillar and out into the supported outby intersection. There is no dispute that there was a sandstone formation above the fall.

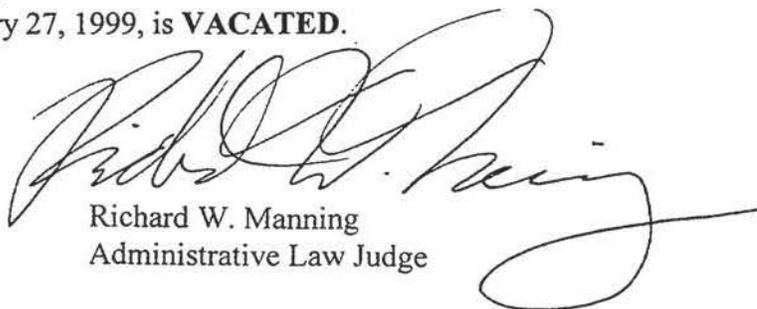
The Secretary's expert witness, Joseph Zelanko, testified that he reached his conclusion that the roof was not adequately supported, based in large measure on the statements made by miners during the MSHA investigation that the conditions in the standing row were "not common." (Tr. 424). He was referring to floor heave, cutters, and rib sloughage. Mr. Zelanko testified that these conditions indicated that the roof was under high stress. He attributed this high stress to the fact that, as the pillar rows were mined, the overburden was getting progressively deeper. (Tr. 425; Ex. G-34 p. 5). He also attributes the high stress to the fact that, as retreat mining progressed, the area of the gob increased. He believes that this section of the mine was not getting a good cave in the gob and this fact greatly increased the stress on the roof in the standing row. (Tr. 427). Finally, he also concluded that the underlying King Mine may have increased the instability in the roof.

John Stankus, Bowie's expert witness, testified that the floor heave reduced the stress in the roof above the standing row. (Tr. 544). He believes that there was a reduced potential for a roof fall in the area because of the heaving. (Tr. 554). He testifies that the effect of the King Mine and the overburden on the stability of the roof was insignificant. Dr. Stankus concluded that the roof fell because of a "geologic anomaly in the roof over pillar 22" that was difficult or impossible to detect. (Tr. 564-65).

Because the roof fell, it is quite obvious that more should have been done to support the roof around Pillar 22 or the final cut should have not been made. Both experts were highly qualified and they presented competing theories about the cause of the accident. MSHA's investigation brought forth information that it believes contributed to the roof fall. As stated above, however, on the evening of December 14, Bowie management reasonably believed that the roof was adequately supported. Messrs. McFarland and Schreckengost reasonably believed that any abnormal stress on the roof had been released when the floor heaved and that it was safe to make the final cut in Pillar 22. Their belief was confirmed by the relatively stable conditions they observed that evening.

III. ORDER

For the reasons set forth above, the notice of contest in this case is **GRANTED** and Citation No. 7018205 issued on January 27, 1999, is **VACATED**.



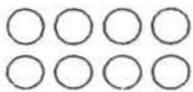
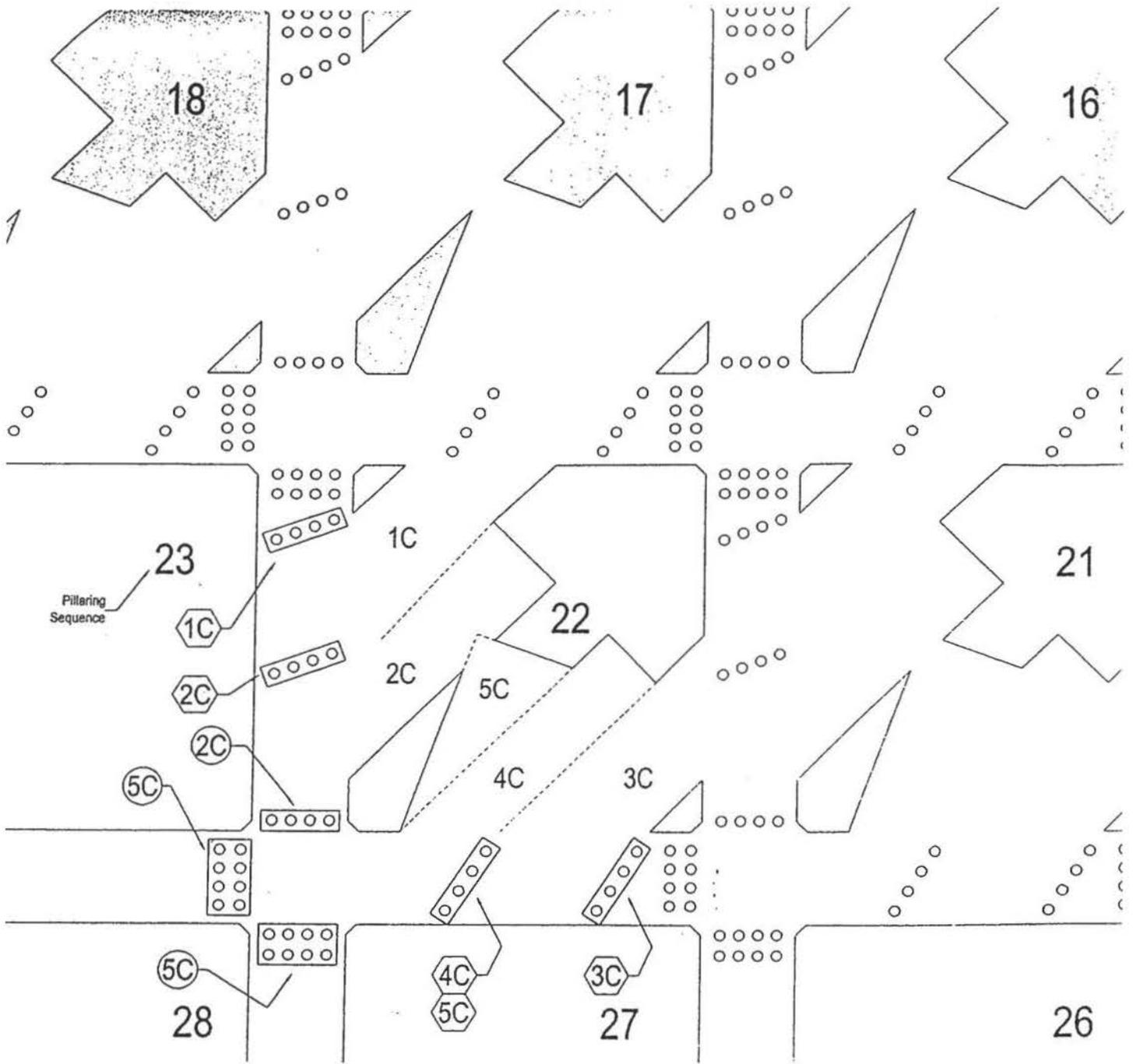
Richard W. Manning
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Buchanan Ingersoll, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

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RWM



Breaker Row



Turn Row

2C Pillar Cut Sequence

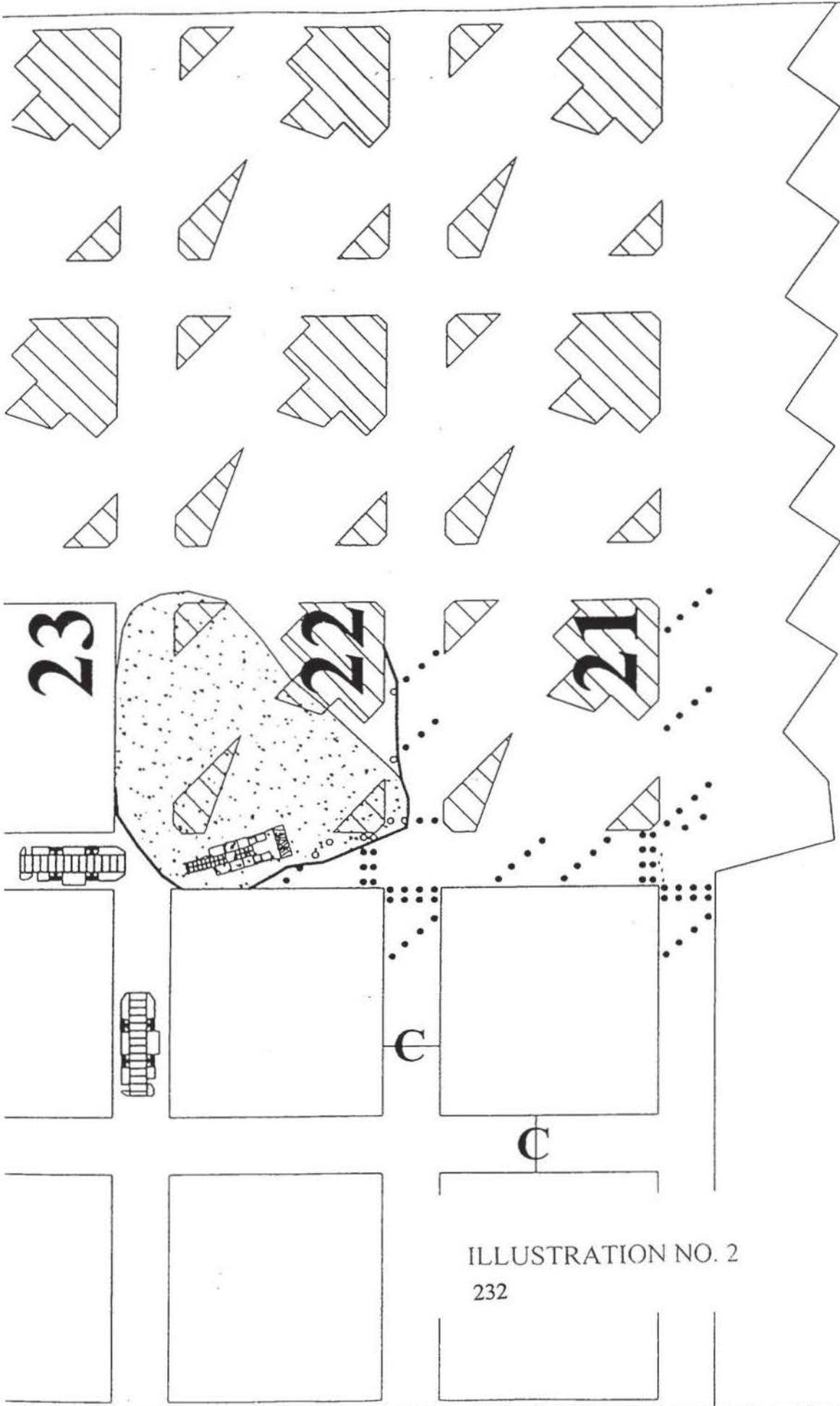


Timbering Sequence - Set Prior to Cut



Timbering Sequence - Set Upon Completion of Cut

ILLUSTRATION NO. 1



Roof fall area - Section 002-0
 Bowie Resources Ltd., Bowie No. 2 Mine
 Paonia, Delta County, Colorado
 M.S.H.A. ID 05-04591

Appendix G

Not to Scale



ILLUSTRATION NO. 2

232

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 18, 2000

| | | |
|----------------------------|---|-----------------------------|
| SECRETARY OF LABOR, | : | TEMPORARY REINSTATEMENT |
| On behalf of CURTIS STAHL, | : | PROCEEDING |
| Applicant | : | |
| | : | Docket No. WEST 2000-145-DM |
| v. | : | WE MD 98-18 |
| | : | |
| A & K EARTH MOVERS INC., | : | Bella Vista Pit |
| Respondent | : | Mine ID No. 26-02046 |

DECISION **AND** **ORDER OF TEMPORARY REINSTATEMENT**

Appearances: Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Applicant;
Richard L. Elmore, Esq., Hale, Lane, Peek, Dennison, Howard & Anderson, Reno, Nevada, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Curtis Stahl, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Stahl as an employee of the Respondent, A & K Earthmovers, Inc., pending a decision on a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA) against the company.¹ A hearing was held on the application on February 15, 2000, in Sparks, Nevada. For the reasons set forth below, I grant the application and order Mr. Stahl's temporary reinstatement.

Summary of the Evidence

On July 27, 1998, Stahl filed a discrimination complaint with MSHA stating that he had been discharged from A & K on July 15, 1998, and alleging that the discharge was the result of his making safety complaints. Specifically, he set out the following as his Summary of Discriminatory Action:

¹ It does not appear that the Secretary has yet filed a Complaint of Discrimination with the Commission. In view of this decision, and in fairness to both parties, the complaint should be filed as soon as possible.

June 24, 1988 [sic] At 7:15 am, I phoned Joe Hess and told him I needed another fuel truck driver because David Chickering (702)425-8042 hadn't showed [sic] up for work. At 8:30 am, I checked out **unit #627** and determined that both the park brake and the service brakes were completely wore [sic] out. At 9:00 am, David's father showed up on the job site and informed me that David was in jail and he had no idea when he would get out. At 9:15 am, I phoned Joe Hess and told him what I had learned about David and the brakes.

On June 26, 1998 Fuel truck **unit #627** was written up on a "required maintenance form" by the new fuel truck driver named Eleuterio Jacinto (702)324-6125 indicating that **unit # 627** had no park brake and no service brakes. He also stopped the lead maintenance mechanic named Kevin ????? (702)972-4487 down by the water tank near the crusher. After thoroughly inspecting the brakes, Kevin confirmed that they were completely wore [sic] out. He said he would inform his boss (the maintenance supervisor) Brian Wade about it and get it fixed.

On June 29-30 & July 1-2-3 Eleuterio Jacinto continued writing up the problem with the brakes and he was fired July 6, 1998.

July 1st, 2nd, 3rd Acting as foreman in charge of Bella Vista Pit and the person responsible for the safety of all persons on the property, I personally had verbal conversations with the maintenance supervisor (Brian Wade) about the problem with the brakes on **unit #627**. He indicated he knew all about the brake problem. He told me he could not work on it now because they were to [sic] busy but he would get to it when he could.

July 6, 1998 I spoke to Brian Wade in front of the office and told him the brakes on **unit #627** are worse now than when M.S.H.A. wrote a citation on it just three weeks ago and asked him if he could please get them repaired. He said he would get to it as soon as he could.

July 7, 1998 I spoke to Kevin ???? and asked him if he knew when they were going to fix the brakes and he asked me if I had done something to upset Brian because he had no intention of fixing it for me. So I said "I'm going to Red Tag it then", and that's what I did.

July 15, 1998 I was terminated. Upon asking why, Joe Hess said: (you allowed both generators to run out of fuel last week and we just don't need any more trouble around here.) [sic]

(Comp Ex. 1 at 9.)

Stahl was the only witness called by the Secretary. He testified that he was hired as the Crusher Foreman in October 1996. His testimony was essentially a reiteration of his statement set out above. He said that: "I feel like I was terminated because of the incident with the 627 fuel truck and when I red-tagged it." (Tr. 32.)

The company presented five witnesses: Melvin E. Borden, Safety Director; F. Joseph Hess, Crushing Superintendent and Head of Asphalt Operations; Kelly Bart Hiatt, Vice President and General Manager; James Busch, Equipment Manager; and Bryan Wade, Field Mechanic Supervisor. The company's case can be summed up as follows: (1) Stahl did not communicate any safety complaints to his superiors; (2) There was no reason to continue using the 627 fuel truck after its brakes were determined to be deficient, since there was another fuel truck available to fuel the generators; (3) Bryan Wade specifically told Stahl to park the 627 truck and he would fix it when he could; (4) If there were any safety violations, they were Stahl's in requiring, or permitting, his drivers to continue to operate an unsafe truck; (5) Stahl was terminated for reasons having nothing to do with his alleged protected activity; and (6) The decision to terminate Stahl was made a week prior to his first alleged safety complaint.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination with Commission Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. § 2700.45(d), states that:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not 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 witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

Thus, “[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987) *aff’d sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to requiring that a complaint appear to have merit, the Commission and the courts have also equated “not frivolously brought” to a “reasonable cause to believe” and “not insubstantial.” *Jim Walter Resources, Inc.*, 920 F.2d at 747 & n.9; *Secretary of Labor on behalf of Price*, 9 FMSHRC at 1306.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev’d on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

In this case, the Complainant has testified that he engaged in protected activity by complaining on several occasions to his superiors about the defective brakes on fuel truck 627 and there is no dispute that his discharge by the company was an adverse action. Other than his opinion, however, he has presented no evidence that his discharge was motivated by his engaging in protected activity. Nevertheless, as the Commission has frequently acknowledged, it is very difficult to establish “a motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Secretary on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that “(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action” are all circumstantial indications of discriminatory intent. *Id.* Here, Stahl testified that the company had knowledge of his complaints and there was a coincidence in time, eight days, between this activity and his discharge.

Thus, if Stahl’s claims are found to be credible, he would be entitled to relief under the Act. I find that his testimony was not inherently incredible and no evidence was presented that he was altogether unworthy of belief. The conflicts between Stahl’s testimony and the Respondent’s are the types of conflicts in testimony that arise in every case. However, it is “not the judge’s duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of the

proceedings.” *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

A & K’s evidence indicates that it may well have a valid defense to Stahl’s complaint, but, as set out above, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his complaint is not frivolous, not to determine “whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources, Inc.* 920 F.2d at 744. Consequently, the focus of the hearing is clearly on the evidence presented by the Complainant and the evidence presented by the Respondent is relevant, at this stage, only to the extent it demonstrates that the claim is frivolous. The company has not presented any evidence that things could not have happened the way the Complainant alleges that they did, that he had stated to witnesses that his claim was “made up” or anything of a similar nature.

Finally, in a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources, Inc.*, 920 F.2d at 748 n.11.

Accordingly, finding that Stahl’s complaint is not entirely without merit, I conclude that his discrimination complaint has not been frivolously brought.

Order

Curtis Stahl’s Application for Temporary Reinstatement is **GRANTED**. A & K Earthmovers, Inc., is **ORDERED TO REINSTATE** Mr. Stahl to the position that he held on July 15, 1998, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105 (Certified Mail)

Richard L. Elmore, Esq., Hale, Lane, Peek, Dennison, Howard & Anderson, 100 West Libert Street, 10th Floor, Reno, NV 89501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 28, 2000

| | | |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 99-182 |
| Petitioner | : | A. C. No. 15-13920-03925 |
| v. | : | |
| | : | Docket No. KENT 99-212 |
| LODESTAR ENERGY, INC., | : | A. C. No. 15-13920-03927 |
| Respondent | : | |
| | : | Wheatcroft Mine |

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee;
Richard M. Joiner, Esq., Mitchell, Joiner & Hardesty, P.S.C., Madisonville, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lodestar Energy, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege two violations of the Secretary's mandatory health and safety standards and seek penalties of \$797.00. A hearing was held in Evansville, Indiana. For the reasons set forth below, I modify the two orders to citations and assess penalties of \$205.00.

Background

The Wheatcroft Mine is an underground coal mine owned by Lodestar Energy, Inc., and located in Webster County, Kentucky. The mine is operated by Green Pond Energy Corporation under contract with Lodestar.

On November 24, 1998, MSHA Inspector Archie Coburn went to the mine to conduct a quarterly inspection, customarily referred to as a "Triple A" inspection. He accompanied Lodestar Fire Boss Dennis Marsili to examine the air courses and seals in the inactive area of the

mine.¹ While they were crawling through the cross-cut going toward the first seal of the No. 6 set of seals, Marsili informed the inspector that the roof in that area was getting heavy, that he had written in the mine book that additional support was needed and that he had orally informed Charlie Dame, the Safety Director for Green Pond, of the situation.

On hearing this, Inspector Coburn examined the area after he got through it. He observed that the roof was sagging six to eight inches in various locations in an area that was approximately 40 feet long and 20 feet wide. When he got back to the surface, the inspector checked the weekly examination book which had the following entry for the previous week:

Walked ret O/C² from #5 seals up to ret O/C 0.1% 20.6%; across and down through #4 seals 0% 20.7% 7:47 am/10:28 am 11-17-98.
No hazards observed. DFM
NOTE: The top in x-cut in front of #1 seals #6 set, to next entry needs extra support — top getting heavy. 11-17-98 DFM

(Govt. Ex. 5 at 4.) The initials DFM are Marsili's.

Inspector Coburn then asked Jess O'Rourke, Green Pond General Superintendent, when they were going to add support to the area. O'Rourke questioned Charlie Dame about the situation and Dame advised him that he had told David Weinbarger, Lodestar Mine Manager, and Kevin Vaughn, Lodestar Safety Director, about the condition, but that Weinbarger was on vacation and nothing had been done.

Based on these facts, Inspector Coburn issued Order No. 4274546 alleging a violation of section 75.364(d) of the Secretary's regulations, 30 C.F.R. § 75.364(d), because:

The hazardous condition recorded in the mine book provided for weekly examination has not been corrected. The examiner recorded in the mine book on 11/17/98 that additional roof support was needed in the entry outby the No. 1 seal in the No. 6 set of seals, that the top was getting heavy. Several of Lodestar management were informed of the hazardous condition on 11/17/98. As of 11/24/98 no corrective action has been made. Some draw rock has already fallen in the area.

(Govt. Ex. 3.)

¹ The responsibility for maintaining the inactive areas was Lodestar's rather than Green Pond's. (Tr. 123.)

² O/C stands for "overcast."

On January 19, 1999, MSHA Inspector Robert Simms was conducting a ventilation review at the Wheatcroft Mine. While going through the weekly examination books, he discovered numerous record-keeping errors for which he issued citations not involved in this proceeding. He returned the following day to examine the books more thoroughly. In trying to match the areas shown on the mine map with the notations in the examination books, he discovered that entries were not being made for some areas in the mine and that this had occurred for a period of several weeks.

As a consequence, Inspector Simms issued Order No. 4275621 charging a violation of section 75.364(h), 30 C.F.R. § 75.364(h), in that:

There is no record showing that the return air course has been traveled from the #2 seals to the #3 seal and from the #6 seal toward the #2 belt entry. There is also no record showing that the Intake and Return of the Main North Parallels have been made. At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly exam . . . shall be made.

(Govt. Ex. 6.) The order was subsequently modified to delete the first sentence concerning the “#2 seals to the #3 seal” and “the #6 seal toward the #2 belt entry.” (*Id.* at 2.)

Order No. 4274546 makes up Docket No. KENT 99-182 and Order No. 4275621 is found in Docket No. KENT 99-212. Since the two violations are not related, they will be discussed separately.

Findings of Fact and Conclusions of Law

Order No. 4274546

Section 75.364(d) provides, in pertinent part, that: “Hazardous conditions shall be corrected immediately.” It is the company’s position that the sagging roof was not a “hazardous condition.” I find that it was and that the company violated the regulation by not adding additional roof support.

At the hearing, everyone agreed that there is no way to know when a sagging roof is going to fall. It could fall sooner or later, with later being months or years later.

Marsili testified that his main concern was that if the roof did fall it would affect ventilation, not that he would be caught in the fall. According to him, he did not consider this to be a hazard, but was notifying management of the condition so they could add the roof support

and the ventilation system would not be affected.³ Dame testified that based on Marsili's entry in the examination book, and his discussion with Marsili, he was of the same opinion. On the other hand, Inspector Coburn testified that the roof was hazardous because it could fall on a mine examiner traveling through the area.

Section 75.364(d) does not define the term "hazardous condition." Nonetheless, the Commission, in discussing the same term concerning section 75.360(b), 30 C.F.R. § 75.360(b),⁴ noted that it had

recognized in *National Gypsum [Cement Division, National Gypsum Co.]*, 3 FMSHRC 822 (April 1981) that, based on its dictionary definition, a "hazard" denotes a measure of danger to safety or health. 3 FMSHRC at 827 & n.7. The Commission has approved the definition of "hazard" as 'a possible source of peril, danger, duress, or difficulty,' or 'a condition that tends to create or increase the possibility of loss.' *Id.* (citing *Webster's Third New International Dictionary* 1041 (1971).

Enlow Fork Mining Co., 19 FMSHRC 5, 14 (January 1997).

While it may not have been likely that the roof would fall on the examiner since he was only in the area once a week, it was certainly a possibility. Thus, it was a possible source of peril, danger, duress or difficulty as well as a condition that tended to create or increase the possibility of loss and, therefore, involved a measure of danger to safety. Consequently, I conclude that the roof was a hazardous condition.

The regulation requires that hazardous conditions be corrected "immediately." In this case, no one would be traveling the area until the next week. Accordingly, I find that for this violation, "immediately" means before anyone is in the area again. Since no roof support had been added before Marsili and the inspector went into the cross-cut, I conclude that the company violated section 75.364(d).

Unwarrantable Failure

This order was issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). That section provides that:

³ I find it curious that Marsili made it a point of informing the inspector of the situation, if this was his only concern.

⁴ 75.360(b) states: "The person conducting the preshift examination shall examine for hazardous conditions"

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.⁵

To establish that a violation comes within section 104(d)(2), the Secretary must prove three things: "(1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard caused by unwarrantable failure; and (3) the absence of an intervening clean inspection." *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 725 (July 1999) (citation omitted); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984). In this case, the Secretary did not present any evidence concerning the absence of an intervening clean inspection. Nor is there any evidence in the record from which such a finding can be inferred.

⁵ Section 104(d)(1), 30 U.S.C. § 814(d)(1), states:

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

Consequently, I conclude that this violation does not come within the purview of section 104(d)(2).

The order will be modified accordingly. In this regard, it cannot be modified to a section 104(d)(1) order because there is no evidence that this order was issued within 90 days of a 104(d)(1) citation. Indeed, the assumption is that it was not since in that case it should have originally been issued as a 104(d)(1) order rather than a 104(d)(2) order. Nor can it be modified to a 104(d)(1) citation inasmuch as the parties stipulated that the violation was not "significant and substantial." (Tr. 14-15.) Hence, it will be modified to a 104(a) citation, 30 U.S.C. § 814(a).

Order No. 4275621

Section 75.364(h) requires, in pertinent part, that: "At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made." The Respondent argues that the regulation was not violated. I find that it was.

After the order was modified, the only violation alleged is that there was "no record showing that the Intake and Return of the Main North Parallels have been made." The parties agree that the air courses had, in fact, been made. Thus, this violation is, as depicted by Inspector Simms, a "bookkeeping" violation.

The company argues that because no hazardous conditions were observed and no measurements of air and methane were required in these areas, the examiner had not failed to follow the regulation when he did not make any entry for the intake and return air courses in the Main North Parallel. However, the regulation requires that the "results" of the examination be recorded. The fact that no hazardous conditions were observed is a result of the examination. Therefore, it should have been recorded. Additionally, as Inspector Simms testified, making such an entry allows someone reading the examination book to verify that the required examinations were being performed.

For these reasons, I conclude that the Respondent violated section 75.364(h) when the examiner did not record the results of his examination of the intake and return air ways in the Main North Parallel.

Unwarrantable Failure

Like the previous order, this one was lodged under section 104(d)(2). For the same reason that I found that the Secretary did not demonstrate that the other order was properly issued under that section, that there is no evidence of the absence of an intervening clean inspection, I

conclude that this order was not properly issued under section 104(d)(2). Accordingly, as with the previous order, this violation will be modified to a 104(a) citation.

Civil Penalty Assessment

The Secretary has proposed penalties of \$797.00 for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that a reasonable penalty will not affect the ability of Lodestar to remain in business, that the Wheatcroft mine produces 342,117 tons of coal per year and that Lodestar produces 9,387,053 tons of coal per year. (Tr. 14.) From this I conclude that Lodestar's ability to remain in business will not be adversely affected by the penalties in these cases and that the mine is a medium size mine, while Lodestar is a large operator.

Based on the company's Assessed Violation History Report and the Proposed Assessment documents in this case, I find that Lodestar has an average history of prior violations. (Govt. Exs. 1 & 2.) I further find from the evidence of record that the company demonstrated good faith in attempting to achieve rapid compliance after being notified of the violations.

As previously noted, the parties stipulated that neither of these violations were "significant and substantial." (Tr. 14-15.) Therefore, I find that the gravity of these violations is not very high.

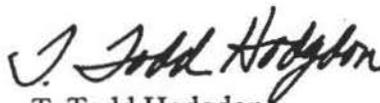
Finally, with regard to the negligence involved in these violations, I find that the company was moderately negligent in not adding roof support in the cross-cut before the No. 1 seal in the No. 6 set of seals. I make this finding based on the fact that the violation was not S&S, that the area was only traveled once a week, and that Marsili apparently indicated to the company that the matter was not urgent. I find that the negligence involved in the bookkeeping violation was low in view of the facts that the decision not to enter negative findings was not an unreasonable interpretation of the regulation and that several other inspectors had reviewed the examination books and had not alerted the company to the deficiency.

Taking all of these factors into consideration, I conclude that a penalty of \$150.00 is appropriate for Citation No. 4274546. I find a penalty of \$55.00 to be appropriate for Citation No. 4275621.

Order

Order No. 4274546 in Docket No. KENT 99-182 is **MODIFIED** to a 104(a) citation by deleting the “unwarrantable failure” designation and by reducing the level of negligence from “high” to “moderate,” and is **AFFIRMED** as modified; Order No. 4275621 in Docket No. KENT 99-212 is **MODIFIED** by deleting the “unwarrantable failure” designation and reducing the level of negligence from “high” to “low,” and is **AFFIRMED** as modified.

Lodestar Energy, Inc. is **ORDERED TO PAY** a civil penalty of **\$205.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003

WASHINGTON, D. C. 20006-3868

Telephone No.: 202-653-5454

Telecopier No.: 202-653-5030

February 28, 2000

| | | |
|---|---|-------------------------------|
| NORTHERN ILLINOIS STEEL SUPPLY, | : | CONTEST PROCEEDING |
| | : | |
| Contestant | : | Docket No. LAKE 99-78-RM |
| | : | Citation No. 7819416; 1/28/99 |
| v. | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Lemont Quarry & Mill |
| | : | |
| Respondent | : | Mine ID 11-01546 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | CIVIL PENALTY PROCEEDING |
| | : | |
| Petitioner | : | Docket No. LAKE 99-120-M |
| | : | A. C. No. 11-01546-05501 1 PR |
| v. | : | |
| NORTHERN ILLINOIS STEEL SUPPLY, | : | Lemont Quarry & Mill |
| | : | |
| Respondent | : | |

DECISION

Appearances: Theodore J. Tierney, Esq., Adriana I. Reyes-Villanueva, Esq., Vedder, Price, Kaufman & Kammholz, Chicago, Illinois, for Contestant; Christine M. Kassak, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois; Gary Cook, Conference and Litigation Representative, U. S. Department of Labor, Duluth, Minnesota, for Respondent.

Before: Judge Barbour

These are contest and civil penalty proceedings arising under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815 (Mine Act or Act)). They involve one citation issued to Northern Illinois Steel Supply (NIS) at the quarry owned and operated by Vulcan Materials (Vulcan). When the citation was issued, an NIS employee was in the process of unloading steel from the bed of an NIS truck. The employee had delivered the steel to the quarry pursuant to a contract between NIS and Vulcan. The employee was standing on top of the steel. The employee was not tied off or otherwise secured against falling. The Secretary alleges the employee, and therefore NIS, violated 30 C.F.R. § 56.15005, a mandatory safety standard for surface metal and nonmetal mines requiring in part that “[s]afety belts and lines be worn when persons work where there is danger of falling”.

NIS contested the citation. NIS argued it was not an “independent contractor” within the meaning of the Act and therefore was not an “operator”. In the associated civil penalty proceeding the Secretary proposed the assessment of a civil penalty of \$113 for the alleged violation, and NIS again raised its jurisdictional defense. The cases were consolidated for hearing and decision. They were tried in Chicago, Illinois. Counsels have filed helpful briefs.

THE CENTRAL ISSUE

Section 104(a) of the Act (30 U.S.C. § 814(a)) requires that an inspector of the Secretary’s Mine Safety and Health Administration (MSHA) issue a citation whenever he or she believes an “operator” has violated the Act or any mandatory safety standard promulgated pursuant to the Act. Section 3(d) of the Act defines “operator” as including “any independent contractor performing services or construction at [a] mine” (30 U.S.C. §802(d)). The cases turn upon the question of whether NIS was an “independent contractor” and thus was an “operator” as a result of its delivery and its unloading of steel at the quarry.

STIPULATIONS

At the hearing the parties stipulated in part as follows:

1. The . . . judge has authority to hear and decide [the] proceeding[s].
2. At all times relevant to [the] proceedings, [NIS’s] operations affect[ed] interstate commerce.
3. On January 28, 1999, [NIS] employed a truck driver to drive a flatbed truck with a load of prime domestic steel to Vulcan[’s] . . . Lemont Quarry . . . in Romeoville, Illinois.
4. Citation [No.] 7819416 . . . was properly served.
5. From January 1, 1998 through December 31, 1998, [NIS] worked [68] hours (in approximately 20 to 30 minutes of time) for each presence at the mine.
6. [NIS] has no history of previous violations.
7. [NIS] employs 41 people at all of its facilities.
8. [The] Lemont Quarry is a mine under MSHA jurisdiction.
9. The . . . [q]uarry mines limestone.
10. On January 28, 1999, NIS either owned or leased the flatbed truck mentioned in Citation No. 7819416.

11. On January 28, 1999, [NIS] did not engage in construction at the Lemont Quarry.
12. NIS sold prime domestic steel products to the Lemont Quarry.
13. On January 28, 1999, the truck driver identified in Citation No. 781941 drove to the . . . [q]uarry and while there, released the restraints on the flatbed truck holding the steel.
14. The payment of the \$113 assessed penalty will not affect [NIS's] ability to continue in business (Tr. 9-11, see Tr. 111-112; see also Joint Exh. 1).

The parties also stipulated that operations at the quarry affected interstate commerce (Tr. 111-112).

THE FACTS

The Quarry And The Delivery Of Steel To The Quarry

At the quarry limestone is extracted, crushed, and stockpiled. The processed stone, which is sold by Vulcan, is trucked away by independent haulers. Much of the stone is used in road construction.

Terry Croxford, who testified on behalf of the Secretary, is an employee of Vulcan. Croxford manages construction projects for the company (Tr. 41). As the manager of construction, he plans and oversees the projects. He orders materials and equipment needed for the projects. He assigns miners to do the work (Tr. 44).

Many of the projects require the use of structural steel in the form of beams, bars, plates, and angles. (Angles are used most often for structural support.) Vulcan purchases the steel from NIS and has done so since either late 1997 or early 1998 (Tr. 126). Depending upon the size of a project, the company may purchase the steel from one to two times a week.

The steel is shipped from the NIS plant to the quarry on flatbed trucks. The trucks are owned or leased by NIS, and the truck drivers are NIS employees. Most of the trucks used by NIS are not equipped with hoists for unloading the steel. Therefore, once the trucks reach the delivery point at the mine, they are unloaded using Vulcan-owned and operated equipment.

At the NIS plant, steel that is put on a delivery truck is secured to the truck bed by wire ropes or metal chains. Before the truck leaves the plant, the ropes or chains are tightened with a winch-like device. Once the load is secured, it is not touched until it is unloaded at the quarry.

The truck leaves the plant and travels on public roads until it reaches the quarry access road. (Vulcan shares this road with some of its contiguous neighbors.) The truck turns onto the

access road. The truck proceeds down the road toward the point where the steel is to be delivered (Tr. 62). It is approximately one half mile from the beginning of mine property to the active areas of the mine (Tr. 63). The delivery point is usually near the project where the steel is to be used, and the truck driver usually backs the truck into the area where the truck is unloaded (Tr. 90). In general, Vulcan employees decide where and when it is safe to unload (Tr. 91).

Most often the equipment used to unload the steel consists of a crane with a hoist, although occasionally a fork lift or a loader is used. When the steel is lifted by a crane, a hook is attached to the crane's metal hoist line. The wire ropes or chains securing the load to the bed of the truck are loosened and removed. The crane operator lowers the hook, and the hook is inserted into a metal sling that surrounds the load. The crane operator raises the hoist line and hook, lifts the load, swings the load away from the flatbed truck, and lowers it to the ground or to a waiting Vulcan vehicle.

Up to and including the time the subject citation was issued, the NIS truck driver usually helped with the loading process by unbinding or "unlocking" the restraints on the load (Tr. 93). On "rare occasions" the driver also guided the hook into the lifting chain that surrounded the load, an act described as "rigging" the load (Tr. 75, 93). Croxford estimated the driver rigged the load approximately 10% to 15% of the time (Tr. 93).*

Events Surrounding Citation No. 7819416

On the morning of January 28, 1999, Denis Libertoski, an MSHA inspector, arrived at the quarry to conduct his first regular inspection of the site. Around 8:15 a.m., as he approached the maintenance shop, he saw an NIS truck. It was parked about 100 feet in front of the shop (Tr. 154). A load of steel was on the bed of the truck. The load consisted of H-beams and I-beams. Also, it may have included angles (Tr. 161). The steel was going to be used in building a catwalk and hand rails at the crusher (Tr. 70).

Libertoski noticed that the load was being readied to be lifted from the truck. Libertoski could not recall the equipment that was going to be used to lift the steel, but he remembered that there was a metal sling around the load (Tr. 166-167). In addition, Libertoski remembered seeing a person standing on top of the steel. The person was guiding a hook into the sling so that the steel could be lifted and removed (Tr. 144-145).

As Libertoski walked toward the truck he saw that the person standing on the steel was not wearing a safety belt and line. The person was approximately 5½ feet to 6 feet above the ground (Tr. 170-172). The road below was surfaced with gravel and the ground was frozen (Tr. 150). There was nothing to prevent the person from falling off of the load to the gravel road.

*Since the citation was issued the unloading practice has changed. After January 28, 1999, upon instructions from NIS officials, NIS drivers have remained at all times in the cabs of their trucks.

At first, Libertoski thought the person was a Vulcan miner. (A Vulcan employee was running the equipment used to unload the steel and two other miners were in the area (Tr. 145-146).) However, when he approached the truck and spoke to the person, the person told Libertoski that he was the truck driver and that he worked for NIS (Tr. 157). The driver also told Libertoski that usually he delivered steel to the quarry twice a week (Tr. 175, 184).

Libertoski touched the steel and found that it was wet, making it “extra slippery” (Tr. 144, 161). He believed the driver reasonably was likely to slip off the steel, fall to the gravel road and be injured seriously. Libertoski acknowledged that the driver might have grabbed the hoist line to regain his stability and that the driver was wearing a hard hat, nonetheless Libertoski thought the driver was in danger (Tr. 149-150, 173-175).

No Vulcan supervisors were present when Libertoski saw the driver, but as he walked toward the truck, a Vulcan management official arrived (Tr. 185). Because of the lack of on-site supervisory personnel, Libertoski speculated that neither Vulcan nor NIS management actually knew the driver was engaging in an unsafe work practice (Tr. 152-153).

Libertoski required the driver to climb down off of the truck bed. Libertoski and the Vulcan supervisor then instructed the driver on the hazards of working without being tied off. Also, Libertoski explained to the driver the requirements of mandatory safety standard section 56.15005 (Tr. 190). The driver agreed that standing on the steel without a safety belt and line was hazardous, and he assured Libertoski that he would not do it again.

Libertoski thought there was a violation of section 56.15005 because the driver was working without a safety belt and line where there was a danger of falling (Tr. 143). Libertoski cited NIS for the violation because the driver was an NIS employee and because NIS was an independent contractor performing a service (the delivery and the rigging of steel). Therefore, Libertoski believed that NIS was an “operator” within the meaning of the Act (Tr. 138, 159, 169).

Libertoski was the last witness to testify for the Secretary. At the close of the Secretary’s case, NIS rested. Counsel for NIS maintained that the Secretary had not established that NIS was an operator (Tr. 195-196).

THE STATUS OF NIS

The Mine Act subjects to regulation each coal or other mine affecting commerce and “each operator of such mine” (30 U.S.C. § 803). Section 3(d) of the Act defines “operator” as “any owner, lessee or other person who operates, controls, or supervises a . . . mine or any independent contractor performing services or construction at such mine” (30 U.S.C. § 802(d)).

The phrase “any independent contractor performing services or construction at [a] mine” was not included in the definition of “operator” set forth in the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), the predecessor to the Mine Act. It was added in 1977 when

Congress amended the Coal Act and renamed it the Mine Act. Expansion of the statutory definition was motivated by concern about the authority of the Secretary to regulate independent contractors (See, e.g., National Industrial Sand Association v. Marshall, 601 F.2d 689, 702-703 (3rd Cir. 1979)). The context within which the concern arose involved the Secretary's attempts to assert jurisdiction over independent general contractors performing surface and subsurface construction at mines (See, Bituminous Coal Operator's Association v. Kleppe, 547 F. 2d 240 (4th Cir. 1977)). In discussing the decision to include independent contractors in the revised definition of "operator", the Senate Committee that drafted the Mine Act stated, "[T]he definition of 'operator' is expanded to include 'any independent contractor performing services o[r] construction at such mine.' It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be . . . engaged in the extraction process for the benefit of the owner or lessee of the property" (S. Rep. No. 95-181, 1st Sess., 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Congress, 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 602)).

The courts have emphasized that the statutory definition of "operator" does not include all independent contractors at a mine, but rather is restricted to those that are "performing services or construction at [a] mine" (30 U.S.C. § 802(d)). For example, the 3rd Circuit has stated that:

The reference made in the statute only to independent contractors who "perform[] services or construction" may be understood as indicating . . . that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. (National Industrial Sand Association, 601 F. 2d 689, 701 (3rd Cir. 1979) (footnote deleted)).

The court's analysis of the legislative history lead it to conclude that the concern of Congress was with the permissive scope of the Secretary's authority not with the mandatory imposition of the Act's requirements (National Industrial Sand, 601 F.2d at 703).

Following this reasoning, the Secretary decided that rather than spell out the parameters of her authority, she would leave to herself the enforcement discretion to determine whether or not a particular regulation applied to a particular independent contractor (45 F.R. 44495, 44497 (July 1, 1980)).

The Secretary's lack of specificity, did not reassure the industry. There was concern — concern that was reiterated at the hearing on these matters — that the Secretary would abuse her discretion by extending jurisdiction to entities that only were connected remotely with mining; for example, that she might attempt cite as "operators" independent contractors delivering food or office supplies to a mine (See Tr. 29-31). Partly in response to such concerns, the Commission set forth two bases it would consider when evaluating the Secretary's exercise of discretion.

The Commission stated that it would look to: (1) the contractor's proximity to the mining process and whether the contractor's work was sufficiently related to that process, and (2) the extent of the presence of the contractor at the mine (see Otis Elevator Company, 11 FMSHRC 1896 (October 1989), 921 F. 2d 1285 (D. C. Cir. 1990); Joy Technologies Inc., 17 FMSHRC 1303, 1307 (August 1995), aff'd, 99 F. 3d 991 (10th Cir. 1996) cert. denied, S. Ct. 1691 (1997)).

The courts have not overturned these bases and the words of the statute and the Commission's guidelines remain relevant to the subject cases. Applying the statutory definition and the Commission's guidelines, I conclude the record fully supports finding that when it was cited, NIS was governed by the Mine Act.

First, NIS was an "independent contractor". Neither the operation of the truck, nor the rigging of the steel was carried out pursuant to Vulcan's supervision. An NIS employee was driving the truck. An NIS employee was "unlocking" and rigging the steel. Vulcan was not supervising the unloading process. In other words, NIS, through its employee, was acting independently of Vulcan. Moreover, NIS was delivering the steel that Vulcan ordered and at no additional cost to Vulcan. In so doing, NIS was acting pursuant to its contract with Vulcan.

Second, NIS was "performing [a] service". It was delivering the steel to the mine, and it was assisting in unloading the steel. As Libertoski properly noted, in so doing, NIS was engaging in work that Vulcan would have had to do if NIS had not acted. Clearly, this was a service to Vulcan.

Third, NIS was engaged in work that was closely related to the mining process. The steel that was delivered on January 28, 1999, was going to be used in building a catwalk and handrails at the crusher. The crusher was vital to the on-site preparation of limestone extracted at the quarry.

Fourth, NIS had a significant presence at the quarry. The delivery of the steel required the NIS driver to traverse a road used by NIS employees and by other contractors, and the steel was unloaded in an area where NIS employees were present and where others might come. Thus, the fact that the NIS driver and the NIS truck were on Vulcan's property had a potential impact on the safety of Vulcan's employees and on the safety of others at the mine.

Because NIS was acting as an independent contractor performing a service, because the delivery of the steel by NIS was closely related to the mining process, and because the presence of the NIS driver and equipment was sufficiently extensive, I find that the Secretary did not abuse her discretion in citing the company, and I conclude that on January 29, 1999, NIS was subject to the Act.

THE VIOLATION

Libertoski's testimony that the NIS driver was on top of the truck's load of steel, that the steel was wet, and that the driver was not tied off with a safety belt and line was not disputed.

Nor was Libertoski challenged when he testified the driver was approximately 5½ to 6 feet above the road surface. The testimony establishes that if the driver slipped, there was nothing to prevent him from falling to the road. Thus, driver was “in danger of falling” and since he was not wearing a safety belt and line, the violation existed as charged.

S & S and GRAVITY

The inspector found the violation was a significant and substantial contribution to a mine safety hazard. A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December, 1998)); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998)); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984)), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

Here, the Secretary met her burden. The failure of the driver to be protected by a safety belt and line contributed to the danger he would tumble from the truck to the road below. The wet steel made it likely he would slip and fall. A fall of up to six feet onto the hard surface of the road certainly was reasonably likely to result in injury to the driver. Had he slipped, the only thing to prevent the driver from falling was for him to grab the hoist line and to use it to stabilize himself. However, rigging the steel required him to move out of reach of the line at times. By wearing a safety belt and line, all element of chance would have been eliminated, and slipping would not have posed a danger of falling unrestrained. Therefore, I conclude that it was reasonably likely the driver would have slipped and that his unrestrained fall would have caused injury. Also, given the distance of the fall and the surface upon which he would have landed, I conclude the injury would have been of a reasonably serious nature.

Finally, the nature of the injury that could have been expected and the present possibility that an accident would have occurred, indicate that, in addition to being S&S, the violation was serious.

NEGLIGENCE

The driver was under the supervision and control of NIS, and NIS failed to ensure compliance with the standard in spite of the fact NIS was aware that its drivers occasionally assisted in rigging steel. (Only after January 29, did the company ordered its drivers to remain in the cab of the truck when delivering steel to the mine.) In failing to make sure its driver complied with section 56.15005, the company failed to exhibit the care required by the circumstances and was negligent.

OTHER CIVIL PENALTY CRITERIA

NIS has no history of previous violations. Given the number of employees and the number of hours NIS employees worked at the mine, counsel for the Secretary characterized the company as small in size (Stips. 5-6; Tr. 13). The parties also stipulated that payment of the assessed civil penalty will not affect the ability of NIS to continue in business (Stip. 14). Finally, the inspector described the violation as have been abated in good faith (Tr. 190).

CIVIL PENALTY

Considering the penalty criteria, and especially in view of the fact that this is the first time NIS has been cited for a violation and that NIS is a small company, I conclude that a civil penalty of \$50 is appropriate.

ORDER

NIS is **ORDERED** to pay a civil penalty of \$50 within 30 days of the date of this decision and upon payment of the penalty, this proceeding is **DISMISSED**.



David F. Barbour
Chief 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, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 7, 2000

| | | |
|-----------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 99-266 |
| Petitioner | : | A. C. No. 41-03164-03544 |
| v. | : | |
| | : | Jewett Mine |
| NORTHWESTERN RESOURCES CO., | : | |
| Respondent | : | |

**ORDER DENYING MOTION
TO CERTIFY FOR INTERLOCUTORY REVIEW**

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Before assigning the case to me, former Chief Administrative Law Judge Paul Merlin denied the Respondent's opposition to the Secretary's motion to accept late filing of the petition. On January 11, 2000, the Respondent filed a motion requesting that Judge Merlin's ruling be certified for interlocutory review. The Secretary did not respond to the motion.

Interlocutory review is governed by Commission Rule 76, 29 C.F.R. § 2700.76. Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i), provides that:

- (1) Review cannot be granted unless:
 - (i) The Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding

I find that the motion must be denied because the ruling does not involve a controlling question of law.

In *Salt Lake County Road Dept.*, 3 FMSHRC 1714 (1981), the Commission held that the late filing of a Petition for Assessment of Civil Penalty was not jurisdictional, that is, that automatic dismissal was not required when the petition was not filed on time. *Id.* at 1716. Instead, it established a two part test for determining whether a late-filed petition should be dismissed: (1) The Secretary must establish adequate cause for the delay; and (2) If adequate

cause is established, the Respondent must show prejudice. *Id.* The determination of both parts of the test is within the discretion of the judge or Commission.

In effect, the Respondent is arguing that Judge Merlin abused his discretion in allowing the petition to be filed late. If a matter is discretionary, it does not involve a controlling question of law. Accordingly, the motion to certify is **DENIED**.


T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 7, 2000

| | | |
|--------------------------|---|------------------------------|
| KEYSTONE CEMENT COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. PENN 99-137-RM |
| | : | Citation No. 4439698; 2/9/99 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. PENN 99-138-RM |
| ADMINISTRATION, (MSHA), | : | Order No. 4439699; 2/9/99 |
| Respondent | : | |
| | : | Keystone Cement |
| | : | Mine ID No. 36-00125 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 2000-29-M |
| Petitioner | : | A.C. No. 36-00125-05571 |
| v. | : | |
| | : | |
| KEYSTONE CEMENT COMPANY, | : | |
| Respondent | : | Keystone Cement Co. |

ORDER DENYING MOTION TO COMPEL

During the course of discovery the Secretary has revealed to Keystone Cement Company (Keystone) the names of all of her potential witnesses and has produced the notes of interviews that have been conducted, redacting in each case however the identity of each interviewee asserting, *inter alia*, the government informant's privilege. Keystone seeks, by motion to compel, the disclosure of the identity of each interviewee and identification with his corresponding statement.

The informant's privilege is the well-established right of the government to withhold from disclosure the identity of any person who provides information about violations of the law to law enforcement officials. *Roviaro v. U.S.*, 353 U.S. 53 (1957); *Secretary v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (November 1984). The purpose of the privilege is two-fold: to protect the public interest, by maintaining a free flow of information to the government concerning possible violations of the law, and to protect persons supplying that information from retaliation. *Bright*, 6 FMSHRC at 2522-2523 (quoting *Roviaro*, 353 U.S. at 59).

Keystone argues that by revealing the names of all her potential witnesses, the Secretary has in fact waived the informer's privilege. While it is true that the informer's privilege

technically extends only to the identity of an informer and not to a known informer's statement. Keystone does not yet know whether the persons identified as witnesses are "informants" *per se*. This is because Keystone does not know whether any of these witnesses spoke disparagingly or in an incriminating manner about Keystone or others and are thus in need of the protection afforded by the informant's privilege. This distinction was noted in *Martin v. Albany Business Journal Inc.*, 780 F.Supp. 927 (N.D.N.Y. 1992), citing *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 at 306 (5th Cir. 1972):

Knowing the identity of persons who have given statements to the Secretary is not equivalent to knowledge of which of those persons were informers within the context of the privilege. Only when the content of the statement is disclosed will it be revealed whether the information was given reluctantly or voluntarily, whether the tone and manner in which it was given was friendly to the defendant or unfriendly, and whether it was accusatory or favorably. In short, if the employee is not known to the defendant as an informer but merely as a statement giver, then disclosure of the statement might reveal him as an informer. 459 F.2d at 306.

As the court noted in the *Martin* case, disclosure of the identity of the statement givers in association with their statements would reveal for the first time whether any of those witnesses were "informers," i.e., speakers who implicated as opposed to mere "statement givers." As that court stated, such a disclosure would defeat the very purpose of the informant's privilege. Since Keystone does not know which of the witnesses were "informers" as that term relates to the informer's privilege there has been no waiver of the informer's privilege as to their identification with particular statements.

Keystone argues that the privilege is, in any event, qualified and must yield where disclosure is essential to the fair determination of a case. *Bright*, 6 FMSHRC at 2523 (quoting *Roviaro*, 353 U.S. at 60-61). The burden of proving facts necessary to show that the information sought is essential to a fair determination rests however with the party seeking disclosure. *Secretary v. Asarco, Inc.*, 12 FMSHRC 2548, 2555 (December 1990) (quoting *Bright*, 6 FMSHRC at 2526). In *Asarco*, the Commission reiterated its holding in *Bright*, stating that the informant's privilege is "well-established, but qualified," and that it is "applicable to the furnishing of information to government officials concerning possible violations of the Mine Act." *Asarco*, 12 FMSHRC at 2553.

The privilege is overcome only by a showing that the opposing party's need for the information outweighs the government's need to maintain the privilege to protect the public interest. *Bright*, 6 FMSHRC at 2526. Therefore, the opposing party must demonstrate special circumstances or a substantial need for the information sought. Factors to be considered in determining whether the information sought is essential to a fair determination include: (a) whether the Secretary is in sole control of the requested material; (b) whether the material sought is already within the control of the party seeking it; and (c) whether that party had other avenues available from which to obtain the substantial equivalent of the requested material. *Bright*, 6

FMSHRC at 2526.

In this regard Keystone makes the following representations:

In this case, Keystone will be unable to depose several key eyewitnesses to the case, the former Murray's Contracting employees, without knowing which employees gave which statements to MSHA. Simply put, this information is critical which eyewitnesses saw which events at the time of the accident [citation omitted]. Keystone does not have alternative means of obtaining the same information-the Murray's Contracting employees were the only witnesses to the events. Moreover, Murray's Contracting has ceased operations and its employees may not be accessible to Keystone as trial witnesses. Given that those individuals' recollections may be offered at trial by MSHA as hearsay testimony, it is all the more critical for Keystone to be able to evaluate the nature of such initial statement. Therefore, even if, *arguendo*, a legitimate claim for privilege existed, Petitioner's need for this information outweighs the Secretary's need to protect it.

I find Keystone's claims to be overstated. Keystone has been provided the identities of all witnesses including the former Murray Contracting employees and is free to interview and/or depose those persons. In addition, the witnesses are subject to the court's jurisdiction by subpoena so that Keystone's claims that certain persons may not be accessible as trial witnesses is without substance. Finally, since Keystone has in its possession all of the statements that have taken from the "informants," and states that it will be deposing the MSHA inspectors, it now has or will have available what may be anticipated at trial as hearsay testimony. Keystone may explore those statements in any event during interviews of the named witnesses. Under the circumstances I do not find that such circumstances exist as would warrant the disclosure of the privileged information.

If, during trial, Respondent can demonstrate prejudice by the failure to have had the information now sought, an appropriate request for continuance would be considered by the trial judge at that time.

ORDER

The Respondent's Motion to Compel is denied.



Gary Melick
Administrative Law Judge
703-756-6261

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Telephone No.: 202-653-5454

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February 11, 2000

| | | |
|---|---|---|
| FLORIDA CANYON MINING, INCORPORATED, Contestant | : | CONTEST PROCEEDING |
| | : | |
| | : | Docket No. WEST 2000-24-M |
| | : | Order dated August 10, 1999 |
| | : | |
| v. | : | |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Florida Canyon Mine Mine ID No. 26-01947 |
| | : | |

ORDER DENYING MOTION TO STAY ORDER TO SUBMIT INFORMATION

On October 12, 1999, the Commission received the operator's notice of contest of MSHA's notices to terminate an Agreement to Abate Violative Health Conditions which was given the above-captioned docket number. The operator advised that it entered into an agreement with MSHA on October 17, 1997, which provided that the time for abatement of certain citations would be extended so that the operator could address the problem of exposure of miners to dust at the mine. On August 10, 1999, MSHA sent a letter to the operator stating that MSHA was terminating the agreement within 30 days. The operator asked for and was granted additional time until October 12, 1999, to comply with MSHA regulations in a letter dated September 8, 1999, from MSHA. On September 10, 1999, MSHA sent another letter confirming that the operator must be in full compliance by October 10. The operator is seeking to contest the August 10 and September 8 letters.

On October 18, Chief Administrative Law Judge Paul Merlin issued an order directing the Solicitor to file a response to the operator's notice of contest.

On November 17, 1999, the Solicitor filed his response stating that the abatement date was extended until November 29, 1999, and the parties were engaged in discussions in order to avoid litigating this matter. Because of these actions, the Solicitor asserted that the contest of the termination of the extension of abatement agreement was not ripe.

On December 16, 1999, Judge Merlin issued an order directing the parties to set forth in writing why this case should not be dismissed for lack of subject matter jurisdiction. Judge Merlin stated in his order that the parties should address what appeared to him the more fundamental question of whether the Commission has jurisdiction in this case. Judge Merlin

pointed out that it is well established the Commission as an administrative agency has only the jurisdiction which Congress gives it, Lyng v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993); Samuel B. and Nancy Sanders, 18 FMSHRC 377, 378 (March 1996), and that the Commission has long recognized that it cannot exceed the limits of its authority as enacted by Congress. Kaiser Coal Corp., 10 FMSHRC 1165, 1169, (September 1988). Judge Merlin further observed that section 105(d) of the Act, 30 U.S.C. § 815(d), sets forth how and under what circumstances Commission review may be obtained of actions taken by MSHA, and that he had repeatedly held the jurisdictional restrictions on the Commission must be observed. Samuel B. and Nancy Sanders, *supra*; Jim Walter Resources, 18 FMSHRC 380, 381 (March 1996); D.H. Blattner & Sons, 17 FMSHRC 1073, 1074 (June 1995); Consolidation Coal Co., 16 FMSHRC 1403, 1404 (June 1994); Wallace Brothers, 14 FMSHRC 586, 588 (May 1992). Finally, Judge Merlin stated that it did not appear the termination of an abatement agreement is an action covered by the statute.

On January 11, 2000, the parties filed a joint motion to stay this proceeding. The parties advise the primary reason for this request is the repeated abatement extensions of related citations and agreements that present a time delay in any basis for contest in these matters. The parties state that they plan to meet within the next sixty days to explore resolution of pertinent issues concerning respirable dust standards at the mine and this may cause the parties to settle these matters without further litigation.

The parties' motion is not well taken. The question of subject matter jurisdiction has been raised by Judge Merlin. Once this issue has raised by either the judge or the parties, it must be adjudicated. Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996). Moreover, rule 12(h)(3) of the Federal Rules of Civil Procedure requires a judge to dismiss an action "whenever it appears by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction." The parties are now requesting that I stay a proceeding regardless of whether subject matter jurisdiction exists. However, implicit in the power to stay a case is that the judge has jurisdiction over the matter. Since it is unclear whether jurisdiction is present, the stay request cannot be granted. Rather, the parties must set forth their position with respect this issue.

In light of the foregoing, it is **ORDERED** that the motion to stay is **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the parties set forth in writing why this case should not be dismissed for lack of subject matter jurisdiction.


David F. Barbour
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K. Street, N.W., 6th Floor
Washington, D.C. 20006

February 11, 2000

| | | |
|-------------------------|---|----------------------|
| SECRETARY OF LABOR, | : | SPECIAL PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| Petitioner | : | Docket No. S. 2000-1 |
| v. | : | |
| | : | |
| STERLING VENTURES, LLC, | : | |
| and CHRIS PULLIAN | : | |
| Adverse Parties | : | |

ORDER GRANTING MOTION TO PERPETUATE TESTIMONY

Counsel for the Secretary is seeking an order granting her the right to take the testimony of Placido (Carlos) Lino, an employee of Sterling Ventures, LLC d/b/a/ Sterling Materials (Sterling). The testimony relates to circumstances surrounding a fatal accident that allegedly occurred at Sterling's mine on December 21, 1999. The accident took the life of a miner who was working with Lino. According to the Secretary, Lino and the victim were shoveling spilled material onto a conveyor belt, Lino was called away for a few moments, and the victim was pulled into the belt's tail pulley.

The Secretary investigated the accident and interviewed Lino, who is a citizen of Mexico. The Secretary issued citations and an order to Sterling. She also interviewed Lino's and the victim's foreman, Chris Pulliam. According to Pulliam's counsel, during the course of the interview representatives of the Secretary candidly advised Pulliam he might be subject to proceedings brought by the Secretary under section 110(c) of the Act for knowing violations of mandatory safety standards.

Sterling did not challenge the validity of the citations and the order, and the Secretary has yet to initiate a penalty proceeding against Sterling or Pulliam. Nevertheless, because she believes that "Lino may return to Mexico at any time and most likely will be outside of the subpoena power of the Commission before any discovery can be commenced in any anticipated litigation", the Secretary requests that she be permitted to depose Lino as soon as possible and prior to the initiation of any proceeding (Sec. Mem. at 6).

The Secretary's request was received on February 1, 2000. Because it did not initiate a proceeding nor relate to one that was pending, it was assigned a special docket number (Docket No. S 2000-1). Counsels then were contacted by telephone. Counsel for Pulliam was not available, but counsel for Sterling stated that he would file a response and that he would consult with counsel for Pulliam about whether he (counsel for Pullian) would file one as well.

Today, February 11, 2000, at 10:30 a.m., counsel for the Secretary advised me via a conferenced telephone call that certain "developments" necessitated an expeditious ruling. Counsel for Sterling added that the company discovered that Lino's Social Security number did not "match" his name and that information Lino filed with the Immigration and Naturalization Service did not appear to be accurate. Counsel for Sterling stated that the company was required to advise Lino of this, to suspend him from employment, and to give him time to correct or supplement his records. Counsel for the Secretary voiced concern that upon being suspended Lino might immediately leave either the country or the jurisdiction.

I asked counsels for Sterling and Pulliam to file by facsimile copy and as expeditiously as possible responses to the Secretary's request. Counsels and I agreed to talk again in an hour, at which time I would rule orally on the request and following which I would issue a written ruling.

Counsel for Sterling's response was received. In it counsel opposed the Secretary's request. Counsel for Pulliam's written response was not received prior to the 11:30 a.m. follow-up conversation, but in the conversation counsel for Pulliam orally stated his opposition to the request and expressed his concerns should the request be granted.¹

Counsels for Sterling and Pulliam believe that I am without jurisdiction to order the deposition because no "proceeding" is pending before the Commission. They maintain section 113(d)(1) and 113(d)(2) of the Act (30 U.S.C. §823(d)(1) and §823(d)(2)) when read together confine the Commission's authority to "proceedings instituted before the Commission" (Response of Sterling 1-2), and they argue that there is no provision in the Commission's rules for the imposition of an order prior to the institution of a proceeding.

Counsel for the Secretary notes that Commission Rule 1(b) (29 C.F.R. §2700.1(b)) requires the Commission and its judges to be "guided" by the Federal Rules of Civil Procedure on any procedural question not regulated by the Act, and she argues that although the order she seeks is not provided for by the Commission's rules, it is allowed by Rule 27 of the Federal Rules (Sec.'s Mem. 2-6).

As I orally explained to counsels, I agree with the Secretary. While it is true the Commission's rules state they are applicable to "proceedings before the . . . Commission" (29 C.F.R. §2700.1(a)), they also state that they must be "construed to secure . . . just determination[s]" (29 C.F.R. §2700.1(c)). The situation before me is extraordinary, and a just

¹ Counsel for Pullium's response was received following the conversation.

determination well may be thwarted if the Secretary is not afforded the opportunity to prevent Lino's testimony from being lost. Federal Rule 27 provides a means for doing just that by allowing for the perpetuation of testimony in "any matter that may be cognizable". Guided by Rule 27, I conclude these principles can be applied in an unusual situation such as this where a matter presently is not able to be brought before the Commission.

Under Rule 27, the unique nature of the right to depose a person before an action begins requires the moving party to meet five demanding conditions, all of which the Secretary successfully has established (See Sec's Mem. 2-3).² Accordingly, I conclude the Secretary's petition should be and is **GRANTED**.

ORDER

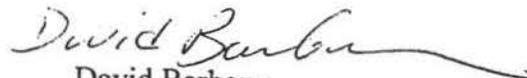
Therefore, it is **ORDERED** that the Secretary be allowed to depose Lino regarding the dates of his employment at Sterling, the nature and extent of his duties, his knowledge of his and of other miners' training while employed, his knowledge of the events and conditions surrounding the alleged accident of December 21, 1999, and any supplementary matters necessary for establishing such facts.

In issuing this order I note the concern of counsels for Sterling and Pulium that prior to the deposition they be afforded copies of notes in the Secretary's possession regarding the Secretary's interview(s) with Lino and copies of any other records that may bear upon the content of the interview(s). They stated that such information is necessary if due process is to be afforded their clients. The problem was discussed with counsel for the Secretary, and she has agreed to provide such copies, reserving her right(s) of privilege.

2

- 1.) The petitioner must show it expects to be a party to an action but is presently unable to bring it or cause it to be brought;
- 2.) The petitioner must state the subject matter of the expected action;
- 3.) The petitioner must state the facts which the petitioner desires to establish by the proposed testimony and the reasons for perpetuating it;
- 4.) The petitioner must name or describe the person the petitioner expects will be the adverse party and must give the address of the person so far as is known; and
- 5.) The petitioner must state the name and address of the person to be examined and the substance of the testimony the petitioner believes will be elicited (See Fed. R. Civ. P 27(a)(1)).

Further, I note that counsel for the Secretary requested and counsel for Sterling orally agreed to advise Lino that he can expect to be served with a subpoena and to be deposed regarding the subject accident.


David Barbour
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 16, 2000

| | | |
|------------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2000-31-D |
| ON BEHALF OF MICHAEL JENKINS | : | HOPE CD 99-10 |
| AND MICHAEL MAHON, | : | |
| Complainants | : | Mine No. 1 |
| v. | : | Mine ID 46-08102 |
| | : | |
| DURBIN COAL, INC., | : | |
| Respondent | : | |

ORDER

The Secretary of Labor initiated this case by filing a complaint on behalf of two miners, Michael Jenkins and Michael Mahon, alleging that they had been discriminated against in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, (Act), 30 U.S.C. § 815(c)(1). Respondent, Durban Coal, Inc., filed a motion to dismiss, or in the alternative, for a more definite statement, contending that the complaint failed to state a claim upon which relief could be granted and otherwise failed to apprise Respondent of the basis of the claims being advanced. Complainants response to the motion further clarified their claims. In it's reply, Respondent continued to maintain that the complaint failed to state a claim upon which relief could be granted and prayed for dismissal or entry of an order directing complainants to file a more definite statement. For the reasons set forth below, Respondent's motion is denied.

The complaint sets forth more than ample allegations of jurisdiction, including that Jenkins and Mahon had a specific employment relationship with Respondent and were miners entitled to the protections of the Act, that Respondent is a mine operator as defined in the Act and that the mine's operations and products enter and affect commerce. It further alleges that:

Respondent illegally discriminated and retaliated against Complainants by discharging or constructively discharging Complainants, on or about March 2, 1999, because Respondent suspected that complainants had made or caused to be made a Code-A-Phone complaint to MSHA which alleged health and safety violations of the mine Act at Respondent's mine. * * *

Complaint, at p.2. The complaint also advances specific demands for relief. Appended to the complaint as Exhibit A, is the initial complaint of discrimination submitted by Jenkins and Mahon to the Mine Safety and Health Administration (MSHA) on March 3, 1999, which states

that they were discriminated against by being discharged on March 2, 1999 because they “were falsely accused of reporting safety violations to inspectors and for stealing.” The MSHA complaint identified the person responsible for the discriminatory action as “Forrest Newsome, Superintendent.”

Respondent filed a motion to dismiss or in the alternative for a more definite statement asserting that the complaint was deficient, chiefly because it failed to allege that either of the Complainants had engaged in activity protected by the Act or that there was a causal nexus between protected activity and the adverse action complained of. Respondent also argues that the complaint fails to allege that Respondent committed an adverse action motivated by animus toward a protected activity, which is largely a re-casting of it’s first argument.

Complainants opposed the motion, indicating that they were relying on *Secretary on behalf of Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (1982), *aff’d. sub nom, Whitley Development Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985). In *Moses*, the Commission held that “discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).” *Id.* at 1480. Complainants did not allege, either in their complaint to MSHA or in the instant complaint, that they engaged in protected activity. Rather, they contend that Respondent was motivated to discharge them by the apparently mistaken belief that they had engaged in protected activity, i.e. making, or causing to be made, a Code-A-Phone complaint to MSHA. Complainants also further explained that a second, or alternative, reason for their discharges was a false allegation that they engaged in stealing, which they contend was a pretext for the illegal personnel actions.

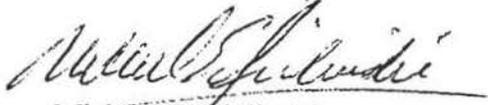
Under Commission Rule 2700.42, a “discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.” 29 C.F.R. § 2700.42. This notice pleading standard is consistent with the general practice in federal litigation under Fed. R. Civ. P. 8(a) and requires no more than that an opposing party be given fair notice of the claim and the grounds upon which it is based. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *and see, Carmichael v. Jim Walter Resources, Inc.*, 20 FMSHRC 479, n. 9 at 489 (1998). A complaint need not set forth all facts upon which a claim is based or specify the precise legal theory that would entitle the complainant to relief. *E.g., Crull v. GEM Ins. Co.*, 58 F.3rd 1386, 1391 (9th Cir. 1995); *Harris v. Procter & Gamble Cellulose Co.*, 73 F.3rd 321 (11th Cir. 1996). These liberal pleading rules permit inconsistency in both legal and factual allegations. *Independent Enterprises Inc., v. Pittsburgh Water and Sewer Authority*, 103 F.3rd 1165, 1175 (3rd Cir. 1997).

A motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), tests only the formal sufficiency of the claims for relief under the liberal notice pleading standard and can be granted “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (citing *Conley, supra*, 355 U.S. at 45-46). The complaint filed on behalf of Jenkins and Mahon easily passes this test.

There is no question that under *Moses*, a miner can state a cause of action for discrimination in violation of § 105(c)(1), by alleging impermissible motivation for adverse action, without claiming to have engaged in protected activity. *See also, Secretary on behalf of Smith, et al. v. Stafford Construction Co.*, 5 FMSHRC 618, 621 (1983). While a specific reference to *Moses* may have helped to clarify the precise legal theory relied upon, it was certainly not required. The complaint alleged that Jenkins and Mahon were subjected to adverse action based upon a motive prohibited by § 105(c)(1). If the complainants can prove facts consistent with those basic allegations, they clearly could be entitled to relief, even if they did not personally engage in protected activity.

Respondent also contends that it needs considerably more information in order to prepare a responsive answer. Without detailed allegations specifying “whether such a [Code-A-Phone] complaint was in fact made and when, whether Complainants made it, and what actions on the part of Durbin indicated that it suspected that Complainants had made it”,¹ Respondent asserts that it would not be able to file a complete answer. While Respondent’s desire for such information from claimants is understandable, it is difficult to understand how it would be necessary to enable Respondent to admit or deny that it discharged or constructively discharged the Complainants on the date alleged, to admit or deny that if it did so it was motivated by a suspicion or belief that they had engaged in protected activity, or to respond to other allegations in the complaint. Respondent also objects to Complainants’ alternative allegations that they were either discharged or constructively discharged, contending that they cannot rely upon theories based upon essentially inconsistent factual allegations. However, as noted *supra*, pleading alternative theories of recovery based upon inconsistent factual premises is clearly permitted. *See also, Perlman v. Zell*, 938 F.Supp 1327, 1337-38 (N.D.Ill 1996). Moreover, while the evidence used to prove those alternative propositions might generally be quite different, the line between discharge and constructive discharge may not always be clear² and the essence of both allegations is the same, i.e. that their employment relationship with Respondent was involuntarily terminated.

Upon consideration of Respondent’s motion to dismiss or in the alternative for a more definite statement, Complainants’ opposition and the reply thereto, the motion be and the same is hereby **DENIED**. Respondent shall file an answer to the complaint on or before **March 3, 2000**.


Michael E. Zielinski
Administrative Law Judge

¹ Memorandum of points and authorities in support of the motion, at p. 5.

² *See, Moses, supra*, 4 FMSHRC at 1479.

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February 25, 2000

| | | |
|-----------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-71-M |
| Petitioner | : | A. C. No. 03-00256-05559 A |
| v. | : | |
| JERRY HUDGEONS, EMPLOYED BY | : | Foreman Quarry & Plant |
| ASH GROVE CEMENT COMPANY, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-72-M |
| Petitioner | : | A. C. No. 03-00256-05560 A |
| v. | : | |
| FRED WALKER, EMPLOYED BY | : | Foreman Quarry & Plant |
| ASH GROVE CEMENT COMPANY, | : | |
| Respondent | : | |

ORDER DENYING MOTION TO DISMISS

ORDER ACCEPTING LATE FILING

ORDER DIRECTING SECRETARY TO AMEND PENALTY PETITIONS

ORDER DIRECTING RESPONDENTS TO ANSWER AMENDED PETITIONS

On October 7, 1999, the Secretary Labor issued penalty assessments against Jerry Hudgeons and Fred Walker pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, (30 U.S.C. § 810(c)), hereinafter referred to as the "Act". In accordance with section 105(d) of the Act, (30 U.S.C. § 815(d)), Hudgeons and Walker timely notified the Mine Safety and Health Administration (MSHA) on November 2, 1999, that they wished to contest the proposed penalty assessments. Copies of the notices were forwarded to the commission and the above docket numbers were assigned to these cases. On December 20, 1999, the Solicitor on behalf of the Secretary of Labor and MSHA filed penalty petitions in these matters.

On January 19, 2000, counsel for Hudgeons and Walker filed motions to dismiss on the ground that the Secretary has failed to timely file the penalty petitions. Counsel further asserts that respondents are prejudiced because considerable time has passed since the citations involved were issued in June, 1998 and the investigation of the citations was initiated by the Secretary in January, 1999.

On February 4, 2000, the Solicitor filed responses to the motions to dismiss as well as motions to accept late filing of the penalty petitions. The Secretary advises that the cases were received by the Solicitor's Dallas Regional Office on December 8, 1999. However, the person responsible for assigning the matters to the appropriate Solicitor, Acting Counsel for Safety and Health, Janice H. Mountford, was away during the week of December 6, 1999 and December 13, 1999, on official business. The Solicitor states that apart from Ms. Mountford's duties as a supervisor, she also carries her own caseload. The responsibility to assign the cases was given to another supervisor in the Dallas office but these files were inadvertently misplaced. The cases were not assigned to a Solicitor until December 17 (Docket No. CENT 2000-72-M) and December 21 (Docket No. CENT 2000-71-M). The Solicitor promptly filed a petition for each case the next business day following the Solicitor's receipt of each case.

The hearing contests filed by Hudgeons and Walker were received by MSHA on November 2, 1999. The Secretary had 45 days after receipt of the hearing requests to file the penalty petitions. 29 C.F.R. § 2700.28. The petitions were due on December 17, 1999. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition in Docket No. CENT 2000-71-M was mailed on December 22, 1999, and the petition for Docket No. CENT 2000-72-M was mailed on December 20, 1999. 29 C.F.R. § 2700.5(d). The petitions were therefore, 5 and 3 days late respectively.

The Commission has permitted late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause apart from any consideration of whether the operator has been prejudiced. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

A determination of adequate cause is based upon the reasons offered and the extent of the delay. Late filings have been accepted where the delay caused by clerical error was of short duration. In Apac Oklahoma, Docket No. CENT 97-187-M, unpublished (December 16, 1997) (attached to Patterson Materials Corp, 21 FMSHRC 463, 466 (April 1999)), a delay of 24 days was permitted where the Solicitor claimed clerical error, and in M. Jamieson Company, 12 FMSHRC 901 (April 1990), a delay of a relatively short period of time was allowed where the matter was misfiled by the Solicitor and the Solicitor promptly filed a response to the show cause order. In addition, a late filing has been accepted where the delay was only 7 days and the Secretary discovered the error and did not wait until either the Commission or the operator took action. Patterson Materials Corp, 21 FMSHRC 463 (April 1999).

Late filings have not been permitted based on mishandling of cases where the delay was lengthy. In Phelps Dodge Morenci Inc., 1993 WL 395589 (June 1993), a delay of over five months was not countenanced where the Regional Solicitor's Office misplaced the case upon receipt and the Solicitor did not file the petition until after the Commission issued a show cause order. See also, Hecla Mining Company, 1993 WL 395630 (June 1993) (where a delay of five months resulted in a dismissal of the petition).

The circumstances in the subject cases are similar to those cited above where late filing was permitted. The delay here was very short and the petitions were promptly filed once they were assigned. Therefore, I find that the Secretary has demonstrated adequate cause for the delay.

It is now necessary to determine whether the respondents nevertheless have demonstrated sufficient prejudice to justify dismissal. The respondents have not alleged specific prejudice from the three to five day delay involved in these matters. Rather, the respondents refer to the length of time from the issuance of the citations to the operator and the time accrued since the initiation of the special investigation. These time delays do not involve the filing of the petitions. The only prejudice that can be evaluated here is that caused by the untimely petitions, and the respondents have failed to demonstrate specific prejudice from these short delays. Therefore, I find that sufficient prejudice does not exist to warrant dismissal of these matters.

Finally, the Solicitor is advised that the petitions incorrectly name Hudgeons' and Walker's employer Ash Grove Cement Company as the respondent. Moreover, the petitions fail to identify section 110(c) as the authority for assessing penalties against individual employees. Rather, they erroneously cite section 110(a), which is the basis for assessing fines against operators. The Solicitor must amend his petitions to reflect the correct respondents and the proper statutory sections.

In light of foregoing, it is **ORDERED** that the motion to dismiss is **DENIED**.

It is further **ORDERED** that the Solicitor's late filed penalty petitions are **ACCEPTED**.

It is further **ORDERED** that within 15 days the Solicitor file amended petitions that reflect the proper respondents and statutory sections involved.

It is further **ORDERED** that within 30 days of the date the Solicitor files his amended petitions the respondents file answers to the amended petitions.


David F. Barbour
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 28, 2000

| | | |
|-----------------------------|---|---------------------------|
| SECRETARY OF LABOR | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-96-D |
| ON BEHALF OF ROYAL SARGENT, | : | DENV CD 99-03 |
| Complainant | : | |
| v. | : | |
| | : | |
| THE COTEAU PROPERTIES CO., | : | Freedom Mine |
| Respondent | : | Mine ID 32-00595 |

ORDER TO SHOW CAUSE
WHY THE COMPLAINT SHOULD NOT BE DISMISSED

This case is before me on an amended complaint filed by the Secretary of Labor on behalf of Royal Sargent, alleging that Respondent, The Coteau Properties Co, had discriminated against him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1). Sargent alleged that, on August 3, 1998, he had been suspended for five days because he brought safety issues to Respondent's attention. He also claims that on August 10, 1998, he was subjected to an involuntary job transfer and restrictions on job availability, and was placed on probationary status. Sargent filed his initial written complaint of discrimination with the Mine Safety and Health Administration ("MSHA") on November 20, 1998, 49 days beyond the statutorily prescribed 60 day period.¹ MSHA investigated the complaint and initially determined that no violation of the Act had occurred. By notice dated December 30, 1998, MSHA advised Sargent of its determination and his right to file a discrimination complaint with the Commission. Upon receipt of the letter, apparently on January 11, 1999, Sargent requested reconsideration of that determination and on February 1, 1999, the "no violation" determination was rescinded and the investigation was reopened. On December 21, 1999, a complaint alleging discrimination was filed with the Commission. The complaint was subsequently amended, first to correct the docket number and second to add a demand that a civil penalty be assessed.

Respondent filed an Answer and a motion to dismiss the complaint asserting that Sargent did not timely file his complaint with the Secretary and that the Secretary's rescission of the "no

¹ 30 U.S.C. § 815(c)(2).

violation” determination was without authority.² The Secretary opposed the motion , claiming that there were justifiable circumstances to excuse the late filing and that the Secretary had the authority to reopen the investigation. The opposition relied upon an affidavit by a senior investigator describing actions by and on behalf of Sargent leading up to the filing of the MSHA complaint and providing factual information regarding Sargent’s receipt of the “no violation” letter and the re-opening of the investigation. In reply, Respondent challenged the legitimacy of the justifiable circumstances explanation and submitted an affidavit by Complainant’s immediate supervisor describing how Complainant was notified of the disciplinary action. Attached to the affidavit was a copy of a memorandum given to Complainant on August 3, 1998, the subject of which was “Disciplinary Suspension and Probation.” A copy of Sargent’s original complaint to MSHA was also submitted.

Untimely Filing of the MSHA Complaint

Coteau’s argument that Sargent’s filing of a complaint with the Secretary of Labor’s MSHA was untimely is based upon § 105(c)(2) of the Act, which specifies that:

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

Here, the discriminatory actions are alleged to have occurred on August 3 and 10, 1998. Sargent’s complaint of discrimination was filed on November 20, 1998, some 49 and 42 days, respectively, beyond the statutory period.

The Commission has held that the 60 day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984), *aff’d*, 750 F.2d 1093 (D.C. Cir 1984) (table); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982).

The cases dealing with justification for delays in filing identify several factors that are typically considered, including: complainant’s awareness of his rights under the Act, *Hollis, supra.*; *Secretary on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (1996)(Manning, ALJ)(delay of 107 days justified by prompt filing after complainant first became aware of rights under the Act, filing of substantially identical allegations in workmen’s compensation and employment discrimination claims and absence of prejudice to respondent); *Secretary on behalf of Smith v. Jim Walter Resources, Inc.*, 21 FMSHRC 359 (1999) (Melick, ALJ)(10 month delay excused by filing within 65 days of first learning of rights under section 105(c), no claim of prejudice by respondent); *Secretary on behalf of Gay v. Ikard-Bandy*

² The motion will be treated as a motion for summary decision pursuant to Commission Rule 2700.67. 29 C.F.R. § 2700.67.

Co., 18 FMSHRC 341 (1996)(Melick, ALJ)(3 month delay excused by filing 1 day after first learning of section 105(c) rights and no claim of prejudice); complainant's capacity or ability to initiate and pursue such a remedy, *See, Sinnott v. Jim Walter Resources, Inc.*, 6 FMSHRC 2445 (1994) (Maurer, ALJ); and, the length of the delay and whether it has resulted in prejudice to a respondent. *See, Sinnott, Id.* (delay of over 3 years "inherently prejudicial"); *Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997)(Fauver, ALJ.)("very special circumstances" required to justify delay of over 2 years). All such factors must be weighed to reach the ultimate determination of whether, on the facts of the particular case, justifiable circumstances exist to allow the complainant to pursue his claim. *Hollis, supra; Herman, supra.*

The ultimate determination to be made is whether, in fairness, a complainant who has failed to timely file a discrimination complaint should, nevertheless, be allowed to pursue his claims forcing a respondent to defend against allegations that should have been made at an earlier point in time. *Herman, supra*, 4 FMSHRC at 2138-39. Here, Coteau does not claim that it's ability to defend against the allegations has been prejudiced by either the untimely filing of the MSHA complaint or the Secretary's reopening of the investigation. It argues that a demonstration of prejudice is not required in order to defeat a claim of justifiable circumstances for late filing.

While the situation may be different when the delay has been the fault of the Secretary,³ Respondent is correct that the Commission has not held that a respondent must demonstrate prejudice to overcome a claim of justifiable circumstances for a miner's late filing of an initial complaint of discrimination with the Secretary. However, prejudice is an important factor in the overall "justifiable circumstances" determination. As the Commission has observed, the legislative history pertinent to the 60 day time limit indicates that it was intended to avoid stale claims⁴ and it is entirely appropriate and consistent with that legislative purpose to include a consideration of prejudice as a highly relevant factor in the determination of whether a miner's late filing will be excused. *Herman, supra*, 4 FMSHRC at 2137; *and see, Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1387 (1999); *cf. Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (1992). Here the delay of 49 days was neither *de minimis* nor excessively lengthy. In the absence of prejudice to Respondent, Complainant's burden of demonstrating justifiable circumstances is not exacting. Nevertheless, he has failed, at least on the present record, to satisfy it.

Sargent's opposition to the motion is troubling on many fronts. He relies upon a Declaration by Judy R. Peters, a Senior Special Investigator employed by MSHA, which relates that Sargent made numerous attempts to obtain certain information from Coteau's management and when the information was not forthcoming, he contacted an attorney. Thereafter, he was advised to notify MSHA of his complaints. He spoke with his brother, who contacted MSHA on

³ *See, Secretary on behalf of Hale v. 4-A Coal Co., Inc.*, 6 FMSHRC 905 (1986).

⁴ *See, Herman, supra*, 4 FMSHRC at 2137.

two occasions and was advised to contact MSHA's Denver District Office, which he did on October 23, 1998. A discrimination complaint form was mailed to Complainant, was received on October 30, 1998, executed on November 15, 1998 and mailed to MSHA, where it was received on November 20, 1998.

The operable facts on this issue, as related in Ms. Peters' Declaration, are apparently not based upon her personal knowledge. While hearsay is admissible in Commission proceedings so long as it is material and relevant, its probative value, if any, must be determined by the Administrative Law Judge, based upon factors evidencing its reliability.⁵ There are very few indicia of reliability for the facts reported in Ms. Robert's Declaration. The sources of the information are not identified, which precludes any assessment of their bias or whether statements she relied upon were made with personal knowledge. Very little detail is provided as to times, dates, locations or the identities of involved individuals. There is no indication as to whether the information provided has been verified by someone other than the source or by documentary evidence, such as contemporaneous notes of conversations or letters.

Even if it is assumed that the reported facts were reliable, many important questions remain unanswered. There is no explanation of the significance of the information that Royal Sargent was seeking or why its unavailability impaired his ability to timely file a discrimination complaint, particularly since his complaint was eventually filed without it. At some undisclosed point, Ms. Roberts relates that Complainant contacted an attorney and was "thereafter advised to notify MSHA."⁶ There is no information as to when he contacted the attorney, what he learned as a result, who advised Complainant to notify MSHA or when that advice was given. More striking is the fact that, despite the advice, he apparently did not personally contact MSHA until he filed his complaint on November 20, 1998. Ms. Roberts further relates that Complainant spoke to his brother, who then contacted MSHA, at undisclosed points in time. His brother apparently also contacted MSHA's Denver office on October 23, 1998, which eventually lead to the filing of the complaint almost a month later. There is no explanation of why Complainant waited two full weeks to fill out the relatively brief complaint form at a time when he was most likely fully aware that he was well past the deadline for submitting a complaint.

In its motion, Coteau argued that Sargent is an experienced miner and was well aware of his right to submit a claim of discrimination to MSHA within 60 days of an adverse action. Its argument is based upon Sargent's length of service, the fact that he had completed all required training, which included information on such rights under the Act, and that a poster explaining

⁵ 29 C.F.R. § 2700.63(a); *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135-37 (1984).

⁶ Declaration of Ms. Peters, para. J. Paragraph 4 of the Secretary's opposition contains the following statement: "The attorney advised [Sargent] to contact MSHA immediately." This somewhat at variance with Ms. Peters' Declaration.

those rights was displayed on a bulletin board at Sargent's place of work.⁷ In opposing the motion, Sargent did not dispute either that contention or the facts upon which it is based. The written notification of "Disciplinary Suspension and Probation" that was given to Complainant on August 3, 1998, was fairly detailed and clearly indicated the serious nature of the action that Coteau was taking. There is no question but that these actions amounted to adverse action within the meaning of the discrimination provisions of the Act.

On the basis of the record as presently constituted, I find that Complainant has not established justifiable circumstances for failing to file his discrimination complaint within the time limits established by the Act. For the reasons set forth above, on the issue of justifiable circumstances the Declaration of Ms. Peters is entitled to very little weight and, in any event, is notably deficient in many critical respects. I have little choice but to conclude that, at all relevant times, Complainant was aware of his right to file a discrimination complaint with the Secretary within 60 days of adverse action taken in violation of the Act. The August 3, 1998, memorandum in no uncertain terms, put him on notice of serious adverse action and his initial complaint of discrimination was based upon information known to him at that time. There is no reliable evidence that he brought his discrimination complaint to Respondent's attention within the statutory 60 day period, either directly, or through some other agency, or that he misunderstood or was misled as to his rights or obligations under the Act. Despite being aware of his rights, and having been directly advised to contact MSHA regarding his complaint, he did not contact MSHA until November 20, 1998, when his complaint was received.

Complainant is in a situation comparable to that in *Herman, supra*, 4 FMSHRC at p. 2138, i.e. "he had abundant opportunity and the ability to go forward with his complaint in a more timely fashion." However, unlike the complainant in *Herman*, Sargent has had only a limited opportunity to establish justifiable circumstances for his late filing. Rather than dismissing the complaint at this time, Complainant will be afforded an additional opportunity to establish justifiable circumstances.

The Secretary's Authority to Rescind the "no violation" Determination

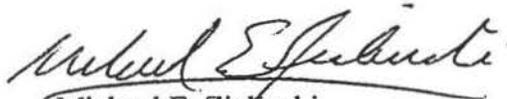
Respondent's argument on the Secretary's authority is based upon an erroneous interpretation of the law. It contends that, section 105(c)(3) of the Act requires that, "upon issuance of a 'no violation' determination, the miner must file a complaint with the Commission within 30 days. The Mine Act nowhere provides the Secretary the authority to 'rescind' a 'no violation' determination 31 days after it has been issued." Motion, at p. 4. While the Act does specify a 30 day period within which a miner may file a complaint with the Commission, the time period runs from the date the miner receives "notice of the Secretary's determination", not the date of the notice. 30 U.S.C. § 815(c)(3). Ms. Roberts' Declaration, apparently based, in part, upon MSHA records, undercuts the factual predicate of Respondent's argument, stating that the notice was not received until January 11, 1999, and that the decision to rescind the notice was

⁷ A copy of the poster was attached to Respondent's motion.

made on February 1, 1999. While the reliability of the statement regarding the date of receipt is open to question, assuming a reasonable time for receipt of the notice,⁸ it appears that the decision to rescind was made prior to the expiration of the 30 day period. Respondent did not address the argument further in it's reply and appears to have abandoned it.

ORDER

Based upon the foregoing, it is therefore **ORDERED**: That **on or before March 17, 2000**, Complainant may submit evidence establishing justifiable circumstances for the late filing of his discrimination complaint, i.e. to show cause why the complaint should not be dismissed because of his failure to file a complaint of discrimination within 60 days of the adverse actions complained of. Complainant shall serve a copy of any such submission upon counsel for Respondent by facsimile and first class mail. Respondent may reply to any such submission **on or before March 28, 2000**. If Respondent intends to pursue it's argument as to the Secretary's authority to rescind a "no violation" determination, it shall address the Secretary's argument in it's reply.



Michael E. Zielinski
Administrative Law Judge

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/mh

⁸ Commission Rule 2700.8 provides that: "When service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other documents." 29 C.F.R. § 2700.8.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 29, 2000

IN THE MATTER OF: : DISCIPLINARY PROCEEDING
CONNIE PRATER, :
: Docket No. D 99-1

ORDER GRANTING WITHDRAWAL OF COUNSEL **AND** **ORDER TO SHOW CAUSE**

This disciplinary proceeding is before me on referral from the Commission pursuant to Rule 80, 29 C.F.R. § 2700.80. On December 20, 1999, counsel for the Respondent filed a letter stating: "I am writing to inform the Court that Ms. Connie Prater will be unable to proceed in this matter due to unexpected health reasons. Therefore, please withdraw my appearance for Ms. Prater. Further, please be advised that Ms. Prater will not make any further appearances before the Court." In his response to the letter, the Prosecutor pointed out that it was not clear whether the Respondent was requesting a continuance because of her "unexpected health" problems or whether she no longer intended to contest the charges in this proceeding.

On January 24, 2000, counsel for the Respondent filed a response to the Prosecutor's letter. Unfortunately, it is not any clearer as to what Ms. Prater's position in this proceeding is than the cryptic letter of December 20. He states that Ms. Prater "is currently fighting for her life against what I understand is a recurring cancer," but that he did not "intend to disturb Ms. Prater during her illness to obtain 'sworn affidavits' from her or her medical doctors." On the other hand, he states that: "I can represent to the Court without even discussing it with Ms. Prater that she would never" consent to an order determining her culpability for ethical misconduct. Counsel concludes by stating: "This proceeding, and the extreme infrequency with which she even participated in Commission proceedings in the past, is simply too remote to the core activities in her life to permit her to focus on this matter as she originally intended."

Counsel closed his January 24 letter by reiterating:

Finally, because I am essentially without a client, I indicated that I wished to withdraw from this case as well. I would appreciate the Court's advice as to whether it desires a formal motion pursuant to Rule 2700.3 or whether such a motion is unnecessary in the event that the Court will shortly resolve this matter.

Turning to the matter of withdrawal first, Commission Rule 3(d), 29 C.F.R. § 2700.3(d), provides that: "Any representative of a party desiring to withdraw his appearance shall file a

motion with the . . . Judge.” Thus, counsel for the Respondent should have filed a motion if he wanted to withdraw. However, since the letter plainly states his position, I will treat it as a Motion to Withdraw rather than require the filing of another document. Accordingly, the request to withdraw is **GRANTED**. With the exception of this order, no further documents in this proceeding will be served on counsel. This, and all further documents, will be served directly on the Respondent.

Next, as the Prosecutor correctly observed in his response to the January 24 letter, if Ms. Prater desires that this proceeding be continued until such time as her illness permits her to participate, she must accompany her request with an affidavit from her treating physician setting forth the nature of her illness, how long she has been ill, the reason the illness renders her incapable of participating in the proceedings, and the probable length of time she will be unavailable before the proceeding can resume. Such an affidavit may not be conclusory, but must set forth a medical history and prognosis of Ms. Prater’s condition, substantiate the medical basis for concluding that her health conditions preclude her from participating in the proceedings at this time and identify any medical restrictions that should be placed on her participation in pretrial examination or at trial.

If the Respondent is not seeking a continuance, but does not intend to participate in the proceedings at all, she should be aware that failure to participate will result in her being found in default and the issuance of a disciplinary order, “which may include reprimand, suspension, or disbarment from practice before the Commission.” 29 C.F.R. § 2700.80(c)(3). In this connection, Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that: “When a party fails to comply with an order of a Judge or these rules . . . an order to show cause shall be directed to the party before the entry of any order of default”

Therefore, in accordance with Rule 66(a), the Respondent is **ORDERED TO SHOW CAUSE**, within 21 days of the date of this order, why she should not be held in default in this matter. The Respondent shall comply with this order by filing a statement that she is ready to proceed, by requesting a continuance in the manner set out above, or by filing a statement acknowledging that she is aware of the possible penalties facing her and stating that she does not desire to participate in the proceedings. **Failure to comply with this order will result in the issuance of a disciplinary order adjudging a reprimand, suspension or disbarment from practice before the Commission.** The Prosecutor shall file comments on the Respondent’s response to this order, or lack of response, within ten days of receiving the response, or the expiration of time for a response, whichever occurs first.


T. Todd Hodgdon
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/nj