March 1987

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

MARCH 1987

The following cases were directed for review during the month of March:

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket Nos. WEVA 86-190-R, 86-194-R, 86-254. (Judge Maurer, February 2, 1987)

Secretary of Labor, MSHA v. Union Oil Company of California, Docket No. WEST 86-1-M. (Judge Lasher, February 12, 1987)

Secretary of Labor, MSHA v. Perry Drilling Company, Docket No. PENN 86-273. (Judge Merlin, Default order of February 11, 1987)

Secretary of Labor, MSHA v. Patriot Coal Company, Docket No. WEVA 86-400. (Judge Merlin, Default order of February 11, 1987)

Secretary of Labor, MSHA v. Dóug Connelly Sand & Gravel Co., Docket No. WEST 86-196-M. (Judge Merlin, Default order of February 11, 1987)

Western Fuels-Utah, Inc., v. Secretary of Labor, MSHA, Docket No. WEST 86-108-R, WEST 86-245. (Judge Maurer, February 19, 1987)

Rushton Mining Company v. Secretary of Labor, MSHA, Docket No. PENN 85-253-R, PENN 86-1. (Judge Broderick, February 20, 1987)

Review was denied in the following cases during the month of March:

Secretary of Labor, MSHA on behalf of Andy Brackner v. Jim Walter Resources, Inc., Docket No. SE 86-69-D. (Judge Broderick, February 9, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 86-273
PERRY DRILLING COMPANY	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on February 11, 1987, finding Perry Drilling Co. ("Perry Drilling") in default for failing to respond to a show cause order and assessing a civil penalty of $500. Six days after the default order issued, the judge's law clerk received a telephone call from Richard C. Perry of Perry Drilling in which Mr. Perry asserted, according to a memorandum placed in the official file by the law clerk, that the company had not received the Secretary of Labor's penalty proposal or the show cause order. The clerk suggested that Perry advise the Commission in writing of these assertions. On February 26, 1987, the Commission received a letter from Perry stating that the company "never received the initial fine." We consider Perry's letter to constitute a timely petition for discretionary review, vacate the order of default, and remand for further proceedings.

We have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for failing to respond, the failure may be excused and appropriate proceedings on the merits permitted. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986); M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1271 (September 1986). Here, Perry Drilling filed a timely "Blue Card" request for a hearing in connection with the Secretary's proposed assessment of a civil penalty for one alleged violation of a mandatory safety standard. In response, the Secretary filed with the Commission a petition for assessment of civil penalty. When no answer to the petition was received, the judge, on November 26, 1986, ordered Perry Drilling to send an answer or show cause for failure to do so. The show

cause order was mailed to Perry Drilling by certified mail, return receipt requested. The return receipt in the official file, dated December 2, 1986, bears the signature, "Richard C. Perry."

We are unable on the basis of the present record to evaluate the credibility of Perry's assertions. We note that the Secretary attached a certificate of service to his petition for assessment of civil penalty stating that a copy of the petition was mailed to Richard C. Perry. Further, the signature "Richard C. Perry" appears on the return receipt of the judge's show cause order. We will permit Perry Drilling to present its position to the judge, who will determine whether sufficient grounds exist for excusing the failure to timely respond. E.g., Kelley Trucking, supra, 8 FMSHRC at 1869.

For the foregoing reasons, the judge's default order is vacated and this matter is remanded for proceedings consistent with this opinion. Perry Drilling is reminded to serve the Secretary with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7. 1/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Commissioner Doyle believes that, given the return receipt to the show cause order bearing Perry's signature and there being no assertion in Perry's letter of February 26 that he never received that order, the default order should not be vacated.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 86-400
PATRIOT COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on February 11, 1987, finding Patriot Coal Company ("Patriot") in default for failure to respond to a show cause order. The judge assessed a civil penalty of $250. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On March 3, 1987, Patriot's general manager wrote a letter to Judge Merlin requesting that the judge review his decision in light of its answer, attached to the letter. The attachment, a letter from Patriot's president dated January 5, 1987, and addressed to the Department of Labor's Regional Solicitor in Philadelphia, contains a short and plain statement of the reasons why Patriot disagrees with a backup alarm violation alleged by the Secretary. Patriot's March 3 letter was received by the Commission on March 9, 1987.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). We are treating Patriot's letter requesting review of the judge's order as a timely petition for discretionary review because it was received within 30 days of the judge's decision. 29 C.F.R. § 2700.70(a). The petition is granted.

The record discloses that on April 16, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Patriot alleging a violation of 30 C.F.R. § 77.410 for failure to equip a parts truck with an automatic warning device. Upon preliminary notification by MSHA of the civil penalty proposed for the alleged violation, Patriot filed a "Blue Card" request for a hearing before this independent Commission. On August 25, 1986, counsel for the

Secretary served Patriot with the Secretary's penalty proposal. When no answer to the penalty proposal was filed, the judge, on November 18, 1986, issued a show cause order directing Patriot to file an answer within 30 days or show good reason for the failure to do so. As noted, Patriot's president served an answer on the Secretary by mail on January 5, 1987. Other than as an attachment to Patriot's March 3 letter, the Commission's official record does not contain a copy of the answer. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the proposal for penalty. 29 C.F.R. § 2700.5(b) & .28.

Patriot's March 3 letter also mentions a thirty-day extension of time in which to answer, which it states it requested and was granted. Again, the Commission's official record contains no documentation that such a request was made or granted.

Patriot has not provided any explanation for its failure to file a timely answer or for its failure to timely respond to the judge's show cause order. However, we note that Patriot is proceeding pro se, that it did serve the Secretary with its answer prior to issuance of the judge's default order, and did bring the existence of a possible excuse to the attention of the Commission. In light of these factors, we believe that the operator should have the opportunity to present its position to the judge.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether relief from default is appropriate. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 20, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 86-196-M
DOUG CONNELLY SAND & GRAVEL	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on February 11, 1987, finding Doug Connelly Sand & Gravel ("Connelly") in default for failure to respond to a show cause order. The judge assessed civil penalties totalling $2,179. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On March 3, 1987, Connelly's attorney wrote a letter to Judge Merlin seeking vacation of the default order on the ground that he mistakenly had filed Connelly's answer to the Secretary's penalty proposal with counsel for the Secretary instead of with the Commission. In support of this assertion, copies of Connelly's Answer, Affirmative Defense and Counterclaim were attached to the letter, together with copies of a mailing receipt for certified mail dated August 7, 1986, and a signed receipt for delivery dated August 8, 1986. Connelly's letter was received by the Commission on March 6, 1987.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). We will treat Connelly's letter requesting relief from the judge's order as a timely petition for discretionary review because it was received within 30 days of the judge's decision. 29 C.F.R. § 2700.70(a). The petition is granted.

The record discloses that on May 1 and 2, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued nine citations to Connelly alleging violations of various safety

regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Connelly's owner filed a "Blue Card" request for a hearing before this independent Commission. On July 24, 1986, counsel for the Secretary served him with the Secretary's penalty proposal. As noted, Connelly's attorney served an answer on the Secretary by certified mail return receipt requested on August 7, 1986. However, the document was never filed with the Commission. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & 28.

Not having entered an appearance, Connelly's attorney never appeared on the distribution list for relevant Commission documents. The return receipt for the judge's show cause order indicates that it was delivered to someone named "Connelly." While Connelly failed to respond to the judge's show cause order, we recognize that Connelly's attorney did prepare an answer and serve it on the Secretary in a timely manner. In light of this fact and counsel's promptness in bringing the existence of a possible excuse to the attention of the Commission, we believe that the operator should have the opportunity to present its position to the judge.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether relief is appropriate. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 20, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF ANDY BRACKNER	:	
v.	:	Docket No. SE 86-69-D
JIM WALTER RESOURCES, INC.	:	

ORDER

On March 16, 1987, Jim Walter Resources, Inc. ("JWR") filed with the Commission a petition for discretionary review of the administrative law judge's decision issued February 9, 1987. The petition was untimely filed and contains no explanation for the late filing. Moreover, the petition contains no reasons supporting the assignments of error. Accordingly, the petition for discretionary review is dismissed. Valley Rock and Sand Corp., 2 MSHC 1673 (March 1982); Victor McCoy v. Crescent Coal Co., 2 FMSHRC 1202 (June 1980).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
March 25, 1987

JIM WALTER RESOURCES, INC.,	:	
	:	
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	Docket No. SE 87-29-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

ORDER

BY THE COMMISSION:

In this matter pending on review, Jim Walter Resources, Inc. ("JWR"), has filed an unopposed motion to withdraw its petition for discretionary review and to dismiss the proceeding.

In his decision below, Commission Administrative Law Judge Avram Weisberger concluded that JWR had failed to comply with a notice to provide safeguards relating to clearance on an underground rail system and dismissed JWR's contest of the citation issued for the violation. 9 FMSHRC 102 (January 1987)(ALJ). On February 24, 1987, the Commission granted JWR's petition for discretionary review. In its present motion, JWR asserts that a stop-block system has been installed along the rail system to abate the alleged violation and that now "[n]o true dispute remains between the parties...." JWR also states that the Secretary of Labor does not oppose the granting of this motion.

Upon consideration of JWR's motion, it is granted. Accordingly, the Commission's direction for review in this matter is vacated, and this proceeding is dismissed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 30, 1987

OFFICE OF THE CHAIRMAN

RUSHTON MINING COMPANY	: Docket Nos.	PENN 85-253-R
	:	PENN 86-1
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

ORDER

BY THE COMMISSION:

Petitioner, Rushton Mining Company, has filed a petition for discretionary review together with a motion to stay the administrative law judge's decision and a motion to remand this case to the judge for further proceedings.

Petitioner presents two issues: Whether an operator is entitled to reimbursement from the Secretary for costs and attorney's fees under Rule 11 of the Federal Rules of Civil Procedure and, if so, whether the facts in this case support such reimbursement.

The administrative law judge's jurisdiction in this case ceased with the issuance of his decision on February 20, 1987. Thus, by operation of Commission Rule 2700.65, petitioner did not have the opportunity to present the issue of reimbursement before the trier of fact.

We believe that under the circumstances it is appropriate that the administrative law judge be given the opportunity to rule on the issues raised in the petition.

Accordingly, it is ordered that this case be remanded to the administrative law judge for the purpose of developing a record and ruling on the issues presented in the petition for discretionary review.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 30, 1987

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

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). 1/ Terco, Inc. ("Terco"), seeks review of a decision by Commission Administrative Law Judge Gary Melick finding Terco, as successor to Sugartree Corporation ("Sugartree"), liable for back pay and other costs determined to be due as a result of Sugartree's

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1/ Section 105(c)(1) of the Mine Act states in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ..., or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

discriminatory discharge of the complainants. 8 FMSHRC 206 (February 1986)(and appendices)(ALJ). For the reasons set forth below, we affirm.

Sugartree was owned by Randal Lawson, who was also its president. In July 1984, Sugartree operated the Sugartree No. 1 coal mine in Knox County, Kentucky. On the last workday prior to the July 4, 1984 holiday, and again on July 5, 1984, Sugartree miners James Corbin, Robert Corbin, and A.C. Taylor complained to their section foreman and to mine foreman Joe Watkins that malfunctioning watersprays on the continuous mining machine were creating a severe dust and ventilation hazard in the section where the miners were working. On July 5, 1984, after unsuccessful repair efforts, Watkins ordered the crew of seven or eight miners to continue working, but the entire crew left the mine rather than work under the existing dusty conditions. The crew returned to work the next day and, at the end of their shift, Watkins issued to the Corbins and Taylor lay-off slips that attributed dismissal "to the sharp decline in production during the last several weeks." No other miners were laid off. Lawson testified that he had picked these three miners for lay off because "they were the ones that [were] complaining...." Tr. 406. 2/

On July 12, 1984, the three miners filed complaints of discriminatory discharge with MSHA. 30 U.S.C. § 815(c)(2). Shortly thereafter, in July 1984, Sugartree ceased mining operations and Terco began mining at the same mine. On September 15, 1984, Terco, pursuant to 30 C.F.R. Part 41, submitted to MSHA a legal identity report for the "Terco No. 2 Mine" that bore the same mine I.D. number as the Sugartree No. 1 Mine. The report listed Randal Lawson as president of Terco.

On September 25, 1984, the Secretary of Labor filed with the Commission applications for the temporary reinstatement of the complainants. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44 (1984). Two days later Commission Chief Administrative Law Judge Paul Merlin issued orders of temporary reinstatement directed to Sugartree. Shortly after receiving copies of Judge Merlin's order, the two Corbins went to the mine to be reinstated but were informed that they would have to apply to Terco for employment. On October 3, 1984, the Secretary moved to amend the reinstatement orders by including Randal Lawson and Terco as parties. However, no further action concerning temporary reinstatement was taken pending determination of Terco's liability. A subsequent legal identity report for Terco and the Terco No. 2 mine, submitted on February 2, 1985, listed Terry McCreary as president and Carol McCreary as secretary. Both McCrearys had served previously as officers of Sugartree, Terry McCreary as vice-president and Carol McCreary as secretary-treasurer.

2/ On July 10, 1984, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a ventilation inspection at Sugartree No. 1 mine and issued to Sugartree two citations, one of which alleged that the water pressure in the continuous miner's spray system was lower than required by the mine's ventilation plan.

On December 27, 1984, the Secretary filed a discrimination complaint against Sugartree on behalf of the three complainants. 30 U.S.C. § 815(c)(2). In April 1985, following prehearing discovery, Judge Melick permitted the Secretary to amend the complaint to add Lawson and Terco as respondents.

After a hearing on the merits, the judge concluded that the complainants had been discharged from their jobs in violation of section 105(c)(1) of the Mine Act. In reaching this conclusion, the judge found that the complainants had made protected safety complaints regarding both the defective water spray on the continuous mining machine and the unhealthy dust conditions in the working section of the mine and had engaged in a protected work refusal. 8 FMSHRC at 209-12. He further determined that the complainants were laid off permanently, i.e., discharged "based solely on their protected safety complaints and/or their refusal to work in the face of clearly hazardous conditions." 8 FMSHRC at 211-12. The judge found that Randal Lawson, as an individual, and Sugartree, for which Lawson was an agent, were responsible for the unlawful discharges and, consequently, were liable for violating complainants' rights under the Mine Act. 8 FMSHRC at 212. The judge further determined that Terco was Sugartree's successor and, as such, was jointly and severally liable for remedying the illegal discrimination. 8 FMSHRC at 212-14. The judge assessed a $1,000 civil penalty against Sugartree, Terco, and Lawson for the violation of section 105(c)(1), ordered them to pay approximately $35,000 in back pay and interest to each of the complainants, and directed Terco to reinstate immediately the complainants either to the same positions held at the time of their illegal discharges or to comparable positions. 8 FMSHRC at 206-07, 214-15. 3/

3/ Terco thereafter reinstated the Corbins. Complainant Taylor waived reinstatement because he had obtained other employment. On July 23, 1986, the Secretary filed new discrimination complaints on behalf of the Corbins, alleging that they had again been discharged illegally by Terco. FMSHRC Docket Nos. KENT 86-131-D & 86-132-D. The cases were assigned to Judge Melick and ultimately became the subject of a settlement agreement between the Secretary and Terco, under the terms of which Terco agreed to pay the Corbins $50,000 damages and the Corbins agreed to waive any right to reinstatement by Terco. The Secretary agreed to "forego any enforcement action on behalf of the Corbins" in the instant proceeding. However, the settlement agreement also stated that in this present proceeding the Secretary would "take all action necessary to enforce the award on behalf of A.C. Taylor," who was not a party to the agreement. Based on the settlement, Judge Melick allowed the Secretary to withdraw the new discrimination complaints and dismissed those proceedings. 9 FMSHRC 24 (January 1987)(ALJ). The Secretary then moved the Commission to vacate that portion of the Commission's direction for review in the pending proceeding pertaining to liability and remedial issues affecting the Corbins. We granted the motion, but emphasized that all liability issues (including the question of successorship) and all personal remedy issues insofar as they affect ... A.C. Taylor, remain for decision." 9 FMSHRC 197, slip op. at 2 (February 10, 1987).

Terco was the sole respondent to seek review of the judge's final decision. Terco has raised no question on appeal regarding the validity of the judge's findings of unlawful discrimination or the responsibility of Lawson and Sugartree for the violation. The sole question before us concerns the derivative liability of Sugartree's alleged successor, Terco.

To determine whether Terco was liable for the damages stemming from Sugartree's discrimination, the judge applied the successorship doctrine enunciated by the Commission in Glenn Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (December 1980), aff'd in relevant part, rev'd in part on other grounds sub nom. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983), cert. denied, 464 U.S. 851 (1983), and analyzed the case according to the nine factors set forth in Munsey (see 2 FMSHRC at 3465-66) for determining successorship status. 8 FMSHRC at 212-14. In particular, the judge found as follows: Terco had notice of the charges of discrimination; Sugartree could not provide remedial relief to the complainants; and a substantial continuity of business operations was maintained from Sugartree to Terco. 8 FMSHRC at 213-14. On the basis of these findings the judge concluded: "Terco was a successor business entity [to Sugartree] and accordingly is jointly and severally liable for [Sugartree's] illegal acts of discrimination in this case." 8 FMSHRC at 214.

In Munsey, this Commission noted that the statutory protection against discrimination afforded miners is similar to the statutory protection afforded workers under other labor statutes. The Commission stated: "In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' act of discrimination ... and ... in appropriate cases the successorship doctrine should also be applied [by the Commission]...." 2 FMSHRC at 3465. Although Munsey was decided under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977) ("Coal Act"), the predecessor to the Mine Act, the discrimination protections afforded miners under the Mine Act are even greater than those afforded miners under the Coal Act, and the successorship doctrine clearly applies under the Mine Act as well.

In determining whether a successor should be required to remedy unlawful discrimination, consideration of a variety of relevant liability and economic factors is appropriate. In Munsey, the Commission approved for consideration nine such factors:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the

same machinery, equipment and methods of production and (9) whether he produces the same products.

2 FMSHRC at 3465-66 (restating factors set forth in EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974)). These and similar factors have been applied under both the Civil Rights Act of 1964 (e.g., MacMillan Bloedel, supra) and the National Labor Relations Act (e.g., NLRB v. Winco Petroleum Co., 668 F.2d 973, 976-78 (8th Cir. 1982)).

The first two factors considered by the judge were whether Terco had notice of the complainants' charges when it acquired Sugartree's business operations and whether Sugartree was able to provide relief to the complainants. Substantial evidence supports the judge's findings that Terco's knowledge of complainants' charges may be inferred reasonably and that Sugartree was unable to provide relief. Legal identity forms submitted by Sugartree in July 1984 and by Terco in September 1984 listed Randal Lawson as president and Carol McCreary as secretary-treasurer of both companies. The complainants filed their complaint of discrimination with MSHA on July 12, 1984, and MSHA's investigation of the complaint followed. We agree with the judge that the existence of identical corporate officers during this period is evidence that Terco had notice of the complainants' charges, particularly where, as here, Lawson, by his own admission, discharged the complainants for an illegal reason. Terco cannot be heard to say that it lacked notice of potential liability arising from the illegal actions of its president at the time it succeeded to Sugartree's mining operation. As to the ability of Sugartree to provide relief, it is clear from the record that Sugartree ceased business activity and that its assets were sold to satisfy Lawson's personal debts. Tr. 432. Under these circumstances, complainants could not obtain reinstatement or monetary damages from Sugartree.

The seven other factors discussed in Munsey provide a framework for analyzing the crucial question of whether there was a continuity of business operations and work force between the successor and its predecessor. Here, the judge found that a substantial continuity in business operations was maintained from Sugartree to Terco, and the evidence substantiates this finding. A comparison of the payroll records of Sugartree and Terco indicates that of the fifteen employees hired by Terco in July 1984 for the Terco No. 2 mine (formerly the subject Sugartree mine), approximately thirteen were employed formerly by Sugartree. Ex. P-27; Tr. 488-491. Terco admits that approximately 50% of its total work force is composed of former Sugartree employees. T. Br. 3. Further, Terco continued to mine coal at the same mine and Sugartree's mine superintendent and section foreman remained with Terco. Although Terco made some changes in its mining methods and equipment, these changes were dictated primarily by the requirements of mining engineering and not by any substantial change in its business operation. Moreover, no change in personnel was required to effect these changes. Under these circumstances, we conclude that the judge properly found that there was a substantial continuity in business operations between Sugartree and Terco.

Terco, citing Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), argues that only a successor who purchases the assets and stock of its predecessor with knowledge of the charges of discrimination may be held liable for remedy of the predecessor's illegal acts. Terco asserts that it did not make such a purchase but rather merely acquired Sugartree's coal leases. We reject this narrow reading of the principles of successorship law. Golden State does not hold that the purchase of the assets or stock of the predecessor by the successor is necessarily the determinative factor in establishing successorship. Rather, the Court merely emphasized that in cases like Golden State, which involve a bona fide purchaser, the successor may protect itself in the purchase arrangement against any potential liability. 414 U.S. 172-74. Purchase of the assets or stock of the predecessor undoubtedly should be weighed in the mix of successorship factors when it is present. However, its absence does not negate a finding of successorship liability. As the Court recognized, successorship transactions may assume many forms and liability may obtain in a number of business contexts. 414 U.S. at 182-83 n. 5. See also Munsey, 2 FMSHRC at 3465.

Accordingly, we affirm the judge's decision and, in particular, his finding that Terco is a successor business entity to Sugartree jointly and severally liable for remedying the illegal acts of discrimination committed by Sugartree and Lawson. In light of the settlement agreement discussed above and the Commission's prior order vacating that portion of the direction for review in this case pertaining to the Corbins (n. 3 supra), Sugartree, Terco and Lawson are directed to immediately comply with that portion of the judge's order directing payment of monetary damages to A.C. Taylor.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 2 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BOBBY G. KEENE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 86-34-D
	:	NORT CD 86-8
v.	:	
	:	No. 4 Mine
S & M COAL CO., INC., JEWELL SMOKELESS COAL CORPORATION, PRESTIGE COAL COMPANY, INC., TOLBERT P. MULLINS, and SHIRLEY A. MULLINS, Respondents	:	

DECISION

Appearances: Carol Feinberg, Esq., and Jonathan Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant;
Daniel Bieger, Esq., and Gay Leonard, Esq., Copeland, Molinary and Bieger, Abingdon, Virginia, for S&M Coal Co., Inc., Prestige Coal Co., Inc., Tolbert P. Mullins and Shirley A. Mullins; Joseph Bowman, Esq., for Jewell Smokeless Coal Corporation.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Bobby Keene under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that Mr. Keene was discharged from S&M Coal Company, Incorporated (S&M) on February 13, 1986, in violation of section 105(c)(1) of the

Act.[1]/ The Secretary further alleges in this case that Tolbert Mullins, part owner and president of S&M, was a "person" under section 105(c)(1) also responsible for the unlawful discharge of (and unlawful failure to rehire) Mr. Keene. The Secretary also alleges that Prestige Coal Corporation (Prestige) is a successor-in-interest to S&M and as such is jointly and severally liable for costs, damages and the reinstatement of Mr. Keene.[2]/

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove by a preponderance of the evidence that Mr. Keene was engaged in an activity protected by that section and that the discriminatory action taken against him was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case. A miner's "work refusal" is protected under section 105(c) of the Act if the

[1]/ Section 105(c)(1) of the Act provides in part as follows:

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

[2]/ At hearing the Secretary, with Mr. Keene's consent, moved to dismiss Jewell Smokeless Coal Corporation as a Party/Respondent in light of the settlement agreement filed herein. At the close of hearing the Secretary also agreed to the dismissal of Shirley Mullins as a Party/Respondent. There was no objection to what were redeemed to be requests to withdraw pleadings under Commission Rule 11, 29 C.F.R. § 2700.11, and the requests were granted.

miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

The evidence shows that Bobby Keene was a state-certified electrical repairman and maintenance foreman with underground mining experience dating from 1974. He began working for the Mullins Coal Company in 1984 as an electrician responsible for maintaining electrical equipment and the electrical "books" and was transferred by Tolbert Mullins to S&M as an electrician in the latter part of 1985.

While at S&M, Keene became concerned because there was "too much bridging going on". As described by Keene, "bridging" is the utilization of a piece of wire on any electrical equipment to bypass its safety features. Anyone touching equipment that has been "bridged-out" can be electrocuted under certain conditions.

According to Keene, about two weeks before February 13, 1986, he was asked by Mine Superintendant Monroe Nichols to "bridge" the transformer and he refused. Around the same time Nichols also asked him to "bridge" the ground fault system and again Keene refused. Keene also complained to both Nichols and Section Foreman Jerry Looney around this time about "bridging-out" the ground system to the miner. According to Keene, Nichols responded that he would "bridge-out" whenever and whatever he wanted so long as he was superintendant.

On his way into the mine at the commencement of the day shift on February 13, 1986, Keene was telling the workcrew on the mantrip in effect that the "bridging" would have to stop. Later he told Nichols that if the "bridging" was not stopped then that Friday (the next day) would probably be his last shift. Around 10:30 that morning the continuous miner "tripped". Keene repaired the problem but as they began running coal, the breaker again "tripped" and the power was cut. The breaker would not reset this time and Keene told Section Foreman Looney that there was trouble in the ground monitor system of the miner cable. According to Keene, Looney then told him "to bridge the cable at the transformer" and when Keene refused stating that it would be unsafe for the miner operator, Looney gave him the choice of either "bridging" the cable or getting his "bucket" and leaving for home. Keene decided to leave and on the way out ran into Superintendant Nichols. Keene says he told Nichols that Looney fired him because he refused to "bridge-out" the cable. Keene also reportedly told Nichols that he was going to talk

to the "Federals" about it. Keene explained at hearing that there was a "big risk" of electrial shock and electrocution to operate the miner with a "bridged-out" cable.

Keene's testimony was corroborated in essential respects by three other miners. Michael Sayers worked the day shift operating the shuttle car. He observed that during the first two months of 1986 the continuous miner broke down almost daily because of the cable. According to Sayers if the cable could not be fixed either Bobby Keene or Jerry Looney would "bridge it out." He had heard both Looney and Nichols tell Keene to "bridge-out" the system. He also heard Keene complain while on the mantrip into the mine that he was tired of "bridging-out" the cables and that he was afraid somebody was going to get hurt or killed. According to Sayers, Looney only replied that "we've got to run coal somehow, someway". On February 13, Sayers heard Keene say that he had been fired for "bridging" the cable and Superintendant Monroe responded that "well something has got to give around here". According to Sayers both Looney and Nichols continued to "bridge-out" the miner after Keene left the mine.

Matney was day shift miner operator at the No. 4 mine. He too had heard Keene complain about "bridging-out" the cables and specifically heard him say that if the practice was not stopped "someone is going to get killed." According to Matney it was standard practice to "bridge-out" the cable if it could not be fixed within a few minutes. During the day shift on February 13, 1986 Matney heard Looney tell Keene to either "bridge-out" the cable or get his bucket and walk. Keene left the mine and only a few minutes later they were again running coal. Nichols and Looney continued to "bridge-out" the equipment.

Jimmy Sexton was hired on February 17, 1986 as a shuttle car operator. He observed that when the continuous miner broke down it was standard practice at the mine for Looney or Nichols to "bridge-it-out."

Keene's testimony is further corroborated by Looney himself. Looney acknowledged that he said to Keene "let's bridge it out" just before telling Keene that if he did not like the way the mine was operated he could leave. Looney also acknowledged that he was not then a certified electrician and that he knew that "bridging-out" the miner could result in fatal electrial shock.

Of the remaining witnesses testifying on behalf of the Respondent only George Lester was present during this exchange between Keene and Looney. It is apparent however

that even Lester failed to hear critical parts of the exchange. For example while Looney admitted that he said to Keene "let's bridge-out the monitor", Lester purportedly did not hear that statement. Lester's testimony at hearing also conflicts with a prehearing interview and his credibility suffers accordingly.

I find additional material support to the Complainant's case in the testimony of both of Respondent's witnesses, Monroe Nichols and Jerry Looney. Both admitted that they had "bridged-out" electrical equipment, a procedure they knew to be in violation of federal regulatory standards and hazardous. Indeed the evidence in this case is uncontradicted that Keene was in effect told to perform an illegal and dangerous procedure or be fired. Keene clearly entertained a good faith and reasonable belief that the procedure of "bridging" was hazardous to himself or to anyone coming into contact with the "bridged-out" miner. Consolidation Coal Co. v. FMSHRC et. al., 795 F.2d 364 (4th Cir. 1986). I also find that since the dangers inherent in such a procedure were obvious and admittedly known to both Looney and Nichols there was no need to further "communicate" the nature of the hazard to them. See Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). Keene's departure from the mine immediately after being given the choice of performing a procedure known to be illegal and likely to have fatal consequences to himself or others or getting his bucket and walking was accordingly a discharge in violation of the Act. Robinette, supra.

The Complainant in this case also alleges that Tolbert Mullins is individually liable as a "person" unlawfully discriminating against him under section 105(c)(1). See footnote 1, supra. According to Keene, on February 26, 1986, he telephoned Mr. Mullins at the request of the MSHA investigator in efforts to settle the case. Keene says that during the course of this conversation Mullins told him that he could have his job back but only as an electrician. Moreover in response to Keene's concerns about the illegal practice at S&M of "bridging-out" electrical equipment Mullins purportedly responded that Keene would not have to report the practice in the electrical inspection books.[3/] This conversational exchange is not disputed and accordingly I accept Keene's

[3/] It is undisputed that Keene as a certified electrician would be legally required to report such violative conditions in the electrical inspection books.

testimony in this regard. This evidence clearly supports a finding that Mullins, as an individual, was a "person" discriminating against Keene in violation of the Act in his refusal to reemploy Keene except under illegal and dangerous conditions. See Munsey v. Smitty Baker Coal Company, Inc., et al, 2 FMSHRC 3463 (1980).

Finally the Complainant argues that Prestige Coal Company Inc., (Prestige) is a successor-in-interest to S&M Coal Company and accordingly under the criteria set forth in the Munsey decision is jointly and severally liable for costs, damages and reinstatement in this case. In Munsey the Commission applied the factors used by the Federal Courts in EEOC v. McMillan Blowdell Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) for determining such liability. These factors are: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether it uses the same or substantially the same work force (6) whether it uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether it uses the same machinery, equipment, and methods of production, and (9) whether it produces the same product.

In this case there is no dispute that Prestige continues to produce the same product as S&M i.e., coal. It is also apparent from the record that Tolbert Mullins as president and part owner of both S&M and Prestige (and therefore as agent for both companies) was in a position to have notice on behalf of Prestige of the charges by the Complainant in this case. It is also established that S&M is not able to provide adequate relief to the Complainant in this case. It is no longer in business and has no liquid assets. Moreover its only unpledged assets consist of old mining equipment having but little value as parts and scrap metal and having limited marketability.

Of the eight employees presently working at Prestige only two formerly worked for S&M. However one of the two employees, Monroe Nichols, was a supervisor at S&M and is a supervisor at Prestige. The Prestige mine is a surface mine and S&M was an underground mine. Accordingly the machinery, equipment and methods of production differ. The specific jobs at Prestige are also different but many of the skills are transferrable. Within this framework I find on balance that indeed Prestige is a successor-in-interest to S&M and accordingly is jointly and severally liable for costs, damages, reinstatement and civil penalties.

Civil Penalty

I find the acts of discrimination by S&M and Tolbert Mullins to be particularily serious in this case because of the direct impact they had on the safety of miners. Here the practice of bridging-out safety features on electrical equipment continued unabated after the discharge of Mr. Keene and after his discharge it was highly unlikely that anyone else would have protested the dangerous practice. In additon Mr. Mullins and the other S&M officials knew that they were requiring Keene to perform illegal and dangerous acts. Their discharge (and refusal to take back) Keene for refusing to perform such tasks was therefore willful. In assessing a penalty herein I have considered that S&M is no longer in business. I have also considered its history of violations and the fact that it was a small operation. The violative conditions of course have not been abated since Keene has not been reinstated nor has he been reimbursed for lost wages, costs, and interest.

ORDER

In light of the stipulations entered in this case S&M Coal Company, Inc. and Prestige Coal Company are ordered, jointly and severally to pay to Bobby Keene within 30 days of the date of this decision, costs amounting to $654.18, backpay of $3,082.16 and interest to be computed in accordance with the formula set forth in Secretary ex rel. Bailey, v. Arkansas Carbona Company, 5 FMSHRC 2024 (1983). It is further ordered that Tolbert Mullins jointly and severally with the aforementioned Respondents, pay the said costs of $654.18 and $2,089.75 of said backpay (inasmuch as his chargeable act of discrimination occurred on February 26, 1986) within 30 days of the date o this decision. It is further ordered that Prestige Coal Co., immediately provide employment to Bobby Keene in a capacity commensurate with his skills and at no less pay than he was receiving at the time of his discharge from S&M Coal Company, Inc. on February 13, 1986. It is further ordered that S&M Coal Company, Inc., Prestige Coal Company, and Tolbert Mullins, jointly and severally pay a civil penalty of $1,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 5 1987

NEWTON J. JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-139-D
v.	:	
	:	BARB CD 86-40
ALLIED COALS, INC., Respondent	:	Allied Mine No. 2

DECISION

Before: Judge Fauver

This proceeding was brought by Complainant, Newton J. Johnson, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., for reinstatement and back pay.

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

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

This matter is now before me upon Respondent's Motion for Summary Decision, filed on January 27, 1987, pursuant to 29 C.F.R. § 2900.64. Complainant was served a copy of the motion and, by order of February 23, 1987, was granted three weeks to respond to the motion. No response has been filed.

The record affirmatively shows the followed undisputed facts:

1. On June 4, 1984, Johnson applied for the job of night watchman at Allied Coals, Inc. Terry Mullins, Allied's mine superintendent, interviewed Johnson for the job. Mullins told him the night watchman position would include picking up garbage and washing vehicles. Mullins hired Johnson for the night watchman job and Johnson started at $3.35 per hour.

2. While employed at Allied, his tasks included watching the No. 1 and 2 mines, loading supplies, washing vehicles, picking up garbage, shoveling the belt line on the outside of the mine, and other odd jobs. Johnson did these tasks when asked by his supervisor, Vernon Noble. In between tasks and on weekends when the mine was not operating, Johnson remained in the night watchman's office.

3. While employed at Allied, Johnson did not complain to anyone in management about the safety or health conditions of the jobs he was doing. He never complained that the jobs he was asked to do were unsafe, or that he lacked training.

4. In April of 1985, Johnson asked Terry Mullins for a raise. Johnson told Mullins he wanted a raise because his job involved tasks other than simply watching the property. Mullins refused to give him a raise.

5. On May 8, 1985, Vernon Noble told Johnson to go to Mine No. 2 and help supplyman Kim Rice. When Johnson arrived, Rice told him to shovel the outside belt line. Johnson had shoveled the belt line several times before. This time, he did not want to do it and he quit. Johnson went to Vernon Noble and told him "I wasn't shoveling no belt line." Johnson told Noble he was quitting and left the property.

6. Almost a year later, on April 24, 1986, Johnson filed a discrimination claim with the Mine Safety and Health Administration, United States Department of Labor. On August 5, 1986, the Mine Safety and Health Administration notified Johnson that in its opinion no violation of § 105(c) had occurred. On August 11, 1986, Johnson filed this complaint with the Federal Mine Safety and Health Review Commission.

DISCUSSION

To establish a claim under § 105(c) of the Act, the complaining miner has the burden of proving that he engaged

in protected activity and that the employer took adverse action against him that was motivated in part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), revd. on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981); Boich v. Federal Mine Safety and Health Review Commission, 704 F. 2d 272 (6th Cir. 1983).

Johnson admits that his sole complaint is that he was required to perform tasks that involved more than merely watching the property and that others who were performing some of the same tasks were paid at a higher rate (Dep. 31, 38, 44, 54, 61-62, 97-98). For example:

Q. Okay. What is your claim against the Company?

A. They ought to have been paying me $10.50 just the same as they was paying all them other workers, like Dean Mullins and all of them. Cause they was unloading supplies and so was I.

Q. Is that that your whole claim against the Company?

A. Yeah. (Dep. 38).

Johnson's only complaint is that in his opinion, he should have been paid more. He asked for a raise once and quit a month later (Dep. 18, 28-30). This is not protected activity under the Act.

Also, Allied did not take any adverse action against Johnson. He admits that he voluntarily quit, and that he quit only because he did not want to perform his assigned tasks at the rate the company was paying him. (Dep. 35-36, 37, 47-48):

Q. Okay. Why did you quit?

A. 'Cause I wasn't going to shovel that belt line no more over at the #2. (Dep. 33).

Q. You just didn't want to do it? Is that right?

A. That's right. I ain't going to shovel no belt line Why should I shovel it, and somebody else shovel it and they getting $10.50 for it and me just getting $3.35. (Dep. 35).

The Act does not protect a miner from the consequences of voluntarily resigning a job for reasons unrelated to safety or health. See, e.g., Munsey v. Federal Mine Safety and Review Commission 595 F. 2d 735, 744 (D.C. Cir. 1978).

Johnson voluntarily quit his job for reasons unrelated to any safety or health concerns. Respondent is therefore entitled to summary decision.

On an independent ground, Johnson's complaint to MSHA was severely late, and barred by the 60-day time limit for filing complaints under the Act.

ORDER

WHEREFORE IT IS ORDERED that Respondent's Motion for Summary Decision is GRANTED and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

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MAR 5 1987

LARRY BRIAN ANDERSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 86-221-D
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, Respondent	:	

DECISION

Appearances: Michael J. Healey, Esq., Healey & Davidson, Pittsburgh, Pennsylvania, for Complainant; Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

On July 14 and September 17, 1986, Complainant filed a complaint with the Commission alleging that he was denied employment by Respondent because of allegations that he "turned in" a foreman of a mine operated by a related company for a safety violation. Complainant stated that these allegations are not true.

On September 18, 1986, Respondent filed a Motion to Dismiss on the grounds that it was not properly served and that Complainant failed to state a claim under section 105(c) of the Act. By order issued October 2, 1986, I denied the Motion.

Pursuant to notice, the case was heard in Pittsburgh, Pennsylvania, on December 16, 1986. Larry Anderson, Kerry Anderson and James Miller testified on behalf of Complainant. Victor J. Columbus, Richard E. Kidd, Louis Barletta and Ed Dudzinsky testified on behalf of Respondent. Both parties have filed post hearing briefs. Based on the entire record and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Greene

County, Pennsylvania, known as the Bailey Mine. Respondent is affiliated with Consolidation Coal Company.

Complainant worked as a miner for Consolidation Coal Company at its McElroy Mine from January 1976 to 1979, as a shuttle car operator and loader operator. He worked as a shuttle car operator at a U.S. Steel Mine for about a year beginning in February 1980. In March 1981, he was recalled by Consol at the Loveridge Mine and worked until he was laid off in December 1984. He worked as a continuous miner operator and bolter operator.

In January 1985, Complainant submitted an application for employment at Respondent's subject mine. He underwent a mechanical aptitude test and psychological test and was interviewed March 26, 1985 by the mine's industrial relations supervisor Ed Dudzinsky. Following the interview, Dudzinski "was impressed" with Complainant and stated he would recommend him as a face equipment operator. Complainant was then interviewed April 10, 1985,by Louis Barletta, mine foreman at the subject mine. At that time Barletta was seeking maintenance and general personnel rather than face equipment operators. Because Complainant's experience was as an equipment operator, his application was placed "in the active file for further consideration." (Tr. 95). No applicants have been hired for work at the face since April 1985.

Several weeks after Barletta interviewed Complainant, Dudzinsky called the personnel representative Wayne McArdle at the Consol McElroy mine and talked to him about claimant and other applicants who had worked at McElroy. McCardle told him that better people than Complainant were available from McElroy and that Complainant had had problems with a supervisor. Bailey Mine personnel assistant Richard Kidd was asked to do a "reference check" on Complainant. McCardle told Kidd that Complainant was an average employee at best. His attendance was average. He also told Kidd of an incident in which Complainant "was involved in trying to set up foreman Nicely for some type of roof control violation." (CX3; Tr. 116). Four others at McElroy stated that Complainant was a good worker and they would recommend him. Al Polis of the Loveridge mine stated that Complainant "had been nothing but trouble. . .all types of illness." (CX3).

On October 4, 1985, Complainant wrote to B.R. Brown, Chief Executive Officer of Consolidation Coal Company complaining that he was not hired because of his religious convictions. Brown referred the letter to the subject mine where the current Supervisor of Industrial Relations Victor Columbus (Dudzinsky's successor) began an investigation. Dudzinsky told Columbus that "he felt uncomfortable with [complainant] because he felt

[complainant] had not been straightforward with him in the interview. . ." (Tr. 56). Columbus obtained Complainant's attendance record when he worked at the Loveridge Mine in 1983 and 1984. These show three unexcused absences in 1983 and six unexcused absences in 1984. Further evidence shows that Complainant was under a doctor's care and received substantial treatment in 1983 and 1984 for a back condition. Based on this investigation, Columbus in early 1986 decided that he would no longer consider Complainant for employment at the subject mine.

In the summer of 1985, Complainant filed a complaint with the Pennsylvania Human Relations Commission charging Respondent with discrimination on the basis of religion and handicap. A hearing was held on April 3, 1986. At the hearing on the complaint, Columbus stated on behalf of Respondent that Complainant along with other "had turned in a boss for a safety violation, going under an unsupported roof." (Tr. 21). This was given as a reason for not hiring Complainant. In fact, Complainant had never complained to State or Federal authorities of safety violations or alleged safety violations by his supervisors.

With respect to Complainant's attendance, the record shows that at McElroy Mine his "attendance was average, did miss some days." (Tr. 116). It further shows that his attendance was "very good, travels a long way . . . always on time . . . willingness to work overtime as needed . . ." (CX 3, Tr. 117-118). These remarks were based on discussions with McElroy personnel and with Bailey Mine personnel who knew Complainant. Since he filed his application with Respondent, Complainant received training in electrical work at the Tri-State Training Services. He took an examination and has been certified by MSHA in low, medium and high voltage electrical work. He notified Columbus of this by telephone.

ISSUES

1. Did Respondent discriminate against Complainant in violation of section 105(c) of the Act when it refused to hire him or when it refused to consider him for future employment?

2. If it did, to what remedy is Complainant entitled?

CONCLUSIONS OF LAW

JURISDICTION

Complainant and Respondent are protected by and subject to the provisions of section 105(c) of the Act, Complainant as an applicant for employment in a mine, and Respondent as the

operator of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

PROTECTED ACTIVITY

Ordinarily a Complainant alleging discrimination must show that he engaged in protected activity and the adverse action complained of resulted from that activity. Secretary/Pasula v. Consolidation Coal KCo., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). In this case Complainant states that he did not engage in safety-related protected activity, but that Respondent believed he did and discriminated against him because of that belief. In Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (1982), the Commission faced a similar issue and held that a Complainant may establish a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion.

I conclude that Respondent believed or suspected that Complainant reported safety violations committed by his supervisor, which would have clearly been protected activity.

ADVERSE ACTION

Following Complainant's interview by Louis Barletta on April 10, 1985, he was not hired for the openings at the subject mine and his application was put back "in the active file." This was adverse action. In "early 1986," Respondent decided that it would no longer consider Complainant for employment and his application was removed from the active file. This was further adverse action.

MOTIVATION

Respondent advances three reasons for the adverse action described above: (1) Complainant's absentee record at other Consol mines; (2) The lack of openings at the subject mine for a miner with Complainant's experience and skills; (3) Complainant's lack of candor in failing to inform Respondent that he complained of safety violations committed by a supervisor at a Consol mine. With respect to the third reason, I have found as a fact that he did not make such complaints. Nevertheless, Respondent believed that he did and its refusal to consider him for any position at the subject mine was motivated in part by that belief. Therefore, Complainant has established a prima facie case of discrimination under section 105(c).

I conclude that Respondent's reliance on Complainant's absentee record was pretextual and not a genuine motive for either of the instances of adverse action referred to above. I base this conclusion on a consideration of Complainant's employment record at Consol mines, as disclosed by exhibits, and the tetimony of Respondents witnesses Columbus, Kidd and Dudzinsky. I am persuaded that the ultimate reason for rejecting Complainant's application was the belief that he accused a supervisor of a safety violation and failed to disclose this incident.

However, the evidence also establishes that the rejection of Complainant for employment in April 1985 was because he was not sufficiently qualified for the openings them available at the subject mine. This decision was made by Barletta and the evidence does not indicate that he was aware of the alleged incident involving a safety complaint at McElroy. I conclude that Respondent would have taken this adverse action (refusal to hire) for unprotected activity alone. See Pasula, supra; Moses, supra.

However, the action in 1986 in removing Complainant from consideration for any job was not motivated by his work experience and skill, but rather by Respondent's conclusion that he was a troublemaker, i.e., that he "was involved in trying to set up" a foreman for some type of safety violation. This motivation is proscribed by section 105(c). Therefore, I conclude that Respondent's removal of Complainant from consideration for employment in "early 1986" was a violation of section 105(c) of the Act.

REMEDY

Fashioning an effective remedy for the discriminatory conduct I have found is difficult. Barletta testified that no miners have been hired to work at the face between April 1985 and December 16, 1986. Complainant's qualifications are primarily though not exclusively for face work. In an attempt to remedy the misconduct, Respondent will be ordered to reinstate Complainant's application and consider it in good faith for openings at the subject mine without regard to his alleged absentee record, and without regard to his alleged reporting of supervisor's safety violations. This shall include all work for which Complainant is qualified, considering his experience and his recent electrical training. Respondent will be ordered to notify me within 30 days of the date of this decision of what steps it has taken to comply with this order. Finally, Respondent will be ordered to reimburse Complainant for reasonable attorneys fees and costs of litigation.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED:

(1) To reinstate Complainant's application for employment at the subject mine and consider it in good faith for openings for which he is qualified, without regard to his alleged absentee record at Consol mines and without regard to his alleged reporting of supervisor's safety violations;

(2) To cease and desist from considering prior protected safety activity in denying employment applications at the subject mine;

(3) To notify me within 30 days of the date of this decision what steps it has taken to comply with the above orders;

(4) To reimburse Complainant for his reasonable attorney fees and costs of litigation. If counsel can agree on the amount of such fees and expenses they shall so notify me within 20 days of the date of this decision. If they cannot agree, counsel for Complainant shall submit his statement of fees and expenses within 20 days and counsel for Respondent shall have 20 days thereafter to reply.

(5) This decision is not final until the matters in Order (3) and (4) are submitted, and I have issued a supplementary decision concerning such matters.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 5 1987

HARLAN L. THURMAN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 86-121-D
QUEEN ANNE COAL COMPANY, Respondent	:	BARB CE 86-51

DECISION

Appearances: James C. Shastid, Esq., Knoxville, Tennessee, for Complainant;
Charles A. Wagner, Esq., Knoxville, Tennessee, for Respondent

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under Section 105(c) of the Federal Mine Safety and Health Act of 1977 30 U.S.C. § 815(c) (the Act) alleging that he was illegally discriminated against in that, in essence, he was forced to quit his job with Respondent due to the danger to him as a consequence of harrassment from co-workers and his foreman.

Pursuant to notice of September 16, 1986, the case was set for hearing in Knoxville, Tennessee on November 4, 1986. On October 22, 1986 Respondent filed a Motion for Continuance. On October 29, 1986 a Order was issued granting the Motion for Continuance and scheduling the case for hearing on December 2, 1986. On November 24, 1986 Respondent filed a Motion to Dismiss on the ground that: 1. the Complaint was not timely filed, and 2. the Complaint failed to state a violation of 30 U.S.C. § 815(c) 1. At the hearing on December 2, 1986 an oral argument was presented by the Parties as to Respondent's Motion. After listening to the arguments, I denied the Motion to Dismiss that was based upon the ground that the complaint was not timely filed. I reserved decision on the Motion to Dismiss which was made on the grounds that the complaint failed to state a violation of Section 815(c) 1 supra.

The case was subsequently heard in Knoxville, Tennessee on December 2, 1986. At the hearing Complainant was represented by James C. Shastid, and Respondent was represented by Charles A. Wagner, III. Harlan Thurman and Deborah Thurman testified for Complainant. Robert Swisher, Dempsey Lindsey, Crawford Harness, Jeffery Mason, and Dewayne Mason testified for Respondent. On December 9, 1986 a letter was received from Complainant in which he advised that Attorney James Shastid was no longer representing him. This was confirmed in a letter from Mr. Shastid received on December 12, 1986. Subsequent to the hearing, the Parties, on February 2, 1987 filed posthearing briefs. On February 17, 1987 a reply brief was filed by Complainant. On the same date a letter was received from Counsel for Respondent who, in essence, waived his right to file a Reply Brief.

Findings of Fact

The Complainant, Harlan L. Thurman, had been employed as a miner by the Respondent, Queen Anne Coal Company, for 3 years prior to March 1986. During that time, he worked the night shift with the same personnel.

The Complainant testified that in the 3 years that he worked for the Respondent there was no outside man. Robert Swisher, the President, and one of the owners of Respondent testified that there has not been any outside man at Respondent's mine for approximately 9 or 10 years. Thurman, in essence, testified that during the 3 years he worked for Respondent his co-workers and foreman continuously hassassed him. He said that they put urine in his tea, that his clothes were tied up, that dish washing liquid was poured over his clothes, that there was grease placed on the seat of his vehicle, there were logs placed under the vehicle's wheels, and a headlight was broken on his vehicle. He also said that in the summer of 1985 he was sent to work alone by his foreman Crawford Harness. It also was Thurman's testimony that when he started to work for Respondent there was an incident when only four men were on the shift and a miner was being operated. In the summer of 1985, Complainant made a complaint to Dempsey Lindsey, the Respondent's superintendent, that Crawford had cursed him over a mistake in transporting certain supplies. Complainant also made a complaint to Lindsey, in the summer of 1985, that the men had left him alone when he had to get a scoop cart out of the mud.

Complainant's work shift usually commenced at 4:00 p.m. and concluded at 1:30 a.m. On March 6, 1986 the Complainant started to work on the shift at 4:30 p.m. and left early at 10:30 p.m., in essence, because he felt that the harrassment from his foreman and co-worker, coupled with the lack of an outside man, created a dangerous condition to him under ground. Prior to March 6, 1986

the Complainant had not made any safety complaints to MSHA Officials, or company management officials.

On March 7, 1986 the Complainant went to see Emroy Haggard, the bookkeeper and part-owner of the Respondent, and told him, in essence, that Respondent's employees were taking coal. He also "explained to him what had been going on and some of the stuff that been happening". (Tr. 32). Haggard then set up a meeting for the Complainant with Swisher the following Monday. At that meeting Complainant indicated that the men on the shift were harrassing him. Thurman had told him that at one time that Crawford stuck his fist in his face and threatened to whip him. Swisher also said that Thurman told him that the men on the shift were: stealing company coal; had broken the headlight on his truck while it was on Respondent's site; had urinated in his food, and had locked him inside the gate. Thurman also told Swisher that there was no outside man. He also told Swisher that Harness does not have any education. Thurman had also told him that when he first started to work for Respondent his shift ran a miner with only four people on the shift.

Swisher than convened a meeting the following Thursday with himself, Thurman and the men on the shift along with Foreman Dempsey. At that meeting, in essence, Complainant's complaints were reiterated, then Swisher told the men on the shift that he would not tolerate any horseplay. According to Thurman, Swisher told him then to go back to work. Swisher also asked Lindsey to find Thurman a job on the day shift.

After the meeting Thurman intended to return to work. However, shortly after he left, Thurman returned to the office and told Dempsey and Swisher that, in essence, that he could no longer work under ground with the men on the shift. Thurman gave his reason that he feared for his safety because Dempsey and Harness were "like they were a clique". (Tr. 107). Swisher told Lindsey to try to get Thurman a job on the day shift. However, Lindsey has testified that in general it is diffcult to get men from the day shift to transfer to the night shift, and that in this case none of the day shift men wanted to trade with Thurman and work on the night shift. Lindsey also talked to the president and manager of another mining company, where Thurman had previously worked, with regard to obtaining a job for Thurman.

Thurman did not return to work after he left early on March 6, and subsequently obtained other non mining employment.

Issues

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

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

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

Conclussions of Law

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

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff supra at 1863, stated as follow:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. MSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected Activity

Thurman's complaints to Swisher on or about March 10, 1986 with regard to the lack of an outside man, and complaints the following Thursday that there was an incidence whereby a miner was operated with only four men in the section, both contained allegations of safety violiations and as such are considered protected activities. The balance of the complaints made to Swisher, Haggard, and Lindsey, all had to do with allegation of harrassment by Thurman's co-employees, were not protected activities (see Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251 (July 1983)). In the same way complaints to Swisher and Haggard with regard to co-workers taking Respondent's coal, are not safety related and thus are not protected activities.

Adverse Action

Complianant, in essence, complains of four adverse actions by Respondent:

1. Swisher told Thurman to go back to work on about March 13, 1986 after Swisher had heard Thurman's various complaints.

2. The fact that Respondent had not found a job for Thurman on its day shift.

3. The fact that the Respondent had not cured its alleged violation of not having an outside man.

4. Swisher threatened Thurman by telling him about a former employee of Repondent who was killed when a tank that he had put a torch to had blown up.

There is no evidance that Respondent took any adverse action against Thurman which was motivated in any part by safety complaints. Indeed, I find that although Thurman at the hearing complained of unsafe practices such as not having an outside man and operating a miner with only four men, there is no evidence that Thurman made any complaint about these condition to any government official, or agent of Respondent prior to the date that he left work, i.e., March 6, 1986. Thurman alleges that after he made various complaints to Swisher on or about March 10 and March 13, 1986, Swisher told him to go back to work. I hold that Swisher's comments to Complainant, in indicating on or about March 10, 1986 that Thurman should go back to work, did not constitute any adverse action. Surely, having Thurman return to his usual job can not be found to be an adverse action. Similarly, although Thurman might reasonably have felt that for him to return to his section, where he was subject to harrassment, would be a danger to him, this can not constitute any type of constructive discharge. In this connection, it is manifest that the Act does not contemplate protecting a miner from harrassment from a co-worker, when that harrassment is not motivated by the miner's safety complaints. In this case, there is no evidence that harrassments from Thurman's co-workers were motivated in any part by Thurman's complaints about not having an outside man. Indeed, all evidance indicates that Thurman's complaints in this regard occurred subsequent to the date that he left work. Also there is no evidence that the harrassment from co-workers were abetted or encourged by management. Indeed, Swisher's uncontradicted testimony was to the effect that at the meeting with Thurman's co-workers on March 6, 1986, after Thurman had complained of harrassment, he (Swisher) told them to stop engaging in horseplay.

Also, it is clear that Respondent did not commit any adverse action in not finding Thurman a job on the day shift. Not only is there no evidence that this was not in any way motivated by Thurman's protected activities but to the contrary, the only evidence in record, testimony by Dempsey, is that none of the day shift wanted to switch shifts with Thurman. To require Respondent to create a position for Thurman on the day shift, would unduely interfere with its business decision in managing its mine.

Thurman might have felt threatened by hearing Swisher telling him of a former miner, who had some type of emotional problem, who was killed in an accident at the mine. However, there was not evidence that Swisher, in telling of this incident, had any intent to threaten Thurman. Nor is there any evidence that his telling of this incident in any way was motivated by Thurman's protected activities. Indeed, Swisher testified that he told of the incident in order to relate his care for his employees.

Complainant appears to arguing that inasmuch as Respondent continues to operate without an outside man at the mine, that this is an adverse action against him. It is clear that although failure to provide a miner with a safe work place might be a violation under the Act but that "such a failure does not without more consititute discrimination." (Lund v. Anamax Mining Company 4 FMSHRC 249, 251 (February 1982)).

Therefore, based upon the above I conclude that Thurman failed to established the second element of a prima facie case i.e., that he did not show that there was an adverse action by Respondent motivated by in any part by safety complaints. I conclude that accordingly Complainant has not established that he was discriminated against under Section 105(c) of the Act.

Order

Based upon the above Findings of Fact and Conclusions of Law, it is ORDERED that this proceeding be DISMISSED. As such, Respondent's Motion to Dismiss is GRANTED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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MAR 5 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 85-162-M
Petitioner	:	A.C. No. 04-04707-05502
	:	
v.	:	Docket No. WEST 85-174-M
	:	A.C. No. 04-04707-05503
SIERRA AGGREGATE COMPANY,	:	
Respondent	:	Red Top Mine

DECISION

Appearances: Joseph T. Bednarik, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Mr. Donald Jolly, Bishop, California, pro se.

Before: Judge Lasher

These proceedings were initiated by the filing of petitions for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (1977)(herein the Act). A hearing on the merits was held in Bishop, California on September 16 and 17, 1986, at which Respondent represented itself. The Secretary was well and ably represented by counsel.

The Secretary seeks assessment of penalties against Respondent for a total of 7 alleged violations involved in the two dockets which were consolidated for hearing in the Notice of Hearing issued July 23, 1986.

PRELIMINARY DISCUSSION

1. Background.

On March 18, 1985, MSHA Inspector Ronald Ainge conducted an inspection of the Red Top Mine operated by Sierra Aggregate Company near Victorville, California. At all relevant times the mine was owned and operated by Mr. and Mrs. Donald Jolly (T. 4, 11, 41, 42) as a sole proprietorship in a community property state. The Red Top Mine is one of two owned and operated by the Jollys. The other, the Black Point Mine, is located near Bishop, California. The offices of Sierra Aggregate Company are located at 2239 Sunrise Drive in Bishop.

Inspector Ainge observed 3 men working at the mine site when he arrived on March 18, 1985. One of these, Bret Redman, was employed full-time by Respondent as a watchman and front-end loader operator (T. 77) and the other two, although characterized by Respondent Donald Jolly as independent contractors (T. 79) and "self-employed" (T. 78) were actually hourly-paid, part-time employees (T. 76-80). Mr. Redman accompanied Inspector Ainge during the inspection.

2. Federal Pre-Emption.

Respondent, in correspondence (letter dated November 7, 1985) has raised the issue that regulation of his mine by MSHA is improper since such is also regulated by the California Occupational Safety and Health Administration (CAL-OSHA). The California OSH Act does not preempt the Federal Mine Safety and Health Act of 1977. Brubaker-Mann, Inc., 2 MSHRC 227 (1980). Section 506 of the Act (provided in the original 1969 Mine Act and left intact by the 1977 Amendments) permits concurrent state and federal regulation, and under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixy Lee Ray v. Atlantic Richfield Company, 98 S. Ct 988, 435 U.S. 151, 55 L. Ed. 2d 179 (1978); Bradley v. Belva Coal Company, 4 MSHRC 982, 986 (1982). Accordingly, Respondent's contention is found to lack merit and is rejected.

3. Interstate Commerce.

The principal activity at Respondent's two mines is the excavation and processing of volcanic material into cinders. (T. 42-43). This material is sold for the production of concrete blocks (T. 43), decorative bricks (T. 44), soil additives (T. 44-45) and highway cinders (T. 70). Approximately 99% of the output of the Black Point Mine and 20% of the output of the Red Top Mine was sold to the State of California which used the cinders in the maintenance of highways, including U.S. Highway 395 and Interstate 15 (T. 72-74).

Sierra Aggregate Company owns a substantial amount of mobile equipment which is used at both mine sites. The equipment was manufactured out-of-state primarily by Caterpillar (T. 56-59, 81, 84) and is powered by diesel fuel. The total amount of diesel fuel purchased by Sierra Aggregate Company in 1985 exceeded 7,000 gallons (T. 83). Such was purchased from wholesale distributors of products manufactured by Chevron (T. 64) and Union Oil (T. 63). I take notice that these are businesses engaged in interstate commerce.

Accordingly, it is concluded that Respondent mine operator owns and operates the mine in question at which volcanic material (cinders) is mined and processed for sale or use in or affecting interstate commerce.

4. Respondent's Mine in Operation.

Respondent contends that the mine (plant) was not in operation and that the Citations thus should not have been issued. The record, however, is clear that the plant was in operation on and off during the period February through May, 1985, and that on the day of the inspection, Bret Redman, who was characterized by Mr. Jolly at the hearing as being a front-end loader operator and watchman, was engaged in work as were two other part-time employees. This contention simply lacks merit and is rejected.

5. Preliminary Findings With Respect To Penalty Assessment Criteria.

a. Respondent, a sole proprietorship owned by Donald Jolly and his wife, Janis, is a small mine operator engaged in the surface mining, crushing, sizing, loading, sale and shipment of volcanic cinder (T. 42-48, 63-66, 70).

b. Respondent is a small mine operator (T. 31-33, 43, 53, 69, 70).

c. Respondent has no history of previous violations (T. 97).

d. Payment of penalties in this matter will not jeopardize Respondent's ability to continue in business (T. 97, 98).

e. With respect to Citations Nos. 2364580, 2364581, 2364582, 2364583, and 2364586, the Secretary concedes that Respondent, after notification of the violation, proceeded in good faith to promptly abate the violative conditions. With respect to Citations Nos. 2364584 and 2364585 the Secretary contends that Respondent did not proceed in good faith to promptly abate the violative condition; findings will be made in the separate discussion of these two violations which follows.

With the exception of the first Citation litigated and discussed herein, No. 2364580, which subsequently herein I have vacated, the remaining Citations charge contravention of safety and health standards in Part 56 of Title 30 of the 1984 Code of Federal Regulations (Revised as of July 1, 1984) covering sand, gravel and crushed stone operations.

The mandatory assessment factors of negligence, gravity and, where pertinent, abatement, will be taken up subsequently in the discussion of the separate alleged violations.

Docket No. WEST 85-174-M (Citations Nos. 2364581, 2364582 and 2364583)

Citation No. 2364581

The standard infracted, 30 C.F.R. § 56.12-28 provides:

Mandatory. Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary of his duly authorized representative.

'The violative condition (or practice) was described by the Inspector as follows:

There was no record of a continuity and resistance of grounding check being done within the recent past or at least Mr. Redman could not produce them.

The Respondent, Mr. Jolly, conceded on the record that the violation occurred (T. 90). Although the Inspector did not believe the violation was likely to result in the happening of the contemplated hazards (minor shock to electrocution), the gravity of the potential injury mandates a finding that the violation was at least moderately serious. Mr. Jolly, as previously noted, admitted the violation, and more specifically, conceded that the test itself had not been performed. Approximately one year prior to the issuance of the subject citation, Inspector Ainge advised Mr. Jolly that he was required to perform this test (T. 87, 88). Accordingly, Respondent is found to be negligent in the commission of this violation. The Secretary concedes that this violation was abated promptly and in good faith upon Respondent's notification thereof (T. 102). A penalty of $30.00 is assessed.

Citation No. 2364582

The standard infracted, 30 C.F.R. § 56.4-12 (T. 136) provides:

All flammable and combustible waste materials, grease, lubricants or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

The violative condition (or practice) was described by the Inspector as follows:

There was a large amount of diesel fuel spillage on the ground at the fueling area.

The Inspector testified that there was extensive diesel fuel oil on the ground inside Respondent's refueling shed and that the mine operator had been notified of the fire hazard created thereby on a previous inspection. There were fire ignition sources in the area as well as other materials which would burn in the event of a fire. Had a fire started in the area, the

violative condition observed, as a minimum, would have contributed to and aggravated the hazard. Because diesel fuel is not as flammable as gasoline and since the possibility of a fire occurring was relatively remote, this violation is found to be but moderately serious. The mine operator, having prior knowledge of the hazard created, was clearly negligent. The violation was abated in good faith by the Respondent upon notification thereof. A penalty of $20.00 is sought by the Secretary and such is found appropriate and assessed.

Citation No. 23683

The standard infracted, 30 C.F.R. § 56.4-7 (T. 135-137) provides:

> "Means shall be provided to remove or control spilled flammable or combustible liquids."

The violative condition (or practice) was described by the Inspector as follows:

> "The buckets that were placed under the oil barrels on the oil rack had been turned upside down and oil had been allowed to contaminate the earth under the oil rack."

The same violative condition had been cited on a previous inspection by Inspector Ainge. As to seriousness, the Inspector indicated that it would take "quite a fire" to get the oil-contaminated area to burn. Accordingly, this violation is found to be of a low degree of gravity and to have resulted from Respondent's negligence in allowing the condition to re-occur. Since this violation, like the previous one, was abated promptly and in good faith by the mine operator upon notification, the Secretary's administrative "single penalty assessment" of $20.00 is found appropriate and is assessed.

Docket No. WEST 85-162-M

Citation No. 2364580

The standard infracted, 30 C.F.R. § 50.30(a) provides:

> Preparation and submission of MSHA Form 7000-2 - Quarterly Employment and Coal Production Report.
>
> (a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, CO 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from

MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

The violative condition (or practice) was described by the Inspector as follows:

"Mr. Redman could not produce the quarterly reports that are to be maintained on file at the mine property as stated in Part 50, 30 Code of Federal Regulations."

The regulation requires that the operator shall retain an operator's copy of the required quarterly report form "at the mine office nearest the mine ...." The record clearly establishes that this small mine operator's nearest-and only-mine "office" was in Bishop, California, and that indeed a copy of the form required retained there. The Inspector apparently was under the impression at the time he issued the Citation that the form was required to be kept at the mine site, since in the body of the Citation he mentioned that such reports "are required to be maintained at the mine property." Since under the precise requirements of the regulation and in the perspective of the geographic configuration of this modest mine operation the form was kept where it was required to be, no violation is found to have occurred.

Citation No. 2364584

The standard infracted, 30 C.F.R. § 56.14-1 provides:

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The violative condition (or practice) was described by the Inspector as follows:

"There were not any guards on either the head or tail pulley on the feed belt under the feed hopper. The plant was down for crusher repair."

During his inspection on March 18, 1985, Inspector Ainge observed that neither the head pulley nor the tail pulley on the conveyor system had guards to protect employees from contacting the pinch point (T. 143). A guard would have prevented contact between the pinch point and an individual's body or clothing or any tools which the individual may be using (T. 144). According to Mr. Ainge, the most likely result of such contact would be a

loss of limb (T. 151). Since the plant was not in production at the time of the inspection, Mr. Ainge felt that an injury was not likely to occur (T. 151). The violation is thus found to be of only a moderate degree of seriousness.

Inspector Ainge discussed the condition with Mr. Redman (T. 151) and explained what modification would be required to abate the hazard (T. 152). An abatement date of April 2, 1985, was selected (T. 152). On May 10, 1985, the conveyor were re-inspected by Inspector Ainge (T. 152). At that time, the head pulley was guarded but no work had been performed on the tail pulley (T. 153). A continuation was issued by the Inspector (T. 153).

Inspector Ainge reinspected the conveyor on May 30, 1985. No additional work had been performed on the tail pulley (T. 153). A Section 104(c) non-compliance order was issued by Ainge after which abatement was accomplished.

While there was no specific evidence of Respondent's negligence attendant to the initial violation (T. 158), Respondent's failure to promptly abate the violation after notification thereof was willful; the plant was in operation at least four days during the interim period after the Citation was issued and before abatement was accomplished (T. 158; 2d Transcript, T. 17). A penalty of $200.00 is assessed.

Citation No. 2364585

The standard infracted, 30 C.F.R. § 56.14-1 provides:

> "Gears; Sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The violative condition (or practice) was described by the Inspector as follows:

> "The head pulley on the 30" x 80' feed belt was not guarded. The plant was not working due to repair on the crusher."

The Inspector testified that a miner could have been pulled into the head pulley with resultant severe injuries including the separation of a limb. It was also his opinion, however, that it was unlikely such an accident would occur. The Respondent only partially abated the violative condition even after the Inspector extended the original abatement time, and it was necessary for the Inspector to issue a Section 104(b) non-compliance order. No evidence of negligence or willfulness was proffered with respect

to the initial commission of the violation. A penalty of $200.00 is assessed in view of the Respondent's intransigence - or substantial neglect - with respect to prompt abatement of the violation.

Citation No. 2364586

The standard infracted, 30 C.F.R. § 56.11-1, relating to travelways, provides:

> "Safe means of access shall be provided and maintained to all working places."

The violative condition (or practice) was described by the Inspector as follows:

> "There is three elevated conveyor belts that have gear reduction boxes on them. This area must be serviced at regular intervals. The people have been walking up the conveyor belts to access these areas."

The hazard foreseen by the Inspector was that miners servicing and lubricating would be required to walk up the conveyor belt to do so and there being no "safety means" present such personnel could fall to the ground- a distance of some 40 feet. Had such an accident occurred, there was a "strong possibility" of a fatal injury, according to the Inspector. Although Respondent was given one month to abate the violation, such was not accomplished. The Inspector concluded, and I find, that Respondent knew of the violative condition/practice and was negligent in continuing such. While it does not appear that Respondent proceeded in good faith to promptly abate the violation after notification, Petitioner specifically makes no such contention, so it is found that Respondent did abate the violation in good faith. This violation is serious in view of the gravity of the hazard posed. Further, Respondent presented no rebuttal to the Secretary's allegation that this was a "serious and substantial" violation. In view of the severity of the hazard posed by the violation, the operator's apparent lack of concern for compliance with mine safety standards, and the Inspector's testimony as to the likelihood of the occurrence of an accident, it is concluded that the Secretary established the prerequisite elements of proof for "significant and substantial" violations mandated by the Federal Mine Safety and Health Review Commission in its decision in Mathies Coal Co., 6 FMSHRC 1 (1984, to wit:

> "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be a reasonably serious nature."

In the premises, the Citation is affirmed in all respects and a penalty of $150.00 is assessed.

ORDER

1. Citation No. 2364580 is vacated.

2. The remaining 6 Citations hereinabove discussed are affirmed in all respects.

3. Respondent shall pay the Secretary of Labor within 30 days from the date hereof the six penalties hereinabove individually assessed in the total sum of $620.00.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 5 1987

ALFRED H. COX,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 86-73-D
	:	MSHA Case No. MORG CD 85-18
PAMMLID COAL COMPANY,	:	
Respondent	:	No. 5 Mine

DECISION

Appearances: Paul R. Stone, Esq., Charleston, West Virginia, for the Complainant; William C. Garrett, Esq., Garrett & Van Nostrand, Webster Springs, West Virginia, and Laura E. Beverage, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for the Respondent.
Rebecca Betts, Esq., King, Betts & Allen, Charleston, West Virginia, for Carson Jackson and Rodney Blankenship (respondent's president and vice-president).

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Alfred H. Cox against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Cox filed his initial complaint on June 11, 1985, with the Secretary of Labor, Mine Safety and Health Administration (MSHA), claiming that his discharge from his job as a scoop operator on or about May 11, 1985, was based on his "safety concerns" at the mine. In several subsequent statements submitted to MSHA in support of his complaint, Mr. Cox further alleged that he was discharged for making safety complaints to mine management concerning certain alleged unsafe mine conditions which he assertedly documented in a personal log or notebook. In addition, during the course of the hearing, Mr. Cox alleged that his discharge was also prompted by certain alleged complaints that he made to MSHA inspectors. Following an investigation

of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and notified Mr. Cox of this finding by letter dated November 7, 1985. Mr. Cox then filed his pro se complaint with this Commission on December 6, 1985. The matter was assigned to former Judge Joseph Kennedy for adjudication, but was subsequently reassigned to me upon Judge Kennedy's retirement.

The respondent filed a timely answer to the complaint and denied that it discriminated against Mr. Cox in violation of section 105(c) of the Act. As an affirmative defense, the respondent asserted that Mr. Cox was discharged for insubordination, and in support of its defense asserted that in a decision of the West Virginia Department of Employment Security, dated May 29, 1985, in connection with Mr. Cox's application for unemployment benefits, Mr. Cox reportedly stated that the reason he was fired was for unsatisfactory service, and not because of his alleged complaints about unsafe mine practices. In a subsequently filed pleading in response to a pretrial order issued by Judge Kennedy, the respondent asserted that Mr. Cox was discharged for unsatisfactory service after making certain threats to the respondent's President Carson Jackson during a telephone conversation of May 11, 1985, and to one Neal Pleasants, Jr., Senior Vice-President for Brooks Run Coal Company, during a second telephone conversation that same day. The alleged threats concerned Mr. Cox's purported assertions that he would call the "Labor Board" and "Union" in to stop the men from working at the mine and that he would shut the mine down.

A hearing was held in Charleston, West Virginia, on October 28-29, 1986, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and the arguments presented have been fully considered in the course of my adjudication of this matter.

Issue

The critical issue in this case is whether Mr. Cox's termination by the respondent was prompted in any way by his engaging in protected activity, or whether it was the result of unsatisfactory services or other legitimate reasons as claimed by the respondent. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

The respondent's motion to quash a subpoena duces tecum served on two of the respondent's operating officers for the production of certain records was denied, and the respondent produced copies of the requested documents for the complainant's examination, including a mine map, an MSHA record of a battery explosion, fire boss records, and records of reported roof falls (Tr. 6-12, 10-28-86). The parties also stipulated to the admissibility of Mr. Cox's deposition, taken on May 28, 1986 (Tr. 13). In addition, the posthearing deposition of Mr. Carson Jackson, respondent's president and general mine superintendent, was submitted and admitted as part of the record.

The complainant's subpoena for the testimony of MSHA Inspector John G. Tyler, was withdrawn after the parties agreed to stipulate to his testimony were he to appear as a witness in this case (Stipulation, Joint Exhibit JE-1), (Tr. 5, 10-28-86). The complainant subpoenaed MSHA Inspector Joey Adkins, and he appeared and testified.

Complainant's Testimony and Evidence

In support of his case, the complainant subpoenaed eight present employees of the respondent, including Mr. Carson Jackson, respondent's president and general mine superintendent, and Mr. Rodney Blankenship, respondent's vice-president, and general mine and section foreman. Respondent also subpoenaed two MSHA inspectors, and one testified. The parties agreed to stipulate to the testimony of the other inspector.

Wayne Lee, Cutting Machine Operator, confirmed that roof falls have occurred in the mine, but "we done what we could" to support the roof by installing longer bolts and cribs. At times, when the roof bolts were found to be too far from the face, company management took corrective action by installing more bolts and cribs where necessary (Tr. 20, 28-29). Mr. Lee could supply no details as to the roof falls, nor could he recall any of the details of the reported roof falls made by

the respondent (Tr. 18, 37). The roof conditions were discussed by the miners among themselves, including Mr. Cox, and with company management. However, Mr. Lee never heard Mr. Cox discuss any roof conditions with Mr. Jackson or Mr. Blankenship, and he did not know whether Mr. Cox complained to management about any roof conditions. Mr. Lee stated that there were "differences of opinion" as to the existing roof conditions (Tr. 34-37).

Mr. Lee stated that on one occasion, when a miner complained to Mr. Jackson about the roof bolts being too far back from the face, and after he (Lee) confirmed that this was the case, Mr. Jackson assured them that he would take care of the condition, and after 2 or 3 days, the condition was corrected. Mr. Lee explained that while the roof bolter would install two rows of roof bolts, the roof-control plan required additional support at the discretion of management if they were required to make the place safe. If any miners believed that the roof bolting was inadequate, they would discuss it among themselves and would try to correct it, and Mr. Lee was aware of several occasions when Mr. Jackson required the roof bolter to go back and rebolt an area. Mr. Lee asserted that there were occasions when Mr. Jackson was not aware of the roof conditions, but that "maybe he was, I don't know" (Tr. 39-43).

Mr. Lee confirmed that powder and caps were hauled in the mine on equipment and left there together, rather than being left in the explosives magazine, and that this was a common practice until 2 or 3 weeks before the hearing in this case. Although he denied that he ever engaged in such a practice, Mr. Lee named three shot firers and drillers who he claimed did (Tr. 21). Mr. Lee explained that leaving the powder and caps on the drill machine or other equipment made it easier on the miners because it would save them time going back and forth from the magazine. Mr. Lee believed that management was aware of this practice, because the powder and caps were in full view of anyone in the area, and no attempts were made to conceal the practice. He was sure that Foreman Blankenship was aware of the practice, and Mr. Lee knew of no complaints to management about it (Tr. 44-45).

Mr. Lee stated that ventilation curtains were often rolled up rather than being kept down, and that this was a common mine practice. He explained that leaving them up made it easier on the equipment operators who were tearing them down, and it made the mining cycle go faster. Mr. Lee believed that management was aware of the practice (Tr. 24).

Mr. Lee testified about a battery explosion incident involving Mr. Cox which occurred sometime in 1984 or 1985, and another similar incident involving another miner, but could not recall all of the details. However, he believed that the incident involving Mr. Cox was cause by lack of adequate battery ventilation, and Mr. Cox's failure to turn off the battery charger power when he plugged in the battery. This caused an arc which set off the explosion (Tr. 37-38).

Mr. Lee confirmed that he has shut off his personal dust sampling device in order to obtain a "good sample," and that this was a common practice for him. However, he was not aware of any MSHA violations ever being issued because the respondent exceeded the applicable MSHA dust standards (Tr. 31-33).

Mr. Lee stated that he was aware that Mr. Cox was keeping a personal notebook, but never saw any of the entries until he was given an opportunity to review the book during MSHA's investigation of Mr. Cox's complaint. He had no independent personal knowledge of any of the incidents recorded by Mr. Cox in the book (Tr. 48-54). Mr. Lee stated that he never complained to any MSHA inspectors about the practices in question, and that he has never been threatened by mine management (Tr. 27).

On cross-examination, Mr. Lee asserted that bad roof conditions can exist anywhere in the mine, and that he does what he can to protect himself and his fellow miners. He confirmed that the respondent uses roof bolts longer than those required by the roof-control plan, and also installs support straps and plates in some places (Tr. 58-59). On one occasion, management decided to leave longer coal pillars rather than taking all of the available coal, and this helped to support the roof. Although falls have occurred around belts and in some face areas, no men or equipment were involved. Although it is not done on a regular basis, Mr. Blankenship has discussed the roof plan with miners (Tr. 60-62). Mr. Lee confirmed that he never heard Mr. Cox complain to management about roof or dust conditions, and that the miners simply discussed it among themselves (Tr. 65).

Mr. Lee stated that the respondent rock dusts on a regular basis, and that the water sprays on his machine are operable. When they are not, the respondent takes the appropriate action to repair them and makes an effort "to go along with me on water to keep the dust down" (Tr. 65-66).

Mr. Lee stated that Mr. Cox himself has kept powder and caps on his drilling machine, and he never heard anyone from mine management approving of this practice (Tr. 63). He has heard Mr. Blankenship tell people to keep the ventilation curtains rolled up (Tr. 64-65). When miner Cogar complained to Mr. Cox about the powder and caps, Mr. Cox responded that the company "was doing things wrong too" (Tr. 73).

Mr. Lee stated that company policy dictates that all roof bolting be done in sequence and that Mr. Cox himself has bolted out of sequence, and Mr. Lee was present when management advised Mr. Cox of the requirement that bolting be done in sequence (Tr. 70). On one occasion when miner Alva Cogar complained to management about the bolting being out of sequence, Mr. Jackson took care of the problem and Mr. Cogar still works at the mine (Tr. 68-69).

Mr. Lee confirmed that Mr. Blankenship has shut off his (Lee's) personal dust sampler, and he has heard that this was done with other samplers (Tr 77-78). However, no one has ever complained to MSHA about the practice (Tr. 78-79). Further, Mr. Lee has never heard Mr. Cox state that he would take any of his complaints to MSHA or other mine agencies (Tr. 76). Mr. Lee stated that Mr. Jackson does what he can "for the most part" to run a safe mine, and that he can communicate with Mr. Jackson and Mr. Blankenship (Tr. 68).

When asked why miners were not concerned about the dust samplers being shut off, Mr. Lee stated "it ain't that we don't care; its that we've got to make a living" and without decent dust samples, inspectors would always be there and shut the mine down for noncompliance and there would be no work (Tr. 79-80).

James Ramsey, Jr., roof bolter operator, stated that he was aware of roof falls between October, 1984 and May, 1985, but could not state how often they occurred. He does what he has to do to insure adequate roof support, and if longer bolts are needed he installs them. He would report bad top to his foreman, and was always instructed to install longer bolts or cribs. Mine management has never instructed him to work under bad top, and has never ignored him when he reported bad top to his foreman or to Mr. Blankenship. On occasion, when he (Ramsey) believed that more could be done to support the roof, he never advised his foreman about this, nor did he complain to Mr. Blankenship (Tr. 81, 95-99).

Mr. Ramsey stated that he was aware of drillers keeping powder and caps on their machines, but no one ever complained,

and the practice has since stopped. He was also aware of ventilation curtains being rolled up, and a battery explosion involving Mr. Cox, but he knew no details since he was not there when it happened, and he and Mr. Cox worked on different shifts (Tr. 81-84, 89, 106).

Mr. Ramsey confirmed that he has shut off his own personal dust sampler, but was not aware of anyone else doing it or Mr. Blankenship's involvement. When asked why he shut his off, Mr. Ramsey responded that "he just did" (Tr. 94). Mr. Ramsey stated that he has never complained to MSHA about any of these practices, and when asked why, he responded that he wants "to go along with everybody" (Tr. 92).

On cross-examination, Mr. Ramsey remembered two roof falls on a belt, and he confirmed that management installed cribs and canopies over the belts, took steps to support the roof, and explained the roof control procedures to the miners (Tr. 102-103). In response to further questions, he confirmed that he has roof bolted out of sequence, but did not make a practice of it. He uses his own judgment in roof control after taking into account the prevailing conditions, and he never told management about bolting out of sequence and "just did it." He admitted that he took it upon himself to bolt out of sequence, and on occasions when Mr. Blankenship and Mr. Jackson observed him doing it, they instructed him to do it the proper way. Mr. Ramsey stated further that he bolted out of sequence only twice in the past 6 months, and that he did so because he believed it was safer, and not as a short cut (Tr. 110-115).

Mr. Ramsey stated that ventilation curtains were rolled up because it increases production and made it easier on the crew. Although dust increases from this practice, the face areas are rock dusted every evening, and no excessive levels of methane have ever been detected in the mine (Tr. 103-105). He thought there "may be trouble" with management if he didn't go along with the curtains being rolled up, but did not know what management's reaction would be if he rolled them down. He was aware of his right to make complaints to MSHA, but never did, and never saw a need to do so (Tr. 108-109).

Mr. Ramsey stated that he is not afraid of Mr. Blankenship and has told him about adverse roof conditions when they were encountered (Tr. 108). He confirmed that he observed miner Alva Cogar with powder and caps on his drill machine (Tr. 107).

Roger Groves, electrician, stated that he was aware of roof falls in the mine, and they resulted from broken roof or areas where it was hard to hold. However, he believed the roof was bolted according to the approved roof-control plan (Tr. 127). He did report one bad top condition to Mr. Jackson, but mining continued in the area for a week (Tr. 131). He was aware of rolled up ventilation curtains, and believed that this was the rule rather than the exception (Tr. 128). He has "heard talk" about dust samplers being turned off, but could not recall any details (Tr. 129). He was also aware of the battery explosion incident involving Mr. Cox (Tr. 130). Mr. Groves stated that he never made any safety complaints to MSHA, and has no knowledge that Mr. Cox did (Tr. 132).

On cross-examination, Mr. Groves confirmed that he was responsible for the maintenance of the mining equipment, and that the respondent's policy is to keep all equipment in good operating condition. He does what is necessary to keep the equipment in good repair and proper operating condition. The ATRS and water sprays on the cutting machines were kept in good condition, and Mr. Blankenship frequently discussed the roof-control plan with the men, usually in the morning. Mr. Groves stated that he never observed any evidence that the respondent did anything to endanger miners under unsupported roof, or that the roof was not supported according to the approved plan (Tr. 135-139).

Mr. Groves stated that during his 5 years of employment at the mine, he complained once about bad top. The roof had dropped in a roadway away from the face and the weight was pulling thru the bolts and half-headers. After he reported this to Mr. Jackson, mining continued for a week, but Mr. Jackson took care of the condition in time, and he was not antagonistic because he had complained. Mr. Groves stated further that Mr. Jackson and Mr. Blankenship never left him with the impression that if he made safety complaints, his job would be in jeopardy, and he recalled a meeting at which Mr. Jackson stated that he would rather shut the mine down than have someone injured (Tr. 144-146).

With regard to the battery explosion incident, Mr. Groves was of the opinion that it was caused by a gas buildup under the lids. Although the lids are vented, they were kept closed. He could not state whether Mr. Cox was aware of the fact that the lids and vents should be opened for adequate ventilation, and when he plugged in the battery with the charger connected,

an arc resulted. It's possible that Mr. Cox forgot to deenergize the charger, and that this caused the arcing (Tr. 142-144).

In response to further questions, Mr. Groves stated that while he never observed Mr. Jackson or Mr. Blankenship present when powder and caps were on the equipment, since they were in and out of the section, and were the bosses, he assumed that they knew of the practice, but he never discussed it with them, nor did he bring it to their attention (Tr. 148-150). Mr. Groves confirmed that he is a certified shot firer, and that he observed powder and caps on equipment, rather than stored in a box. Keeping the powder and caps on the equipment made it easier on the shot firer (Tr. 152-153).

Mr. Groves was aware of the Holmes Safety Group sponsored by the respondent, and he has seen notices posted informing the men about meetings. He denied that he was concerned about his job or the mine shutting down if he complained, and he could not recall Mr. Cox ever complaining to Mr. Jackson or Mr. Blankenship about any safety matters. He also stated that Mr. Cox never told him that he had made any complaints (Tr. 154-157).

Aaron Bender, coal drill operator and shot firer, confirmed that he worked with Mr. Cox on the same shift when he was first employed, and then went to the evening shift in 1984. Mr. Bender was aware of some roof falls because of bad top, and the top would fall above the roof supports (Tr. 163, 175). Mr. Bender admitted that he has kept powder and caps on his drill because it makes his work easier and faster. He was also aware of multiple powder bags or boxes being carried about, and admitted that he had done this and was aware of the fact that it is a violation. He denied any knowledge of any uncertified persons drilling or shooting. He was aware that ventilation curtains were not always maintained within 10 feet of the face and in the down position, and admitted that he did not always keep the curtains down because it slowed him down. He has helped roof bolters and they always bolted in sequence, and he was not aware of any roof bolting being done out of sequence (Tr. 164-168).

On cross-examination, Mr. Bender stated that he was familiar with the roof-control plan and has helped out on roof support. He stated that the roof-control plan was followed "pretty well, as close as we could," and that cribs or larger bolts were set if the roof "started working." There were never occasions when nothing was done to attempt to keep the roof intact, and when he pointed out adverse roof

conditions to his foreman Dave Young, Mr. Young always cautioned him to watch the roof and to rebolt it when it was safe to do so. There were instances of roof falls in places which had been bolted, but this did not occur every day or every week. However, additional support was always installed in these areas, and he believed it was adequate. Additional support would be installed in those instances when he reported adverse conditions to Mr. Young (Tr. 177-180).

Mr. Bender stated that the respondent provides bags for carrying powder, and it is his understanding that he can carry enough in the bags to shoot three or four places. He also knew that he was not to keep the powder and caps on his drill, but he did so anyway because it made his work easier and saved him time because he did not have to walk back and forth from the powder magazine (Tr. 182).

Mr. Bender explained that the ventilation curtains were kept rolled up to preclude knocking them down with equipment. If they are knocked down, the equipment operator is supposed to stop and put it back up, but many times he did not stop after knocking down a curtain, and usually, no one observed him. On one occasion, Mr. Young observed him tear down a curtain but did not stop him or order him to put it back up (Tr. 184-186).

Mr. Bender stated that he never complained about the curtains being knocked down, but "us workers used to talk to each other about it." He also stated that he was not concerned about knocking down curtains because "you probably wouldn't run coal if you went by every law that you had to go by" (Tr. 186-187). Mr. Bender stated that he was not aware of anyone complaining to management about safety concerns, and he never complained to Mr. Jackson about safety or about any dissatisfaction with his job. Mr. Bender confirmed that anytime he believed something was not safe, he discussed it with his foreman (Tr. 189-190).

Steve Mullins, scoop operator, testified that he was aware of roof falls in the mine, but they were not frequent occurrences, and he recalled one or two a year in the 5 years he has worked at the mine. He was aware of powder and caps kept on equipment, and believed that it was a commonplace occurrence. He engaged in the practice because it made his work easier, and he never believed he was in any danger. Foreman Blankenship has sent him for powder and caps, and Mr. Mullins would bring it in and place it on the drill. Mr. Mullins was of the opinion that Mr. Blankenship was aware

of the practice because "he was there all day and so he'd have to have seen it" (Tr. 195, 201).

On cross-examination, Mr. Mullins stated that he has served as a substitute section boss, and has also served as a shot firer. He has cleaned up debris after a roof fall, and confirmed that adequate steps were taken to resecure any roof fall areas, and that headers, cribs, and canopies have been installed in these areas. He believed that most places where falls occurred were too high for the bolter to reach. He conceded that keeping powder and caps on his scoop was not a smart thing to do, and he would never have done it if he believed he were in any danger (Tr. 211).

Michael R. Poole, formerly employed by the respondent as a bratticeman, confirmed that Mr. Cox is his uncle and helped him get his job. Mr. Poole stated that he was fired by the respondent for failing to appear for work on Saturday, May 11, 1985, and that he had worked for the respondent as a bratticeman for 3-years prior to his termination. Mr. Poole stated that during May 1984 to May 1985, the mine experienced eight roof falls in the working area. He also stated that the ventilation was not kept up to par, and that the only time it was is when an inspector was present for an inspection every 6 months (Tr. 218-219). Curtains were rolled up and nailed to roof headers, and at times no curtains were installed unless an inspector was on his way into the mine. However, the permanent brattices and stoppings were installed and maintained properly (Tr. 222, 245).

Mr. Poole confirmed that powder and caps were frequently kept on machinery underground and he named five management individuals who he claimed knew about this practice, including Mr. Jackson and Mr. Blankenship (Tr. 219). Mr. Poole stated that on occasion, he operated the coal drill and helped shot firer Alva Cogar, and Mr. Jackson and Mr. Blankenship would walk in and see the powder and caps on the machine (Tr. 210).

Mr. Poole stated that he never wore any dust sampler, but they were made available to other miners. Although he never personally heard Mr. Blankenship order anyone to deactivate a sampler, two of his fellow workers told him Mr. Blankenship told them to turn off their samplers, and Mr. Poole stated that he observed samplers in a box on a rectifier and that they remained there during the entire shift (Tr. 223-225).

Mr. Poole stated that on one occasion during his last year on the job he complained to Mr. Blankenship about the practice of keeping powder and caps on the equipment when the top was bad, and that he often told Mr. Jackson's son Kit about the ventilation and float coal dust. Mr. Poole stated that he complained to Kit Jackson, and knew that he would tell his father about it (Tr. 232). Mr. Poole stated that on one occasion, Mr. Cox told Mr. Blankenship that the next time an inspector was in the mine, he (Cox) "would have a talk with him," and a week later Mr. Cox was fired (Tr. 233).

When asked whether he or the other men had ever threatened to go to an inspector with his complaints, Mr. Poole responded as follows (Tr. 233):

> A. I think we've all discussed it at one time or another, yes, but later, right before we got fired, within a month or two months, maybe, before we got fired, I even told Kit that I might go and try to get the union in there to get it straightened out. And I'm sure that he went back and told Carson and Rodney.
>
> * * * * * * *
>
> A. I'm sure, while we was gathered around, you know, eating lunch or something, that a few of them has mentioned such things as bad top and things like that, but most of them was scared they was going to lose their jobs and they wouldn't ever threaten the company as far as going to the mine inspectors or anything because they was all afraid of losing their job.
>
> JUDGE KOUTRAS: Did they ever talk about doing it?
>
> THE WITNESS: A lot of them a lot of times, quite often, they'd say somebody needs to do something about it, you know. As a matter of fact, Alva Cogar, he's the one -- he runs the coal drill, and he was always complaining that something was needing done, too.

Mr. Poole stated that although he is not a certified shot firer, he was required to shoot coal in the absence of the regular shot firer, and that he did so at Mr. Blankenship's

direction (Tr. 238-239). He also stated that he shot coal while a trainee, but was not sure who directed him to do it. However, he believed that foreman Euhl Damron and Mr. Blankenship knew about it, and that Mr. Blankenship assigned him to help the coal driller and the firer (Tr. 240). Mr. Poole stated that there were occasions when Mr. Blankenship would leave the section, or would be late in arriving, and no foreman would be present, or he would assign scoop operator Steve Mullins to be in charge (Tr. 242).

On cross-examination, Mr. Poole stated that after Mr. Cox received a telephone call at his home from Mr. Jackson on Saturday morning, May 11, 1985, Mr. Cox informed him that Mr. Jackson fired him for not reporting to work that day. Mr. Poole confirmed that Mr. Jackson was the person who initially hired him, that Mr. Jackson is the person who decides when employees are required to work, and that he (Poole) was told by his foreman that he was scheduled to work that particular Saturday (Tr. 247). However, Mr. Poole also stated that he was led to believe from Mr. Blankenship that he did not have to work that day (Tr. 248). Mr. Poole denied that either he or Mr. Cox attempted to convince other miners not to report for work that day (Tr. 249). Mr. Poole confirmed that because of certain personal problems with his spouse, he was staying at Mr. Cox's house and was sleeping when Mr. Jackson called, and he did not hear the telephone conversation.

Mr. Poole stated that he and Mr. Cox went to the mine on Monday, May 13, 1985, and he did not understand that he had been fired until everyone else went into the mine. He and Mr. Cox were summoned to the office by Mr. Jackson, and Mr. Jackson handed them their paychecks and termination notices, and the notices stated that they were fired for "services unsatisfactory" (Tr. 251).

Mr. Poole confirmed that prior to his discharge, he had been late for work "a few times," and had two unexcused absences because of personal problems, and had been warned by Mr. Jackson and Mr. Blankenship that his absences would not be tolerated in the future. Mr. Poole denied that he was ever given a written warning about his absences, but admitted that Mr. Jackson or Mr. Blankenship had given him "a slip of paper" which recorded the dates of his unexcused absences and days that he was late for work. Mr. Poole stated that when he received this, he went to Mr. Jackson' home and informed him that he would understand it if Mr. Jackson fired him for his absences and tardiness, but that Mr. Jackson simply told him not to miss anymore work "if I could help it" (Tr. 252).

Mr. Poole confirmed that he filed a discrimination complaint with MSHA after he was fired, and later received a letter advising him of MSHA's findings that the respondent had not violated the law and that his case would not be pursued further. Mr. Poole stated that he moved out of state and did not pursue the matter further (Tr. 253-254; 270-271).

With regard to his assertion that roof falls had occurred in virtually every entry during the period immediately before his discharge of May 11, 1985, Mr. Poole stated that the only evidence he has of this allegation is his word and the word of Mr. Cox, and "if a couple of the other guys hadn't left, their word" (Tr. 254). He further explained as follows at (Tr. 255-257):

> Q. As far as you know, when the roof falls occurred were reports of the roof falls made to the proper governmental officials?
>
> A. As far as I know, no. As far as I know, they may have reported every one of them.
>
> Q. You don't know.
>
> A. As far as knowing, no, sir, I don't.
>
> Q. Did the investigators come while you were there and investigate the areas where the falls occurred?
>
> A. I think one time there was a mine inspector came and investigated.
>
> Q. When the falls were occurring, was Mr. Jackson doing anything? Was he investigating it himself?
>
> A. He looked at a few of them, I do know that, but I was pretty well busy the times I was there.
>
> Q. The point I'm getting at is this: did the company -- you testified you were concerned and worried about the condition of the roof. Was the company management also concerned about the roof?
>
> A. I would say they was worried to where they didn't want their roadways blocked. They're

pretty well used to it. They've been underground twenty or thirty years, you know and it's just normal; you hear popping and cracking, you know. You get used to it and you don't really worry that much about it.

Q. Are you saying they had more knowledge about the condition of the roof than you did? Do you admit that?

A. I'm saying more experience.

Q. In dealing with roof conditions?

A. Right.

Q. And were you aware that the company took steps to support the roof in the areas that they were having trouble with the roof?

A. Not all of them, but in a lot of them, yes.

Q. You admit that the company took extra added steps to ensure a supported roof?

A. In a few places, yes. Not everywhere, though.

Q. Did you point out bad roof areas to anyone in management that they ignored?

A. Yes.

Q. They ignored it?

A. Yes.

Q. They did nothing?

A. Right.

Q. All right. Can you give me specific instances?

A. Like, most of the time we'd eat on the rectifier. Probably two weeks before we was fired, three weeks before we was fired, me, Kit, Rodney, probably Steve Mullins and my

uncle was sitting on the rectifier, and Wayne Lee came up there and I pointed out to Wayne, Kit and all of them the way that that rib was cutting -- they call it cutting but the top just keeps falling out in small pieces, and, you know, it's hard telling how much of it will fall out. And No. 5 entry, that was the only roadway going to the face passable by scoops or any big machinery. Wayne Lee looked at it two or three times with me; my uncle looked at it with me; Kit has looked at it with me and I showed them -- normally, when you have so much pressure on a bolt, the plate -- you have a half header above the bolt -- the half header, so much weight will come against it, it will squeeze plumb in two and an end will even fall off. But these particular ones, the bolt head itself was ripping the plate and pulling the head of the bolt through the plate. That's how much weight was on them.

Mr. Poole confirmed that the permanent stoppings were usually constructed and maintained in compliance with the law, and that when he shot coal as a trainee he never did it without being supervised, but he was not sure whether the person who supervised him was a certified shot firer. With respect to his shot firing after his training was over, Mr. Poole stated that he was still not a certified shot firer, and while Mr. Blankenship may have at times been present, he was not under his direct supervision (Tr. 260).

With regard to his complaints about the coal dust, Mr. Poole confirmed that he made no direct complaints to mine management but that he "would be talking about it" (Tr. 262). He stated that management agreed with him "a lot of times," and conceded that he rock dusted the affected areas, and that the maintenance shift also rock-dusted in order to keep the dust down. Mr. Poole believed that rock dusting was done 75-85 percent on his shift as well as on the maintenance shift (Tr. 263).

Mr. Poole agreed that his shift and the third shift kept the brattice cloth within 10 feet of the face, but disagreed that this was always done (Tr. 264). He explained further as follows (Tr. 264-265):

JUDGE KOUTRAS: Let me ask you this: what if I were to tell you hypothetically that six

miners testified in this case that the curtain was always hung up in the right locations, but it was rolled up. It was hung, but it was rolled up, and that way, it interfered with ventilation. Do you disagree with that? Are you saying it was never hung up in the right place?

THE WITNESS: No, no, that's not what I'm -- a lot of times it would be hung up in the right place and rolled up. But I would say at least forty percent of the time, especially if, like Monday, Tuesday and Wednesday a mine inspector came and he finished -- I think it's called a general inspection -- for two weeks, probably, there wouldn't be hardly any curtain put up.

JUDGE KOUTRAS: At all?

THE WITNESS: We'd go something like two breaks before any curtain would be put up again -- a lot of times. I'm not saying all the time or every time; I'm saying a lot of times.

With regard to his asserted "complaints" to mine management, Mr. Poole stated as follows (Tr. 265-268):

Q. Now, you said earlier you made complaints to management or you talked with management about the float dust. And you talked about the rock dust; you talked about the curtains. Did you make any other complaints to management?

A. Yes. The more the top got bad the more everybody complained, more or less, but all of us would discuss the top getting worse, possibly falling on the drill and blowing us all up. There was a lot of people talking about it.

Q. That's fine. A lot of people were getting concerned about the driller hauling shot and caps on his drill as the roof got worse, and that would be getting close to the time that you were discharged. Is that correct?

A. Right.

* * * * * * *

Q. Who are you talking about when you say a lot of people?

A. I would say just about everybody that was an employee on the day shift: Roger Groves, Steve Mullins, Wayne Lee, Alva Cogar, me, my uncle.

Q. Were these conversations you had among yourselves or were these conversations you also had with members of management?

A. Not all the time, but a lot of times, management would be there, too, yes.

Q. Let's talk about that. Alva Cogar, Mr. Groves, Mr. Mullins, Mr. Lee, your uncle, yourself --did you say any more?

A. We wouldn't all be there at one time, don't get me wrong. Three or four of us would talk about it at lunch, and three or four of us would talk about it when we was taking a break or something.

Q. When you'd talk about it and management would be present, what would be management's response?

A. A lot of times they wouldn't even comment on it.

Q. Did they ever disagree that you can recall, about this driller hauling powder on his machine?

A. As far as I can recall, no, but like I said, most of the time they wouldn't have any comment on the subject.

Q. Besides complaining about the float dust and complaining about the powder and caps on the drill, were there any other complaints that either you or your uncle or other members made to management?

A. I can't think of any at this time.

* * * * * * *

Q. Let's talk about those complaints now, a minute. What was the nature of the complaints? How would they be made to someone from management?

A. How would they be made?

Q. How would you make the complaint? What form -- in what form were they made?

A. Somebody needs to do something about the dust. Somebody needs to get the ventilation right so that this float dust will be taken out of here. Different things, different ways like that.

When asked whether he had ever made any safe complaints to any Federal or state inspectors, Mr. Poole testified as follows at (Tr. 269):

Q. Did you ever make a complaint about these two areas or any other safety concern that you had in the mine to an investigator from the federal government or state government? To an inspector?

A. I went to Mr. Tyler's house. He's a federal mine inspector. I went along with my uncle, and we discussed what was going on at the mine. And he told us a couple of steps to take.

Q. And did you take those steps?

A. We tried to take them and then we was fired, yes. I don't remember if we got fired right before we started the procedures or what, but we did try to take the steps.

Q. The question I'm asking you is, did you contact anyone from MSHA -- the right person from MSHA prior to your discharge?

A. I don't think prior to my discharge; I'm not for sure.

Q. You didn't then.

A. I don't think so.

Q. And after your discharge, you did. Is that right?

A. Yes.

With regard to his visit to the home of MSHA Inspector Tyler when Mr. Cox purportedly complained to him about safety violations, Mr. Poole stated that he also complained to Mr. Tyler (Tr. 275). Mr. Poole confirmed that this was the only time he went to see Mr. Tyler, and that he was aware of the MSHA publication informing him that he could complain to any MSHA inspector, and he assumed that seeing Mr. Tyler was adequate (Tr. 277). Mr. Poole stated that Mr. Cox had previously gone to Inspector Tyler's home during the summer of 1984, in response to an ad that Mr. Tyler had placed concerning some automative parts for a Subaru which he wanted to sell. Mr. Poole explained that his visit to Mr. Tyler's home came 3 months later when Mr. Cox again visited Mr. Tyler, and he was with him at that time (Tr. 278-279). Mr. Poole stated that the second visit was "just the other day" (Tr. 280). As far as he knew, no one from mine management knew about the first visit to Mr. Tyler's home (Tr. 280).

Mr. Poole stated as follows at (Tr. 272-273):

Q. Do you know of any instances where, prior to your discharge, employees were discharged or punished because they made complaints about safety?

A. I can't think of any right off, no.

Q. Did you ever hear Mr. Jackson, the president of the company, make any such claims? That he would lay off or fire or punish anyone because they were concerned about safety?

A. No.

Q. And it's a fact that you knew Mr. Jackson was the boss?

A. Yes.

Q. And he was the one that hired and fired the men?

A. Yes.

Q. And your purpose was to get your job back by trying to get Brooks Run to interfere with the management decision of Mr. Jackson. Is that correct?

A. Yes.

Q. Sir?

A. Maybe not to interfere, but to talk to him and maybe ask him about getting it back, things such as this, not really to interfere with it.

Q. Well, what hold did you and your uncle hold over Brooks Run to get them to get Mr. Jackson to change his mind and give you your job back? Weren't some threats made?

A. Not really threats; just my uncle told him that we were going to the MSHA office and see if there wasn't something could be done about it.

Q. Didn't he also tell him that they weren't going to run no more coal and they were going to shut the mine down and have a walkout, work stoppage? Isn't that a fact, Mr. Poole?

A. Not to my knowledge, no.

Q. Not to your knowledge.

A. No.

Q. You're saying that your uncle did not tell Mr. Pleasants over the phone -- all you could hear was your uncle's part of the conversation -- that you'd better get his nephew's job back or he was going to have a work stoppage and stop running coal on that mountain?

A. No.

Q. And he didn't mention anything about there was going to be trouble up there if you didn't get your job back.

A. My uncle told Mr. Pleasants that he had trouble in one of his mines; that his nephew had been fired -- referring about me -- and that he was going to have trouble up there if something wasn't done.

Q. And the trouble you mean is what we're doing today. Is that right? Because you didn't get your job back.

A. Probably so, yes.

With regard to Mr. Cox's telephone call of May 11, 1985, to Mr. Neil Pleasants, a business associate of Mr. Jackson, and the person to whom the respondent sells its coal, Mr. Poole confirmed that he heard one-side of the conversation, and he confirmed that he heard Mr. Cox tell Mr. Pleasants that he was planning to go to a federal mine inspector and complain about violations at the Pammlid Mine. Although he was not sure, Mr. Poole believed that Mr. Cox also mentioned that he would go to the "labor board" with his complaints (Tr. 274-275).

Mr. Poole identified Mr. Pleasants as the "head honcho" at the Brooks Run Mine, and he believed that Mr. Pleasants had the authority to shut the respondent's mine down until "any problems were taken care of" (Tr. 281). Mr. Poole stated that after Mr. Cox informed him that he had been fired, he (Poole) asked him to call Mr. Pleasants. Mr. Poole stated that he did not wish to call Mr. Pleasants because he (Poole) was "kind of hot headed" and did not know how to communicate with people, and believed that Mr. Cox could serve as his "mediator" (Tr. 282).

Mitchell Nash, scoop operator, confirmed that he was aware of a roof fall on the belt because of bad top and inadequate support. He was also aware that ventilation curtains were rolled up most of the time, and stated that the only time they were down was when an inspector was in the mine. He explained a battery explosion incident in which he was involved, and stated that while the ventilation was adequate, a gas build-up under the battery which had been idle for 2 days caused an explosion sparked by an arc when he plugged in the battery. Had the battery lids been lifted, he did not

believe an explosion would have occurred, and he was not instructed to lift them prior to the incident. After the incident, Mr. Jackson instructed him to open the lids for ventilation (Tr. 6-10).

Mr. Nash was not aware of anyone turning off dust samplers, but was aware of powder and caps on equipment, and that he did it "to bring up production." He confirmed that the practice has since stopped. He was not aware of any miners complaining to management or MSHA, and Mr. Cox never spoke to him about complaining or threatening to make safety complaints to state or federal mine authorities. He stated that neither Mr. Blankenship or Mr. Jackson ever instructed him to store powder and caps on equipment, nor did they imply that this should be done (Tr. 11-18).

On cross-examination, Mr. Nash stated that when the battery explosion occurred, Mr. Blankenship wanted him to go to the hospital but that he (Nash) said he was "all right" and wanted to return to work. Mr. Blankenship told Mr. Jackson to file an accident report, and while Mr. Jackson was reluctant to do it at first, he did report the incident. Mr. Nash went to the hospital and was checked by a doctor who gave him aspirin and he was sent home. He had no follow-up care and returned to work, and he identified exhibit R-1 as the accident report of May 17, 1985, relating to the incident (Tr. 23-27).

Mr. Nash stated that the roof fall he mentioned could have been prevented because the roof was dribbling, and the foreman knew it was weak. However, it fell over a weekend when no one was in the mine, and it covered half of the belt feeder. After the fall, Mr. Blankenship began watching the roof closer and longer roof bolts were used for support. Mr. Nash did not know whether MSHA inspected the fall area. He confirmed that a state roof inspector has discussed roof conditions with the miners, and that his foreman and Mr. Blankenship discussed the roof plan with him and instructed him to check the roof bolt test holes (Tr. 29-35).

Mr. Nash stated that he took it upon himself to keep powder and caps on the equipment because it made his work easier, and no one from management suggested that he do so to speed up production. He has torn down ventilation curtains with his equipment, and has stopped to replace them only if an inspector were present. Stopping to replace curtains slows his work down. The curtains were always rolled up when an inspector was not present, and he never complained to management or any inspector about the practice. Since he is

paid by the hour, he is not concerned about production (Tr. 35-41), nor is he concerned about his job if he were to complain (Tr. 53).

Mr. Nash stated that when he was hired by Mr. Jackson, he was told that he would be required to work some overtime. He confirmed that Mr. Jackson is responsible for hiring, firing, and salaries, and that everyone knows it. He stated that when he was hired he went to the office of the Brooks Run Coal Company to inquire as to whether he would be paid or given the day off on his birthday, and when Mr. Jackson found out about it he called a meeting of the men and told them that he runs the mine and that Brooks Run did not. Mr. Jackson also advised the men that if anyone contacted Brooks Run asking about Mr. Jackson's mine, he would fire them. Mr. Nash confirmed that "Mr. Jackson makes no bones about who runs the mine" (Tr. 44-46).

In response to further questions, Mr. Nash stated that he went to Brooks Run because he assumed they operated the respondent's mine, and that when he was looking for a job he went to Brooks Run, and they sent him to Mr. Jackson (Tr. 48).

Joey Adkins, testified that he is an MSHA inspector assigned to the Mt. Hope District Four Office, and he confirmed that his office does not have enforcement jurisdiction of mines in Webster County. He confirmed that Mr. Cox visited him before his discharge and expressed some concerns about the safety conditions at the mine where he was then working. Mr. Adkins could not specifically state when the visit occurred, and he stated that Mr. Cox did not identify the mine in question. He stated that Mr. Cox complained about the hauling of explosives on electrical equipment, poor mine ventilation, and some roof problems (Tr. 112).

Mr. Adkins stated that carrying or storing explosives on equipment is a violation of the law, and it could be an imminent danger. Mr. Cox also complained about the lack of line curtains and indicated that mine ventilation was poor. Mr. Adkins stated that the question as to whether this would be a violation would depend on the applicable approved mine ventilation plan. If he were to find a ventilation curtain rolled up in a mine which he inspects it would be a violation (Tr. 115). He explained further that Mr. Cox stated that the mine had "bad roof" and said something about a "double linear." Mr. Adkins stated that "anytime you go through those, you've got a bad top anyway," but this condition is not of itself a violation, unless it is not taken care of.

The condition is corrected by roof bolting, cribbing, timbering, strapping, or "whatever is necessary." The condition could be a violation of section 75.200, but he did not see any of the reported roof conditions (Tr. 116). If a miner went under unsupported roof, this would be a violation of section 75.200 (Tr. 117).

Mr. Adkins stated that he has observed rolled up ventilation curtains which are kept out of the way in some mines which he has inspected, and he confirmed that he has issued a citation for such a condition (Tr. 118-119). He was of the opinion that rolling up curtains and then rolling them down is a bad practice because air would not be sweeping the face to dispel methane, and he is aware of no ventilation plans in his office that allow this practice (Tr. 120).

Mr. Adkins stated that additional roof support such as cribs would be required if the top is pulling through the bolts and plates, and if the roof is taking weight and is not supported and "it's popping the plates off," this would be a violation (Tr. 120-121).

Mr. Adkins stated that after discussing Mr. Cox's complaints with him, he advised Mr. Cox to file a section 103(g) complaint so that MSHA could look into the matter or to put the complaint in writing and give it to the MSHA inspector who inspects the mine (Tr. 121). Since Mr. Cox told him that the mine was near Summersville, Mr. Adkins advised him to go to the MSHA office in Summersville to lodge his complaint, and that they would help him out (Tr. 126).

Mr. Adkins confirmed that exhibit C-6, is an MSHA publication entitled in part "A Guide to Miner's Rights and Responsibilities," and stated that while he was not familiar with it, he may have seen it or "looked at it one time" (Tr. 122). Mr. Adkins stated that there is no particular MSHA "form" to fill out for filing a section 103(g) complaint, but it needs to be in some written form, and he simply advised Mr. Cox to file it, and did not discuss the matter with anyone else at that time (Tr. 128). Mr. Adkins confirmed that Mr. Cox came to see him a second time after he was discharged, and advised him that he was filing a discrimination complaint and would probably subpoena him if he needed him (Tr. 129). Mr. Adkins stated that after this second visit, he spoke with MSHA special investigator Leighton Farley about the matter (Tr. 129).

Mr. Adkins explained the procedure for taking personal dust samples, and he stated that once he puts a sampler on a

miner, he may or may not follow him around and observe him during the shift, but in any case, he would remain at the mine. The sampler is required to be checked during the first 2 hours and last hour of the sampling period. Although not required to do so, Mr. Adkins checks the sampler at least two or three additional times during the day (Tr. 130-132).

Mr. Adkins stated that shooting more than one place at a time may or may not be a violation, and that this would depend on the approved mine plan. With regards to any ATRS roof control requirement, he stated that MSHA does not require such a system, but if it is required by a state plan, the mine operator must keep them in a safe operational condition, but that this too would depend on a particular approved roof-control plan (Tr. 132-133). He also stated that MSHA only requires that a section foreman "run his place every two hours," and that a foreman cannot be with his crew every minute they are underground. If a shift is over at 5:00, a foreman can leave at 3:30 as long as he's inspected the section within the last 2 hours (Tr. 134).

On cross-examination, Mr. Adkins confirmed that he has known Mr. Cox since he was a child, and that he lives 3 miles from him. He does not socialize with Mr. Cox, and Mr. Adkins confirmed that everyone in the community knows that he is a Federal mine inspector. Mr. Adkins stated that he first learned about Mr. Cox's complaints when he spoke with him over the CB radio, and he told Mr. Cox to come to his home to speak to him about the matter. Mr. Adkins could not state precisely when this occurred, and that a day or so later Mr. Cox came to see him. Mr. Adkins confirmed that he took notes during his discussion with Mr. Cox, and Mr. Adkins did not believe that Mr. Cox was complaining to him, but simply wanted to know what he could do about it because he knew he was an inspector (Tr. 137). Mr. Adkins confirmed that he told Mr. Cox that transporting explosives on equipment was a violation. With regard to Mr. Cox's statements that the "ventilation wasn't being kept up," that "it was poor," and that "curtains weren't kept up," Mr. Adkins stated that he would have to inspect the mine before he could determine any violations of the ventilation plan, and that he explained this to Mr. Cox (Tr. 139-140).

With regard to Mr. Cox's complaint about "bad top," Mr. Adkins reiterated that "bad top" is not a violation, unless it is ignored and not taken care of, and that Mr. Cox was of the opinion that the roof needed more support (Tr. 141). Mr. Adkins confirmed that he cannot determine whether

a roof is adequately supported without conducting an inspection (Tr. 141). The same is true for ventilation curtains. He would have to look at the ventilation plan and inspect the mine before he could conclude that there were any violations (Tr. 142).

Mr. Adkins stated that after discussing the need for Mr. Cox to file a section 103(g) complaint, he was confident that Mr. Cox understood him. Mr. Adkins confirmed that a complaint could have been filed with any MSHA office (Tr. 144). Mr. Adkins confirmed that he did not advise Mr. Cox that he could file such a complaint with him, but did advise him to stop by MSHA's Summersville office because it was convenient to him (Tr. 144). Mr. Adkins also stated that Mr. Cox advised him that he spoke to the inspectors at the mine, "but couldn't get anything out of those guys," and that he advised Mr. Cox about the "hot line" and that the Summersville office could give him the telphone number (Tr. 146).

Mr. Adkins stated that after Mr. Cox's first visit, he did not call him again about any safety complaints, and that during the period between the two visits, Mr. Adkins did not discuss Mr. Cox's visit with anyone (Tr. 148). However, he did mention it to Inspector Leighton in his office after Mr. Cox's discharge, and he did so because Mr. Cox advised him that he may subpoena him (Tr. 149).

Mr. Adkins confirmed that in the event Mr. Cox had filed a section 103(g) complaint with him, he would have had to turn it in. He reiterated that he simply told Mr. Cox of the need to file such a complaint, and advised him that it had to be in writing. He did not, however, quote the section 103(g) statutory provision to Mr. Cox (Tr. 151).

NOTE: The complainant subpoenaed the attendance of Mr. Rodney Blankenship as an adverse witness for testimony in this case. In view of the testimony of the witnesses regarding certain alleged illegal mine practices implicating Mr. Blankenship, respondent's counsel advised him to seek additional counsel to advise him of his rights against self-incrimination and possible criminal liability for those alleged practices. Mr. Blankenship retained counsel to represent him in this matter, and counsel entered her appearance on his behalf (Tr. 161-162; October 29, 1986). In response to certain questions, and on advice of counsel, Mr. Blankenship declined to answer, and pleaded his Fifth Amendment right not to incriminate himself. His objections are noted below.

Rodney Blankenship, confirmed that he is employed by the respondent as a section foreman and general mine foreman. He is a one-sixth owner of the mine and serves as respondent's vice-president. Mr. Blankenship confirmed that he was Mr. Cox's supervisor on the first shift, which worked from 7:00 a.m. to 3:00 p.m., and that he is responsible for the logging of some MSHA and state mine reports, including onshift and fire boss reports, but denied that he was responsible for any dust sample reports (Tr. 165).

In response to questions as to whether anyone, including Mr. Cox, had ever made any complaints to him about any safety violations in the mine during 1984 and up to mid-May, 1985, Mr. Blankenship declined to answer (Tr. 165-166). He also declined to answer whether anyone ever reported or threatened to report, any mine safety violations to MSHA or state mining officials (Tr. 166-169). Mr. Blankenship was then proffered as a witness for the respondent.

Mr. Blankenship confirmed that Mr. Carson Jackson is the respondent's president, and in that capacity, he makes all of the decisions with respect to the hiring and firing of mine personnel, hours of work, and work and shift assignments. Mr. Blankenship stated that at one time in 1984, Mr. Cox worked as a roof bolter on his section, but was transferred to another job at Mr. Jackson's direction. Mr. Blankenship confirmed that at the time this decision was made, two jobs were open, and he gave Mr. Cox a choice as to which job he would prefer. Mr. Cox informed him that he would prefer a scoop operator's job because it was an easier job, and Mr. Blankenship assigned him to that job, with Mr. Jackson's concurrence (Tr. 171-172). Mr. Blankenship explained that Mr. Cox's transfer to the scoop operator's job was the result of a suggestion by an MSHA inspector (Tr. 172).

Mr. Blankenship stated that during the time Mr. Cox worked for him, Mr. Cox was "vocal and loud," made threats, and Mr. Blankenship considered him to be "a bully." Mr. Cox complained about working on Saturdays, as did other miners. Mr. Blankenship stated that Mr. Cox "threatened to whip me in front of the other men," and that this occurred at the time he was transferred from roof bolter to scoop operator (Tr. 175). Mr. Cox was upset and unhappy over the transfer because he believed his work was being questioned, and Mr. Blankenship stated that the transfer had nothing to do with his work (Tr. 175).

Mr. Blankenship stated that on the Monday prior to Saturday, May 11, 1985, all mine personnel were notified that

they were required to work that Saturday. Mr. Jackson made the decision, and Mr. Blankenship informed the crew of this decision. Mr. Cox informed him that he was the coach of his son's little league baseball team and that he could no longer work on Saturdays because he had to be with the team. Mr. Blankenship denied that he gave Mr. Cox permission to be off that Saturday, and stated that he did not have the authority to give him the day off. Mr. Blankenship could not recall specifically giving Mr. Cox any instructions as to what to do about his desire to be off on Saturdays, but confirmed that his general advice in such a situation was to instruct a crew member to "take it up with Carson Jackson," and that his decision would prevail (Tr. 176-177).

With regard to any permission given to Mr. Poole that he did not have to work on Saturday, Mr. Blankenship stated that in view of the fact that Mr. Poole had missed so much work time, he warned him countless times that he would be discharged for not working. Mr. Poole advised him that he was not going to work on Saturday, May 11, 1985, and Mr. Blankenship stated to Mr. Poole that "I didn't want to hear it," that he did not make those decisons, and that he expected him to work that day. Mr. Blankenship stated that he was not aware that Mr. Poole was not going to work until he failed to show up for work that day (Tr. 177). Mr. Blankenship confirmed that he did not give Mr. Poole permission to be off that day (Tr. 178). Had he given him permission to be off, Mr. Blankenship would have so informed Mr. Jackson, and Mr. Poole would not have been fired (Tr. 179).

Mr. Blankenship stated that apart from his absenteeism record, Mr. Poole was a good worker, and that he liked him, and still does. His only complaint about Mr. Poole was his irregular work habits, and he warned him many times about it. Mr. Blankenship stated that he and Mr. Jackson warned Mr. Poole that he would be discharged if he missed another day of work, and that Mr. Jackson prepared a written warning for Mr. Blankenship to give to Mr. Poole (Tr. 180).

Mr. Blankenship stated that in addition to Mr. Poole and Mr. Cox, the only other person who did not work on Saturday, May 11, was Mr. Wayne Lee. Mr. Jackson gave Mr. Lee permission to be off, and Mr. Jackson's brother-in-law worked in his place (Tr. 180). Mr. Blankenship stated that he was not a party to the telephone conversation between Mr. Jackson and Mr. Cox on Saturday morning, May 11, 1985. He confirmed that Mr. Jackson consulted with him before placing the call, and informed him that he was going to fire Mr. Poole because of

his irregular work and Mr. Blankenship concurred in that decision. Mr. Blankenship confirmed that the sole reason for Mr. Poole's discharge was "because he wouldn't work" and had missed so many days and was late for work. He confirmed that Mr. Poole was having marital problems, and that he took this into consideration (Tr. 182).

Mr. Blankenship stated that when Mr. Cox failed to come to work on Saturday, May 11, 1985, Mr. Jackson filled in for him and ran the scoop that day. Mr. Blankenship heard about the telephone call from Mr. Pleasants to Mr. Jackson, but had gone home and was not a party to that conversation (Tr. 183). He learned of Mr. Cox's discharge from Mr. Jackson later that day when Mr. Cox telephoned him at his home asking for a meeting with the six mine owners. Mr. Blankenship stated that he informed Mr. Cox that he did not know he had been fired, but would try to find out what happened, and Mr. Cox never called back (Tr. 184).

Mr. Blankenship stated that after Mr. Cox called him, he spoke with Mr. Jackson later that Saturday evening, and Mr. Jackson informed him that Mr. Cox had called Mr. Pleasants and "made some threats as far as our company, and he'd discharged him" (Tr. 185). Mr. Blankenship confirmed that Mr. Jackson had previously advised his personnel that Brooks Run Coal Company is independent from the respondent's company and had nothing to do with its management. Mr. Jackson also told his personnel that if anyone contacted or complained to Brooks Run about wages or other company matters, he would discharge them (Tr. 185). Mr. Blankenship stated that everyone, including Mr. Poole and Mr. Cox knew about Mr. Jackson's policy, and the fact that he, and not Brooks Run, made company policy for the respondent (Tr. 186).

Mr. Blankenship stated that he was at the mine when Mr. Poole and Mr. Cox came to the mine on Monday, May 13, 1985. They were in the lamphouse getting dressed, and he told Mr. Cox "to get his coveralls on and let's go to work and he said he was fired. And I just put my clothes on and he went out" (Tr. 186). Mr. Blankenship stated that he thought "maybe it might blow over," but that the decision of Mr. Jackson to discharge Mr. Cox apparently stood and that he was going to enforce it (Tr. 187). Mr. Blankenship denied that he had any imput into the decision to fire Mr. Cox, and that the decision was solely that of Mr. Jackson. When asked the reason given by Jackson for firing Mr. Cox, Mr. Blankenship responded as follows (Tr. 187-188):

THE WITNESS: He told me that Pete Cox had -- was going to -- called Neil Pleasants, Brooks Run Coal Company, and was going to shut down their operations and our operations, and he fired him for trying to take over the mines.

JUDGE KOUTRAS: How was he going to do that? Do you have any idea how Mr. Cox planned to shut the mine down?

THE WITNESS: No, I don't. All I'm telling you is what Mr. Jackson told me.

Mr. Cox's counsel declined to ask Mr. Blankenship any further questions (Tr. 188).

NOTE: The complainant subpoenaed the attendance of Mr. Carson Jackson as an adverse witness for testimony in this case. In view of the testimony of the witnesses regarding certain alleged illegal mine practices implicating Mr. Jackson, respondent's counsel advised him to seek additional counsel to advise him of his rights against self-incrimination and possible criminal liability for those alleged practices. Mr. Jackson retained counsel to represent him in this matter, and counsel entered her appearance on his behalf (Tr. 188-189; October 29, 1986). In response to certain questions, and on advice of counsel, Mr. Jackson declined to answer, and pleaded his Fifth Amendment right not to incriminate himself. His objections are noted below.

Carson Jackson confirmed that he is part owner of the mine and serves as the general mine superintendent, as well as president of the company. He confirmed that he is ultimately responsible for reviewing and counter-signing most official mine reports and documents, including dust sample reports (Tr. 189-199).

When asked about his knowledge concerning the alleged mine practices testified to by the prior witnesses, Mr. Jackson declined to answer (Tr. 201). Mr. Jackson denied any knowledge of miners other than Mr. Cox either making complaints to MSHA or threatening to do so (Tr. 202). With regard to Mr. Cox, he confirmed that he never heard Mr. Cox threaten to go to MSHA about anything in the mine while he was employed there (Tr. 201). He confirmed that none of his employees ever complained to him about any mine safety violations during 1984 and up to mid-1985 (Tr. 203). Mr. Jackson stated that he is not in the mine at all times, and if any complaints were made he might not hear all of them (Tr. 205).

Mr. Jackson stated that Mr. Cox has upset him at times when he would arrive late for work, and that "quite a few times" they have exchanged words, and even cursed each other (Tr. 205-206). Mr. Cox also upset him "a few times" when "he's tried to tell me how to run the mines, that people didn't have to work on Saturdays" (Tr. 207).

Mr. Jackson identified exhibit C-7 as a copy of the termination notice given to Mr. Cox, and he confirmed that he changed the discharge date on the form from May 13, 1985 to May 11, 1985, and that he did so because "I either had to do that or get him to knock my brains out." He also confirmed that the reason for Mr. Cox's discharge as shown on the form is "service unsatisfactory" (Tr. 201-208). Mr. Jackson stated that he actually fired Mr. Cox on Monday, May 13, 1985, and that when he called him at his home on Saturday, May 11, 1985, he only fired his nephew Mr. Poole. Mr. Jackson further explained that he changed the date to Saturday because Mr. Cox demanded that he do so, and that the date made no difference to him (Jackson) (Tr. 208-211). When asked when he decided to fire Mr. Cox, Mr. Jackson responded as follows (Tr. 211-213):

> A. I decided to fire him when he called Neil Pleasants. I run the scoop the day that this fellow was off. I didn't get outside until about three o'clock. And after the threats and stuff that he made over the telephone, I told --
>
> Q. About the labor board and that sort of stuff?
>
> A. Stopping the mines -- going to throw a picket line up around the mines.
>
> Q. It was after the telephone call, then, to Neil Pleasants, that you decided to fire him?
>
> A. I decided to fire him right then.
>
> Q. Did Neil Pleasants communicate the content of that telephone call on Saturday, May 11, 1985, to you, just before you decided to fire Cox?
>
> A. Yes.

Q. You say you're doing it after the telephone call. Pleasants, then, must have called you. Is that correct?

A. I decided it during the telephone call.

Q. I mean, as a result of the telephone call. You weren't on a conference call. Pleasants had to call you and tell you that Cox had called him?

A. That's right.

Q. And made some threats about closing the mine down, going to the labor board and such as that?

A. He was going to cause a lot of trouble.

Q. Did he say something about the labor board?

A. He was going to throw a picked line up around there. He said he was going to go to all the agencies.

Q. In other words, the mine enforcement agencies, like MSHA?

A. I don't know what he meant by that. But when he said a picket line, I knew what it was.

Q. He said he was going to the agencies. Is that right? Is that what you just said?

A. Yes, he was going to the agencies.

On cross-examination, Mr. Jackson stated that when he was upset with Mr. Cox he may have warned him, but he never threatened, reprimanded, or punished him in any way so as to effect his job security at the mine. Mr. Jackson did, however, warn Mr. Cox about his future with the company because of his frequent tardiness and his complaints about how Mr. Jackson was running the mine (Tr. 214). Mr. Jackson stated that Mr. Cox threatened "to whip his ass" several times, and that this would upset him. Mr. Jackson stated that he received information that other members of management and other workers were similarly threatened by Mr. Cox, and

that he (Jackson) had no similar problems with any of the other men (Tr. 215).

Mr. Jackson confirmed that he did not protest the unemployment claims filed by Mr. Poole and Mr. Cox after their discharge, and Mr. Jackson confirmed that he told Mr. Cox that he was tired of Mr. Cox trying to run the mine (Tr. 216). Mr. Jackson denied that Mr. Cox's discharge had anything to do with any safety complaints, and that the decision to fire Mr. Cox was his alone, and neither Mr. Blankenship or any of the other mine owners had nothing to do with it (Tr. 217).

Mr. Jackson stated that at no time during his employment did Mr. Cox or any other miner ask to review the mine fire boss records, or any records required to be kept by Mr. Blankenship (Tr. 218). Mr. Jackson expressed doubt that Mr. Cox could have asked to see those records without his being aware of it (Tr. 219).

In response to further questions, Mr. Jackson stated that while work was required to be done on Saturdays, he did not like Saturday work because he had to pay time and a half. However, Mr. Cox and Mr. Poole did not like to work on Saturdays, and Mr. Cox attempted to influence his crew not to work on Saturdays. He did this by letting it be known that he had gone to the "labor board" and there was nothing Mr. Jackson could do about working on Saturdays, and that the men could leave. Mr. Jackson stated that Mr. Cox said "you can lay off, you can be off, there's nothing he can about it" (Tr. 223). When asked whether Mr. Cox had ever made that statement to him, Mr. Jackson replied "He didn't tell me nothing. He would tell it someplace where he knew I would get hold of it" (Tr. 223).

Mr. Jackson stated that when he first hired Mr. Cox, he informed him about Saturday work, and that Mr. Cox advised him that "I'll work on Saturday, Sunday, 16 hours a day anytime you want." Mr. Cox also stated to him "anytime you don't like my work or anything, you just tell me, you won't have to discharge me, just tell me and you'll never see me no more" (Tr. 223). When asked whether Mr. Cox ever refused to work on Saturday, Mr. Jackson replied "he didn't refuse, he always had something to do" (Tr. 224). When asked why he did not fire Mr. Cox when he threatened him, Mr. Jackson replied "He was a good worker. I tried every way in the world to get along with him. Mr. Cox is moody. He'll get better for a week or two, then he's hell for a while" (Tr. 224).

In view of the unavailability of Mr. Jackson's private counsel, the parties agreed that Mr. Jackson could be deposed posthearing, and Mr. Jackson's posthearing deposition was taken and filed as part of the record in this case. Mr. Jackson testified as to his background and experience and confirmed that he is a certified mine foreman. He confirmed that Mr. Cox and Mr. Poole were the only two miners ever discharged, but that others had been laid off as a result of a reduction in force (Tr. 7). Mr. Jackson reiterated that when he first hired Mr. Cox he informed him that Saturday work may be required, and Mr. Cox agreed that he would work if called upon to do so. Mr. Jackson also confirmed that Mr. Cox was desperate for a job when he hired him. Mr. Jackson stated that Mr. Cox's starting pay was $100 a shift, and time-and-one half for work over 8 hours. All miners were paid the same regardless of their job classification, and whatever he instructed them to do was their job (Tr. 10).

Mr. Jackson stated that Mr. Cox was first hired as a bratticeman, and when a roof bolter quit, he assigned Mr. Cox to a roof bolter's job. Mr. Jackson later decided to take him off the roof bolter's job after a discussion with MSHA inspectors, and Mr. Cox was assigned to do brattice work. However, Mr. Blankenship asked him to assign Mr. Cox to a scoop because his back was bothering him and lifting brattice blocks was hurting him. Mr. Jackson stated that he accomodated Mr. Cox and allowed him to work as a scoop operator (Tr. 11).

Mr. Jackson stated that he considered Mr. Cox to be a good worker, but "if you tell him to do something he don't always do it the way you want him to" (Tr. 12). Mr. Jackson also stated that Mr. Cox has always had a problem in taking orders and that he resented authority (Tr. 12). After he was taken off the roof bolter, Mr. Cox resented doing what was asked of him, and didn't want to work overtime. Although Saturday work was considered a regular work day and Mr. Jackson was not required to pay overtime pay, he always paid the men at the overtime rate, but Mr. Cox resented working on Saturday even though very few Saturdays were scheduled as a work day (Tr. 13). Mr. Jackson stated that he hired Mr. Poole after Mr. Cox asked him to give him a job (Tr. 14).

Mr. Jackson confirmed that he had problems with Mr. Poole's work attendance and that he warned him about it at least three or four times before he finally fired him (Tr. 15). Mr. Jackson identified a copy of the mine's attendance records beginning in February, 1984, through June, 1984, and May, 1985, and he confirmed that Mr. Cox and Mr. Poole did

not work Saturday, May 11, 1985, and were terminated the following week (Tr. 19, deposition exhibit No. 1). Mr. Jackson confirmed that he excused Mr. Poole from work when he had a death in his wife's family, and advanced him money to purchase an airline ticket for his wife (Tr. 20).

Mr. Jackson confirmed that Mr. Cox was late for work several times, and his policy is to allow employees who are late to work rather than go home. He warned Mr. Cox about being late. Mr. Jackson stated that he had "kind of a feeling" that Mr. Cox was the cause of Mr. Pool's absence on May 11, but that he did not know that they were not going to work that day. Mr. Jackson "had some feedback" that none of the men would work that day, and that Mr. Blankenship told him that Mr. Cox was telling the men that since he and Mr. Poole were not going to work, the rest of the men didn't either (Tr. 23).

Mr. Jackson stated that he did not give Mr. Cox permission not to work on Saturday, May 11, and that he did not ask him for such permission. Except for one miner who had permission to be off, and who was replaced by someone else, all employees except Mr. Cox and Mr. Poole reported for work. He called Mr. Cox because he had to arrange for replacements if he were not coming to work (Tr. 23-24). Mr. Jackson explained further as follows (Tr. 25-26):

> Q. So it's your testimony then that Cox and Poole did not ask you for permission to be off that Saturday but Mr. Blankenship told you that they didn't want to work, probably wouldn't come out to work, and they were trying to get the other men not to come out to work?
>
> A. Yes. They told me that Mr. Cox said there was no more Saturday work as far as he was concerned. So that encouraged me to be just a little bit strict on this. I just thought well, it looked like this was deliberate and I'll just let Mr. Poole go.
>
> Q. If he didn't show up?
>
> A. Yes.
>
> Q. And then you were going to deal with Mr. Cox in some other manner?

A. Well, I was going to give him a warning. It takes you a year, unless somebody misses a whole lot of work, before you can go through the steps discharging somebody for irregular work.

Q. You had documented Mr. Poole missing work. Is that correct?

A. Yes.

Q. And that's shown in Exhibit 1 here?

A. Yes.

Q. The point is you had decided that if Mr. Poole didn't show up you were going to discharge him for missing another day?

A. Yes.

Q. After he had been warned?

A. Yes. I told him so.

Q. But you did not plan on discharging Mr. Cox if he missed work?

A. No.

Q. But you had given him warning?

A. I would have.

Q. Had you not fired him?

A. Yes.

Mr. Jackson explained the operation of the Holmes Safety Counsel, and confirmed that it is sponsored by the respondent and that its purpose is to afford an opportunity to the miners to discuss various mine safety matters. Meetings are held once a week in the evenings, and announcements are posted and miners are encouraged to attend. The meetings are not held on company time, and the miners are not paid to attend. Mr. Cox has never attended a meeting (Tr. 28-29).

Mr. Jackson confirmed that he reprimanded Mr. Nash for going to the Brooks Run Coal Company with another miner to

ask about time off or pay for his birthday. Mr. Jackson explained that Brooks Run holds the mineral rights and that the respondent simply mines the coal and sells it to Brooks Run. Mr. Jackson stated that he met with his miners and made it clear to them that they were not to go to Brooks Run, and told them that Brooks Run has nothing to do with the management of his mine. Mr. Jackson was certain that Mr. Cox was at this meeting since he was on the payroll. Mr. Jackson is the only mine owner who ordinarily deals with Brooks Run through Mr. Pleasants (Tr. 31).

Mr. Jackson stated that when he spoke with Mr. Cox over the telephone Saturday morning, May 11, 1985, he did not fire him, did not intend to fire him, nor had he made any decision to fire him. Up to that point in time Mr. Cox had never said anything to him about speaking with MSHA Inspectors Adkins or Tyler, or any other inspectors, and Mr. Cox said nothing to him about going to any inspectors (Tr. 32).

Mr. Jackson confirmed that he called Mr. Pleasants from the mine office later in the day after speaking with Mr. Cox. Up to that point, he had not discussed Mr. Cox's and Mr. Poole's failure to show up for work with any of his mine co-owners (Tr. 33). Mr. Jackson explained his telephone conversation with Mr. Pleasants as follows (Tr. 33-38):

> A. Well, we called him and he said what's going on up there. And I said nothing. And he said how many people did you fire. I said I fired one. He said well, there was a fellow called me and told me that Brooks Run had trouble and that -- he was more or less fearing about a work stoppage. And I said well, who was that. He said he didn't give me his name. I said well, what did he say. And he started repeating what he'd said.
>
> Q. Well, what did he tell you had been said?
>
> A. He said something about his son had little league ballgame that day and he had to be home with him to manage that little league team. I said well, I've fired two. I said that was Mr. Cox.
>
> Q. You knew it was Mr. Cox that called Mr. Pleasants?

A. We had already went over that morning when I was talking.

Q. About his son playing in a baseball game?

A. Yes.

Q. So it was the only employee it possibly could have been?

A. Yes.

Q. And that's when you told Mr. Pleasants well, I fired two?

A. Yes. Then, you know, he went on to tell me -- he said do you reckon the men will strike on you or go home, quit work. I said I don't think so. He said well, do you reckon he'll cause you any trouble. I said I'm sure he will.

Q. What did you mean by that?

A. Well, any way that he could -- I told him -- I said the Labor Board, according to him, he's told me at least twenty times the Labor Board will eat me up.

MR. STONE: Who is he?

THE WITNESS: Mr. Cox.

BY MR. GARRETT:

Q. Go ahead.

A. He told me that morning that the Labor Board would eat me up.

Q. Was he ever more specific with his threat to you than the Labor Board would eat you up?

A. No. He just more or less said well, you can't do that. That morning he told me that Kit Jackson missed more work than Mike did.

Q. And that you couldn't fire a man for missing work on Saturdays?

A. Yes.

Q. Did he tell you that?

A. Yes, he did.

Q. That you couldn't make men work on Saturdays if they didn't want to?

A. That's right.

Q. And in that context he said if you try it the Labor Board will eat you up?

A. Yes, the Labor Board would eat me up.

Q. Do you know who he was referring to when he used the word Labor Board?

A. No, I didn't. In fact I didn't even know who the Labor Board was or anything.

Q. Did you even care who the Labor Board was?

A. No, I couldn't care less. I just knew someone was going to eat me up.

Q. Did you take his threats then seriously?

A. I did't when I talked to him that morning. Now he may -- I knew what he said to Neil.

MR. STONE: You're talking about the morning of May 11th?

THE WITNESS: That's right.

BY MR. GARRETT:

Q. Did Mr. Pleasants also tell you he had made threats of going to federal agencies or going to agencies or something?

A. Yes.

Q. Did he tell you that after you'd decided already to fire him?

A. Yes. In my mind I had fired him. I told him I'd fired him before --

Q. Did it make any difference if he made any threats at all about doing anything to you?

A. No, it didn't make any difference.

Q. Did that have any part to play in whether you made a decision to fire him or not to fire him?

A. No. It had no -- didn't have nothing to do with the firing.

Q. Did you care if he was going to go to MSHA about anything that went on in that mine?

A. He told me that morning he would -- that he would have every federal and every state -- everybody up there at that mine. I said hell, we've got them now; you just might as well hire you some. I said I think we've got them all in the state up here anyway.

Q. So did that matter making that threat to you?

A. No, sir.

Q. It didn't have any impact at all about you requiring the men to work on Saturday?

A. No.

Q. Did Mr. Pleasants ask you then if he was worried about putting out a work stoppage or pickets or trying to pull the men out?

A. Yes. That was Mr. Pleasants' main concern and he threatened with the union throwing up the picket line. His brother-in-law was president of some local down there. But there's got to be a breaking point somewhere, the way I felt. And I felt like no matter what he does to me or how he does it or what else he's got to go.

Q. So you were not -- you did not decide to fire him as a retaliation or punishment for threatening to go to the Mine Safety and Health Administration?

A. No, that had nothing to do with it, nothing at all.

Q. In fact if you were afraid of him going to MSHA what would have been your course to follow? Would it have been not to fire him?

A. If I was afraid of it I guess I would be afraid to fire him.

Mr. Jackson stated that he met with Mr. Cox and Mr. Poole at the mine on Monday, May 13, 1985, and told them that he was discharging them. Both of the termination notices stated "unsatisfactory service" as the reason for the discharge, and Mr. Jackson explained to Mr. Cox that he was being fired for "trying to take over management of the mine," and that Mr. Poole was told he was being fired for "irregular work." Mr. Jackson explained further that Mr. Cox was "trying to encourage the people to miss work telling people there wasn't nothing I could do about it. There's several different things, just like him threatening to put up a picket line" (Tr. 39). Mr. Jackson also stated that Mr. Cox's calling Mr. Pleasants was "the last straw" (Tr. 39). He further explained as follows (Tr. 40-41):

Q. When you say management of the mine, that had nothing to do with making complaints about safety?

A. No. That's every man's right. He can withdraw himself from the mines. They've got a hotline they can call and get them down there. They don't have to turn in their name or anything else if they want a federal mine inspector in.

Q. Well, so it's every man's right to expect the mine to operate within the law.

A. Yes.

Q. Do you acknowledge that?

A. Yes.

Q. And that had nothing to do with your decision to fire Mr. Cox?

A. No.

Mr. Jackson confirmed that Mr. Cox never asked to review the fire boss books, dust sampling books, or other records kept in the mine office (Tr. 41). He also confirmed that he holds safety meetings and annual training sessions for miners and that he has participated in the training. Mr. Jackson stated that miners are advised of their right to talk to Federal inspectors and he had no doubt that Mr. Cox knew his rights at the time he was discharged (Tr. 42).

On cross-examination, Mr. Jackson confirmed that all of his coal orders are sold to the Brooks Run Mining Company (Tr. 44). He confirmed that he advised the men about not going to Brooks Run with their problems either in 1980 or 1981, "when we first started the mine up," but he could not recall the specific date (Tr. 47). Since the incident concerning Mr. Nash, no one else ever went to Brooks Run or to Mr. Pleasants about any complaints (Tr. 50).

The parties stipulated to the testimony of MSHA Inspector John G. Tyler, and they agreed that if called, Mr. Tyler's testimony would be as follows:

1. John Tyler is a surface coal mine inspector with the Federal Coal Mine Health and Safety Administraton. He has no underground experience. He has worked out of the Summersville, West Virginia field office since 1982. He is not familiar with Pammlid Coal Company.

2. Mr. Tyler became acquainted with Mr. Cox when Mr. Cox answered an advertisement to buy Subaru car parts from Mr. Tyler. Mr. Cox came to Mr. Tyler's home which is about six miles from Mr. Cox' home, inspected the parts, and purchased them. During the course of conversation, they exchanged information concerning what each did for a living. This occurred in Summer, 1984.

3. Approximately three months later, Mr. Cox came to Mr. Tyler's home and related information concerning alleged conditions in

his workplace. Mr. Tyler could not recall the exact nature of the complaints, but is relatively certain that Mr. Cox related information about hauling caps and powder on pieces of equipment. He is not certain about any other information related by Mr. Cox. Mr. Tyler did not offer comment with respect to the validity of any information offered by Mr. Cox.

4. During the course of the conversation with Mr. Cox, Mr. Tyler explained to Mr. Cox that he is a surface mine inspector. Mr. Tyler told Mr. Cox that the Summersville field office did not have jurisdiction over the geographical area in which the mine where Mr. Cox worked was located. Mr. Tyler explained to Mr. Cox that the appropriate field office was in Clarksburg, West Virginia, or Bridgeport, West Virginia and that the district office for the area is in Morgantown, West Virginia. Mr. Tyler subsequently verified with his then supervisor, Clyde Perry, that he had given Mr. Cox correct and appropriate information and advice. Mr. Perry agreed with Mr. Tyler. Mr. Tyler did not contact anyone else with respect to his conversation with Mr. Cox, including anyone with Pammlid Coal Company or any other inspector. Mr. Tyler did not even recall the name of the company until he was contacted by Mr. Cox and told sometime during the week of October 13, 1986, that he would be subpoenaed.

5. Mr. Tyler never saw Mr. Cox again or heard from him after the initial conversation took place until shortly after Mr. Cox was discharged, when Mr. Cox again came to Mr. Tyler's home. Mr. Tyler again recommended that Mr. Cox go to the proper district office if he had any complaint. Mr. Tyler even suggested that Mr. Cox go to the Mt. Hope MSHA district office since it was near Mr. Cox's home in Oak Hill, West Virginia.

6. Mr. Tyler took no notes during any conversation with Mr. Cox and cannot remember specific dates on which they occurred, nor did he offer any opinion or have an opinion

whether any information Mr. Cox related had merit.

Complainant Alfred H. Cox, testified as to his background and experience, and he explained that by "Labor Board," he had in mind the Mine Safety and Health Administration (Tr. 5). Mr. Cox identified exhibit C-4, as a personal notebook he kept on certain mine conditions, and he testified as to some of the entries he made in the book, as well as to certain entries made on the mine fire boss records, exhibit C-8 (Tr. 5-26). He also testified about the battery explosion incident which occurred on October 5, 1984 (Tr. 26-37).

Mr. Cox stated that he made few complaints to Mr. Jackson because "he flew off the handle", but that he did complain many times to his section foreman Rodney Blankenship. Mr. Cox stated that he complained about the roof in the number five entry taking weight and pulling through the plates, and about powder and caps kept on the drill. He also complained to Mr. Jackson's son, Kit, and he believed that he was part of mine management (Tr. 38). On one ocasion shortly before his discharge, Mr. Cox said that he advised Mr. Blankenship that he intended to talk to an MSHA inspector the next time one was in the mine, and that Mr. Blankenship told him that while he could not be fired for doing this, "we could always have a layoff and never call you back" (Tr. 39). Mr. Cox stated that he obtained an MSHA pamphlet discussing miners' rights on May 13, 1985, from MSHA's Clarksburg Office (Tr. 41). Mr. Cox conceded that he was aware of his right to complain to any MSHA inspector before he obtained the pamphlet (Tr. 44-45).

In further reference to any safety complaints to mine management, Mr. Cox stated as follows (Tr. 85-87):

> JUDGE KOUTRAS: All the men sit around talking and threatening to blow the whistle on this mine operator and call the feds in, right?
>
> THE WITNESS: They didn't all threaten to. They was unsatisfied with the way things was running, but they didn't have enough guts to stand up and say anything to Carson Jackson about it.
>
> * * * * * * *
>
> JUDGE KOUTRAS: What are you getting from all that? What are they saying? What are they trying to tell me by all that?

THE WITNESS: The conversations I had with them and still have with a lot of my co-workers is that they need their jobs. Several of them said, well, more or less, to get by, to have a job. They didn't directly come out and say that --

JUDGE KOUTRAS: Well, isn't it a fact that nobody ever directly complained to Mr. Jackson about safety?

THE WITNESS: I have on very rare occasions.

JUDGE KOUTRAS: Directly to Mr. Jackson.

THE WITNESS: Directly to Mr. Jackson. Mr. Blankenship, like I say, is the one that was my section foreman. He was there most of the time.

JUDGE KOUTRAS: And you would complain to him?

THE WITNESS: And I would complain to him.

Mr. Cox confirmed that he spoke with MSHA Inspectors Tyler and Adkins before his termination, and he confirmed that Mr. Adkins advised him to file a section 103(g) complaint with MSHA's Summersville Office. Mr. Cox stated that he did not show his notebook to Mr. Tyler or Mr. Adkins because he intended to tell them about the violations in the mine (Tr. 51).

Mr. Cox stated that Mr. Jackson threatened to fire him in June, 1984, because he would not work on a Saturday when he had to bale hay. Although he was not fired, he was taken off the roof bolter and assigned to run the scoop. Mr. Cox stated that he then informed Mr. Blankenship that "the mines is going to be run in compliance with the law," and that Mr. Blankenship replied "you know we can't run coal like that" and "don't do something to make me have to fire you" (Tr. 59). Mr. Cox then had some words with Mr. Jackson about being taken off the roof bolter, and while he did not specifically tell Mr. Jackson that he was going to turn him in for the way he was operating the mine, Mr. Cox stated that this was his intention (Tr. 59). Mr. Jackson then explained that he took Mr. Cox off the roof bolter after discussing the mine accident rate with an MSHA inspector, and Mr. Cox confirmed that he had four roof bolting related accidents (Tr. 61).

Although Mr. Jackson intended to "issue him a slip" for unsatisfactory service, he changed his mind and told him to go back to work (Tr. 64).

Mr. Cox confirmed that after he was taken off the bolter, he was assigned to build stoppings, and was then assigned to loading coal with the scoop. He confirmed that the ventilation curtains were rolled up at that time and that he did not roll them down because he wanted to keep his job (Tr. 68). Mr. Cox believed that he was taken off the roof bolter because he refused to work on Saturday, and that Mr. Jackson did this to "spite" him. He conceded that it was possible that Mr. Jackson took him off that job because of his discussions with the MSHA inspector over his accidents (Tr. 71).

Mr. Cox stated that Mr. Jackson and Mr. Blankenship have never told him that his services were unsatisfactory, and he confirmed that Mr. Jackson admonished him for riding the belt out of the mine. He could not recall Mr. Jackson warning him about working under unsupported roof (Tr. 73-74).

Mr. Cox stated that he agreed with all of the testimony by his fellow miners with regard to the violations which they testified to during the course of the hearing (Tr. 77). He explained the circumstances concerning his refusal to work on Saturday, May 11, 1985, and confirmed that he did not work because he had to coach his son's little league baseball team (Tr. 81-84).

Mr. Cox confirmed that he received a telephone call at his home from Mr. Jackson on Saturday morning, May 11, 1985, and he explained the conversation as follows (Tr. 95-96):

> On May 11th at approximately three minutes after seven, I received a phone call from Mr. Carson Jackson. He asked me why that I wasn't working today. I told him, I said, well, you know, I've talked to Rodney about it already. I said I've got a Little League game today; I'm the coach. And he said, where's Mike. I said he's in bed asleep. He said, well you tell him to come in and pick up his time. I'm tired of him laying off. And I said, well, Carson, you know that ain't right. I said Kit, your own son has missed more work than he has. And he said Kit is part owner of the mine. He can do what the hell he wants to. And I said, yes, anything that the company wants to do is just fine, if it's for their

> own personal -- whatever. I said, but if it's to help the men any, if it's something that the men need, then to heck with it. And he said, well that's the way it is, and if you don't like it then you can come and pick up your time, too. And I said, well, if that's the way you feel, or I'm sorry that's the way you feel or something to that effect. And he hung up the telephone.

Mr. Cox stated that after his conversation with Mr. Jackson, it was not clear to him whether he had been fired, and that he first learned that he was fired when he was handed his termination slip by Mr. Jackson on Monday, May 13, 1985 (Tr. 97). Mr. Cox stated that Mr. Poole asked him to call Mr. Pleasants after his Saturday morning conversation with Mr. Jackson, and that he informed Mr. Pleasants that he had trouble at one of his mines. Mr. Cox stated that he asked Mr. Pleasants to speak to Mr. Jackson to see whether Mr. Poole could retain his job. Mr. Cox stated that he also told Mr. Pleasants that if something wasn't done "we was going to the Mine Safety and Health Administration, to the Department of Labor." Mr. Cox stated that he informed Mr. Pleasants that he was planning to go to MSHA anyway "about the way the mines was run. He knew it was run out of compliance with the law" (Tr. 99). Mr. Cox denied that he mentioned any picket line to Mr. Pleasants (Tr. 100).

Mr. Cox stated that it was clear to him that Mr. Jackson fired Mr. Poole on Saturday, May 11, 1985, and when asked to explain why he asked Mr. Jackson to change the date of the discharges from May 13 to May 11, Mr. Cox stated that "It's immaterial as far as I'm concerned. I'm fired" (Tr. 103). Mr. Cox stated that he went to the mine on Monday, May 13, with the intention of going to work, and that Mr. Poole simply rode with him and would have dropped him off and returned to pick him up after work. However, Mr. Jackson asked to see both of them, and handed them their termination notices. Mr. Cox stated that when he asked Mr. Jackson to explain "unsatisfactory service," Mr. Jackson replied "you're trying to run the God damn mines" (Tr. 107).

On cross-examination, Mr. Cox confirmed that he understood that Mr. Jackson was the person who hired and fired employees, and that when Mr. Jackson hired him he advised him that there would be times when overtime Saturday work would be required (Tr. 119-121). Mr. Cox confirmed that Mr. Jackson allowed him to trade shifts with another employee so he could

keep a doctor's appointment, and that he "respected him for it" (Tr. 122).

Mr. Cox confirmed that between January and May, 1985, Mr. Poole was having an attendance problem at the mine, and that because of certain marital problems, Mr. Poole moved in with him (Tr. 123). Mr. Cox stated that early in the week of May 11, 1985, he was told that he would have to work on Saturday, May 11, and while he told Mr. Blankenship that he couldn't work that day, Mr. Cox conceded that it was his intent not to work. Mr. Cox confirmed that he did not work on other Saturdays, and that Mr. Jackson did not give him permission to be off on May 11 (Tr. 124-125). Mr. Cox stated that he did not ask Mr. Jackson about being off because he believed that Mr. Blankenship led him to believe that he could be off (Tr. 127). However, Mr. Cox later stated that when he informed Mr. Blankenship on Friday, May 10, that he was not going to work on Saturday, Mr. Blankenship replied "I've done talked to you about it. I don't want to hear anything about it" (Tr. 131). When asked whether he had advised any other employees that they did not have to work on that Saturday, Mr. Cox replied as follows (Tr. 128-129):

> Q. During the course of that week, Mr. Cox, did you tell other men that you weren't going to work on Saturday -- other men on your section? I'm not talking about management employees.
>
> A. Yes, I did tell them that I wasn't going to be working Saturday. After I'd talked to Rodney.
>
> Q. Did you tell any other employees that they didn't have to work on Saturday either?
>
> A. Well, there was a bunch of employees complained about having to work on Saturday and stuff, and I did tell them that you know, if you didn't want to work, don't come in, you know. As simple as that. You want to work or either you don't. If you had a reason for not coming in --
>
> Q. Did you tell them that there wasn't anything the company could do to them about not working on Saturday because of the labor board?

A. No, ma'am, I did not.

* * * * * * *

JUDGE KOUTRAS: Why would you tell other people that they didn't have to come to work on Saturday? Why was that your concern?

THE WITNESS: It wasn't my -- they complain on the section, they've got to work Saturday, they've got other things they want to do, and I just simply said, well, if you've got other things that you want to do, just don't come in to work. You know.

Mr. Cox confirmed that he disagreed with Mr. Jackson's decision to fire Mr. Poole, and told him so. Mr. Cox also confirmed that he got the impression from his telephone conversation with Mr. Jackson that he (Jackson) was fed up with Mr. Poole, but did not believe he was fed up over Mr. Poole's absences. Mr. Cox was of the opinion that Mr. Jackson found an opportunity to get rid of Mr. Poole because of his complaints over the conditions in the mine (Tr. 136-139).

Mr. Cox confirmed that the purpose of his call to Mr. Pleasants on May 11, 1985, was to attempt to get Mr. Pleasants to influence Mr. Jackson to rehire Mr. Poole. Mr. Cox stated that he did not call Mr. Jackson because he (Jackson) was "hot headed" and Mr. Cox believed that he would definitely be fired if he called him (Tr. 147-148).

Mr. Cox confirmed that when he called Mr. Pleasants on May 11, he told him that "there would be trouble in one of his mines," and that there would be trouble at Brooks Run Mine if Mr. Poole were discharged (Tr. 149-150). Mr. Cox stated that he did not identify himself to Mr. Pleasants when he placed the call because "it was still up in the air whether I had a job or not," and he was afraid that his job would be in jeopardy for making the call (Tr. 158-159). Mr. Cox also stated that another reason for not identifying himself was that "if something wasn't straightened out, I was going to go to MSHA," and that he told Mr. Pleasants that he was thinking about going to MSHA before the telephone conversation. Mr. Cox explained that if Mr. Poole was not given his job back, he and Mr. Poole were going to go to MSHA. When asked whether he would have gone to MSHA if Mr. Poole were given his job back, Mr. Cox replied "not right at that time" (Tr. 161).

Mr. Cox confirmed that he also called Mr. Blankenship on May 11, 1985, and asked him whether or not all of the mine owners had collaborated to fire Mr. Poole, and that Mr. Blankenship informed him that they had not, and that the decision was made by Mr. Jackson alone. Mr. Cox confirmed that he called Mr. Blankenship because he always considered him to be a friend and was curious as to whether he had spoken with Mr. Jackson (Tr. 164). Mr. Cox confirmed that when he asked Mr. Jackson for an explanation as to the meaning of his "unsatisfactory service," Mr. Jackson replied "You're trying to run the God damn mines," but did not elaborate further (Tr. 166, 168).

Mr. Cox examined copies of certain roof bolting accident report forms for January 16, and May 16, 1984, and December 14, and August 9, 1983, in which he was involved (exhibit R-3, Tr. 177). Mr. Cox stated that he has no reason to doubt that he was taken off the roof bolter in 1984, because an MSHA Inspector suggested to Mr. Jackson that this be done (Tr. 178). He conceded that he was upset because Mr. Jackson did not initially explain his decision to take him off the roof bolter, but that he later accepted the decision (Tr. 179-180). Mr. Cox confirmed that when he was assigned to the scoop, he informed Mr. Jackson that he would operate it in compliance with the law (Tr. 180), and he conceded that "a lot of times" he did not operate the roof-bolter machine in compliance with the law (Tr. 180). Mr. Cox conceded that all times during his employment at the mine, he never refused to operate a piece of equipment because of any safety considerations, and that he voluntarily operated his scoop with the ventilation curtains rolled up "like everybody else" (Tr. 181-182).

Mr. Cox confirmed that there have been lay offs at the mine for a week or so out of the month and for one 3-month period, because of production quotas, and that he has been laid off and called back to work for these reasons. He knows of no one who was laid off and not called back because they made safety complaints (Tr. 183-184).

With regard to his complaint to Mr. Blankenship about bad roof conditions, Mr. Cox explained that Mr. Blankenship may have told Mr. Poole that "we was going through a double linear." Mr. Cox confirmed that he did not know what a "double linear" was until it was explained to him by an MSHA inspector in the Morgantown Office after he was terminated (Tr. 186). He also confirmed that most of his complaints about dust and the powder and caps on the coal drill were made to Mr. Blankenship more than once (Tr. 187). He also complained to Kit Jackson, and he believed that he would tell

his father Carson about them (Tr. 187). Mr. Cox also confirmed that he complained while riding out of the mine on the mantrip with Kit Jackson and other miners (Tr. 191). He also confirmed that he complained to Carson Jackson about the dust caused by the ventilation curtains being rolled up, but that Mr. Jackson did not respond (Tr. 192).

With regard to the use of the ATRS system on the roof bolter, Mr. Cox confirmed that he would use it when he encountered loose rock, and there were times when he did not use it. Any decision as to the use of the ATRS was his, and he did not seek Mr. Blankenship's advice in this regard. Mr. Cox confirmed that most of the time he used a Galis 320 bolter which was not equipped with an ATRS system (Tr. 193-194).

Mr. Cox admitted that he stored caps and powder on his drill, and while no one directed him to do it, he still complained to Mr. Blankenship about the practice (Tr. 197-198). Mr. Cox also admitted that Mr. Jackson had warned him about riding the belt out of the mine, and that he tried to ride it out again after he was warned, but someone shut the belt off, and he had to walk out of the mine (Tr. 198). Mr. Cox denied that he was ever warned about operating his scoop with any part of his body out from under the canopy, and he could not recall being told by Mr. Jackson not to bolt off cycle. However, Mr. Cox confirmed that Mr. Blankenship told him on one occasion not to roof bolt out of sequence, but he could not recall whether he bolted out of sequence after that time (Tr. 200).

Mr. Cox confirmed that he made entries in his personal notebook for approximately 2 weeks from August 18 to September 4, 1984, and he confirmed that he never showed it to any inspector or to anyone from mine management. He stated that he kept the book so that he could use it as a threat to "implicate them before the Mine Safety and Health Administration," and in the event management found out that he was keeping the book and tried to fire him (Tr. 205). Mr. Cox confirmed that he never told Carson Jackson that he was keeping the book, but did tell his son Kit, and he thought that he also told Mr. Blankenship. He also stated that he "might have" intended that by telling Kit Jackson about the book, he would inform his father about it (Tr. 205).

Mr. Cox confirmed that at no time during his employment at the mine did he ever go to any mine inspector who inspected the mine about his complaints (Tr. 208). He confirmed that he was first acquainted with Inspector Tyler when he went to his home during the summer of 1984 to buy a car engine from him.

Mr. Cox also confirmed that Mr. Tyler advised him that he was not an underground inspector, and advised him where he could file any complaint (Tr. 209). He also understood Inspector Adkins' instructions as to where to file any complaint (Tr. 210). Mr. Cox explained that he did not follow up on the advice given him by the inspectors to file his complaint with the appropriate MSHA office because he did not believe he would get a "fair shake" from MSHA inspectors. He explained further that when MSHA inspectors come to the mine, it takes them 2 or 3 hours before they go underground, and that once underground, they are not in the mine very long (Tr. 211-214). Mr. Cox also believed that Mr. Tyler and Mr. Adkins would be more concerned about his complaints and pass them on to the appropriate MSHA office (Tr. 217-218).

Mr. Cox confirmed that when he was laid off after the mine production was in, Mr. Jackson gave him "low earnings slips" so that he could draw unemployment. Mr. Cox also confirmed that the respondent sponsored his daughter in a beauty contest and donated money so that she could participate in the pageant (Tr. 222). He also confirmed that there were some Saturdays when he was not required to work (Tr. 223).

Michael Poole was called in rebuttal, and he stated that during Mr. Cox's telephone conversation of May 11, 1985, with Mr. Pleasants, he heard Mr. Cox tell Mr. Pleasants that since he (Pleasants) has been in the respondent's mine and has observed how it was run, "if something wasn't done that we was going to the labor board" (Tr. 332). Mr. Poole stated further that Mr. Cox stated "If something wasn't done somebody was going to get killed in that mine and my uncle and I was going to the Department of Labor board, MSHA, or whatever it is . . . whatever we had to do in order to get the mine back within the specifications of the law" (Tr. 333).

Mr. Poole stated that he and Mr. Cox were going to the Labor Board or to "governmental authority" regardless of whether they were fired, and that he and Mr. Cox had made plans to do so because their complaints to management were being ignored (Tr. 333-334). In response to further questions, Mr. Poole confirmed that his initial request that Mr. Cox call Mr. Pleasants was made in order to convince Mr. Pleasants to tell him that Mr. Jackson was running an unsafe mine, and that if Mr. Jackson had not called Mr. Cox on May 11, he (Poole) would not have thought to call Mr. Pleasants to complain about safety or to express his concern about anyone getting killed in the mine (Tr. 336). Mr. Poole conceded that he knew that Mr. Jackson ran his

mine, but thought that Mr. Pleasants had the authority to speak to Mr. Jackson on his behalf (Tr. 338).

Respondent's Testimony and Evidence

Alva Cogar, drill operator and shot firer, confirmed that he worked on the same shift with Mr. Cox during the last 3 years, and prior to that he worked the night shift. He confirmed that powder and caps were stored on his equipment during mining, and that all of the drillers engaged in this practice, including Mr. Cox. Mr. Cogar stated that he would find powder and caps on the drill machine at the end of Mr. Cox's shift (Tr. 61-65). He engaged in the practice because it made his job easier, and it was not done at the respondent's direction (Tr. 71).

Mr. Cogar confirmed that he has encountered bad top in the mine, but stated that it was worse in other mines that he has worked. He stated that during the first 4 or 5 months of 1985, when bad top was encountered, extra long bolts and cribs were used, and Mr. Blankenship would have the affected areas rebolted and would instruct him to watch the roof. Loose coal would be barred down and proper roof bolting procedures were followed. In addition, bad top would be cribbed and dangered off (Tr. 66-70). The section boss would review the roof-control plan every day before starting work underground, and Mr. Jackson talked to the men about safety and cautioned them to be careful of bad top (Tr. 74-76).

Mr. Cogar stated that he has observed Mr. Cox operate the scoop with his feet up on the canopy, and he has "heard talk among the crew" that Mr. Cox was taken off the roof bolter because he was bolting the wrong way and management became concerned for his safety (Tr. 72-73). Although he has never observed Mr. Cox walk out under unsupported roof, he believed that Mr. Jackson caught Mr. Cox doing this, and also cautioned him about riding the belt out of the mine (Tr. 76-78).

Mr. Cogar confirmed that when he was first hired by Mr. Jackson he was told that Saturday work would be required. He stated that everyone complains about Saturday work, including Mr. Cox. He has heard Mr. Cox state that he would "jack Jackson's jaw" and would "whip the man fired him." Mr. Cogar believed that Mr. Cox was kidding when he made these statements, but he could offer no other explanation as to why they were made (Tr. 82-83, 99). Mr. Cogar stated that he is not reluctant to speak to mine management about mine conditions,

is not afraid of losing his job, and he never heard management state that anyone could quit if they did not like the working conditions (Tr. 84-85). He also confirmed that he has observed mine inspectors in the mine after roof falls (Tr. 85).

On cross-examination, Mr. Cogar confirmed that ventilation curtains were rolled up, and that he "took shortcuts." Although Mr. Jackson and Mr. Blankenship did not order that the curtains be rolled up, Mr. Cogar believed they were aware of the practice because they were on the section all of the time (Tr. 87). He confirmed that Mr. Blankenship did order the curtains to be rolled up and out of the way so that they would not be torn down by equipment, but that this was always after an inspector had left the section (Tr. 92). Mr. Cogar stated that he had adequate water on his machine to keep the dust down, but that the curtains were up more often than down during the start of his shift (Tr. 90-91).

Mr. Cogar stated that he overheard Mr. Cox state that he could not work on Saturday, May 11, 1985, because he had a ball game, but does not know whether he informed management that he could not work. Mr. Cogar believed that everyone except Mr. Cox and Mr. Poole worked on that Saturday (Tr. 90, 93).

Mr. Cogar confirmed that he has shot more than one place at a time, but did not believe that this was a violation. He stated that he has never shot under unsupported roof, except for a corner where the roof bolter could not reach, but he would be no further than 30 inches from unsupported roof (Tr. 92). He confirmed that Mr. Blankenship has instructed him to shoot three places at one time (Tr. 99). He also confirmed that there were occasions when his hand-held methane detector would not work, but that he would borrow another one from his foreman (Tr. 95).

Mr. Cogar stated that he has heard Mr. Cox complain about the lack of brakes on the mantrip they were riding, and that Kit Jackson was present on some of these occasions. At times, Mr. Blankenship was aware of the lack of brakes, but they would either be repaired on a subequent shift, or another mantrip would be used. Management always repaired his equipment when needed, but at times the brakes on the mantrip would not be repaired on the next shift (Tr. 100-102).

Mr. Cogar stated that he never complained to Mr. Jackson or Mr. Blankenship about safety, and did not know whether Mr. Cox did. He confirmed that he "jawboned" with his fellow

miners about dust, powder and caps on equipment, and walking under unsupported roof. Mr. Cogar stated that Mr. Cox mentioned these conditions to him, and that the miners complained to each other about these conditions (Tr. 103-105). Mr. Cogar stated that since Kit Jackson rode the mantrips with the men, he believed that the complaints would be taken to Carson Jackson by Kit Jackson and he believed the two Jacksons would discuss them with each other (Tr. 109-110).

Donnie Crum, belt man, testified that he worked the first shift and was primarily responsible for maintaining the belt system. He confirmed that a roof fall occurred on the No. 4 belt, but he did not know when. He recalled seeing Mr. Cox operating his scoop with his legs outside of the protective canopy on more than one occasion (Tr. 228). He also confirmed that Mr. Jackson warned the men about riding the belt out of the mine, and that he told them he would fire them if he caught them. Mr. Jackson shut the belt down and became upset when he found that some of the men were not on the mantrip coming out of the mine. Mr. Cox had not used the mantrip when he (Crum) rode it out of the mine (Tr. 225-229).

Mr. Crum confirmed that his foreman Blankenship or Mr. Jackson would hold safety meetings in the lamphouse "once or twice a week, or maybe once every two weeks" (Tr. 230). Mr. Jackson discussed and stressed safety with the men, and advised them that they were to keep their minds on their job. Mr. Crum stated that he has never had any difficulty in discussing mine problems with Mr. Jackson or Mr. Blankenship, and they were responsive to his concerns about the roof or anything that needed to be repaired (Tr. 231).

Mr. Crum confirmed that he worked on the Saturday that Mr. Poole and Mr. Cox did not show up for work, and that he had been told earlier that he would have to work that day. Mr. Crum stated that he understood that work was required on Saturdays, and knew this when he was first hired. Mr. Crum stated that Mr. Cox told him he was not going to work on that particular Saturday, and that Mr. Cox told him "if they tried to make me work Saturday, he said the labor board would take care of it" and that "the company couldn't do anything about it" (Tr. 233).

Mr. Crum stated that dust samples are taken on the belt, and that Kit Jackson "sets the pump" and is in charge of that procedure. Mr. Crum knew of "no talk among the crew" that the dust pump does not run all day and that it is tampered with (Tr. 234). Mr. Crum confirmed that he is the son-in-law of Euhl Damron, a part owner of the mine (Tr. 234).

On cross-examination, Mr. Crum stated that Mr. Cox told him that the men did not have to work on Saturday sometime during the week, and he assumed that Mr. Cox believed that the Department of Labor had some sort of requirement that men did not have to work on Saturdays (Tr. 236).

In response to further questions, Mr. Crum confirmed that he was aware of ventilation curtains being rolled up and that "it was difficult to rock dust around them." With the curtains rolled up, more dust was present, and he was aware of powder or explosives transported and stored on drills. However, he never complained to anyone about these conditions, and he never heard Mr. Cox make any complaints, nor did he ever discuss any safety concerns with him. Mr. Crum stated that Mr. Cox "had a playful way," but "didn't act like a bully" (Tr. 238). He confirmed that at times, Mr. Cox "kidded around a lot," but that he did hear him tell Mr. Jackson's son, Kit, that "if he ever fired him, he'd whip his ass" (Tr. 242). Mr. Crum could not say whether Mr. Cox was serious or just "fooling around." He simply heard him make the statement (Tr. 242).

Mr. Crum stated that Mr. Cox complained about wage increases, and once told him that he should make the company buy a "golf cart" for Mr. Crum to ride on while examining the belt (Tr. 239). Mr. Crum confirmed that there are no ventilation problems on his belt system, and that it is inspected and is in compliance (Tr. 241).

David Huffman, third shift (midnight) electrician, stated that his shift is responsible for hanging curtains, rock dusting, moving the water line, and roof bolting. He confirmed that he works for an excellent foreman, and that curtains are hung and the water line is extended for the cutting machine and drill sprayers. He confirmed that the curtain must be kept within 10 feet of the face, but that it is rolled up. Rock dusting is done on a regular basis every night, and it is seldom not finished (Tr. 247).

Mr. Huffman stated that he never had any dealings with Mr. Cox because they work on different shifts. Mr. Huffman stated that he was in the mine office on Saturday morning, May 11, 1985, after his shift was over, and he overheard Mr. Jackson on the telephone. He heard Mr. Jackson tell the person on the other end of the line to "tell Michael Poole not to come back to work, just to come pick up his time because he don't have a job here any more" (Tr. 249). Mr. Jackson was not mad or cursing, and spoke in a normal

tone of voice. Mr. Huffman did not know who was on the phone with Mr. Jackson (Tr. 249).

On cross-examination, Mr. Huffman stated that the curtains were rolled up "in order to work in the places," and that he is the only person working in the face area. However, roof bolting is also being done, and the curtains are moved up for the men to use at the face (Tr. 252). Mr. Huffman believed the ventilation to be adequate and that there was enough air, and he had no complaint with the ventilation (Tr. 253).

Robert Massey, purchasing agent, stated that he works in the mine office and never goes underground. He confirmed that his duties include the maintenance of records such as purchase orders, citations, accident reports, roof falls, inspection reports, fire boss reports. Kit Jackson takes care of the dust sample reports. Mr. Massey stated that at no time has any miner or Mr. Cox asked to review any of these reports (Tr. 256).

Mr. Massey confirmed that Mr. Jackson is the "boss," and that he made it clear to him that he was expected to work on Saturday if it is required. Mr. Massey confirmed that he was in the mine office on Saturday, May 11, 1985, when Mr. Poole and Mr. Cox failed to report for work, and that Mr. Jackson asked him to call them at their home. Mr. Massey placed the call to Mr. Cox and handed the phone to Mr. Jackson. He heard Mr. Jackson tell Mr. Cox "to tell Mike not to come out to work Monday, just to come out to pick up his time." Mr. Massey stated that Mr. Cox and Mr. Jackson "crosswords for a while," and he heard Mr. Jackson tell Mr. Cox "if you want an order for your time, too, you can come in Monday and pick it up." Mr. Jackson then hung up the phone (Tr. 259). Mr. Jackson then went underground, and Mr. Massey stayed in the office.

Mr. Massey stated that at approximately the noon hour on that same Saturday, he received a telephone call from Mr. Pleasants, and that he wanted to talk to Mr. Jackson. Mr. Massey took the message, and gave it to Mr. Jackson when he came out of the mine. Mr. Massey stepped out of the office and did not hear the conversation (Tr. 261).

Mr. Massey identified exhibit C-2(e) and (f) as MSHA accident report forms, and he confirmed that he filled them out and submitted them, and that the information on the forms would normally come from Mr. Jackson. He identified the reported incidents as roof falls, and confirmed that an MSHA

inspector usually comes to inspect the area where the falls occur, and that Mr. Jackson goes with him. He confirmed that these incidents occurred before Mr. Cox was fired, and stated that as long as he has been employed at the mine he is not aware of any MSHA citations being issued because of the reported roof falls in question (Tr. 263).

Mr. Massey confirmed that he has filed MSHA accident reports when it was not necessary to do so, and he confirmed that MSHA had advised him that "band aid" incidents need not be reported, and that only lost time injuries are required to be reported (Tr. 264). He confirmed that he has filed accident reports for minor injuries, including the reported battery incident involving Mr. Cox, and no citations ever resulted from these reported incidents. Citations have been issued, but not for the reported roof falls and accidents (Tr. 265-266).

Mr. Massey stated that shortly after going to work with the respondent in June, 1984, there was a conference in the mine office between MSHA Inspector Bob Wilmoth and Mr. Jackson about Mr. Cox and his duties as a roof bolter. According to the inspector, 50 percent of the reported mine accident frequency rate involved Mr. Cox. Although he did not hear it specifically, Mr. Massey believed that the inspector recommended to Mr. Jackson that Mr. Cox be taken off the roof bolter. Although Mr. Massey was further aware that Mr. Jackson spoke to Mr. Cox about the matter, he left the office and did not hear the discussion (Tr. 269).

On cross-examination, Mr. Massey confirmed that Mr. Jackson told him that Mr. Cox was involved in 50 percent of the reported accidents. Mr. Massey confirmed that he would call underground to advise the crew that an inspector was coming underground but that he has never worked in the mine (Tr. 270). He also confirmed that MSHA inspected the reported roof fall areas during April, 1985, and that no citations were issued as a result of those incidents (Tr. 271). Mr. Massey was aware of citations for unguarded belts and lack of protective rubber mats in the shop (Tr. 273). Copies of all citations are posted on the bulletin board and are kept there until the next inspection (Tr. 277).

Bobby Carpenter, roof bolter operator, testified that he worked with Mr. Cox on the roof-bolting machine. He stated that Mr. Blankenship reviews the roof-control plan with the bolters everyday, and explains the bolting sequence. He confirmed that he and Mr. Cox have bolted out of sequence, and that on more than one occasion Mr. Jackson and Mr. Blankenship

have "chewed them out" about bolting out of sequence (Tr. 254-258). Mr. Carpenter also confirmed that bad top has been encountered in the mine "off and on," but that management has corrected the conditions by using longer bolts to make it safe, and has never ignored the condition (Tr. 258).

Mr. Carpenter stated that he does not believe he "would be in trouble" if he made safety complaints to management, and confirmed that he has often discussed mine conditions with Mr. Blankenship, and that "he always said correct it, . . . make it safe for us to work" (Tr. 259). Mr. Carpenter stated that Mr. Cox did not "have to good an attitude" toward management, and that he has heard him say he would "whip Carson." Mr. Carpenter believed that Mr. Cox might have been kidding but sometimes he may have been serious.

Mr. Carpenter stated that he gets along with Mr. Jackson, and that Mr. Jackson has never threatened or cursed him. Mr. Carpenter never heard Mr. Cox complain to management about safety, but has heard him talk to the crew about it (Tr. 261). Mr. Carpenter stated that Mr. Blankenship has advised the crew that they could roll the ventilation curtains down if they needed more air, and Mr. Carpenter did not believe he "would be in hot water" if he did so. The roof bolter operator is responsible for using the ATRS which is on the machine, and Mr. Cox used it on occasion when bad top was encountered. The ATRS has always been maintained properly (Tr. 263).

On cross-examination, Mr. Carpenter identified exhibit C-9 as a prior statement which he gave to the MSHA investigator during the investigation of Mr. Cox's complaint, and he confirmed that he stated that Mr. Cox "did a lot of hollering" to Mr. Blankenship and Mr. Jackson, and that Mr. Cox "complained several times." Mr. Carpenter stated that Mr. Cox "had a lot of complaints about different things," and that he heard him talk about air at the face and the ventilation curtains being rolled up. He also understood that Mr. Cox spoke about powder and caps on equipment, but did not hear him make such statements. Mr. Carpenter also confirmed his prior statement that on one occasion when Mr. Jackson threatened to fire Mr. Cox, Mr. Cox told Mr. Jackson that "they would run the mine according to the law." Mr. Carpenter construed this to mean that the mine should run without any safety violations (Tr. 264). Mr. Carpenter also confirmed his prior statement that everyone on the day shift knew that Mr. Cox was keeping "a book" on mine safety violations (Tr. 265).

Mr. Carpenter stated that he heard Mr. Cox state that he did not like Saturday work, but never heard him complain about

his pay. When asked what Mr. Cox's complaints were about, Mr. Carpenter stated "odds and ends. He was always complaining about a lot of things . . . to some extent a lot of it did have to do with health and safety." Mr. Carpenter also confirmed that some of the complaints were about how the mine was being managed, and management decisions not necessarily related to safety (Tr. 268-269).

Mr. Carpenter did not know what prompted Mr. Jackson's prior threat to fire Mr. Cox, but he confirmed that Mr. Jackson had warned Mr. Cox about riding the belt out of the mine after being told by Mr. Jackson that he should not do so (Tr. 269). Mr. Carpenter confirmed that on one occasion, while riding the mantrip, he heard Mr. Blankenship tell Mr. Cox "don't do anything to make me fire you" (Tr. 271).

William J. Griffin, roof bolter, testified that he has been off the job for a year due to a non-work related condition, but that he is still employed by the respondent. He confirmed that sometime in June, 1984, he traded shifts with Mr. Cox for 2 weeks, and that they were both working as roof bolters at the time. At that time, MSHA inspectors were conducting roof control inspections of the mine, and he heard an inspector recommend to Mr. Jackson that Mr. Cox be taken off the roof bolter, but did not know why (Tr. 275). After that time, Mr. Cox operated a scoop, and Mr. Griffin stayed on the bolter (Tr. 276).

Mr. Griffin confirmed that he worked on Saturday, May 11, 1985, but that Mr. Cox did not, and they had no conversation about not working that day (Tr. 277). Mr. Griffin confirmed that the ATRS systems sometimes does not work, but that repairs are usually made within two shifts (Tr. 279). He has never known the system to be down for weeks at a time. Mr. Griffin never heard Mr. Cox complain to management about safety, but he (Griffin) has discussed safety matters with Mr. Jackson and Mr. Blankenship, and they always checked it out and took corrective action (Tr. 279-280). Mr. Jackson was "all the time saying something about safety." On one occasion, Mr. Jackson told the men "to look out for their accident rate or he was going to shut the mine down," and that he was upset over a lot of minor injuries (Tr. 281-282). Mr. Griffin confirmed that working on Saturdays was a condition of employment, and that he worked a lot of overtime on Saturdays, and that Mr. Cox called him a "company suck" for doing so (Tr. 284).

In response to further questions, Mr. Griffin confirmed that when he complained to Mr. Blankenship about roof cracks,

he would inform Mr. Jackson, and longer bolts or cribs would then be installed (Tr. 285). Mr. Griffin confirmed that powder and caps were kept on the drill, and that ventilation curtains were rolled up (Tr. 288).

Johnny Stafford, outside man, testified that he is married to the sister of Kit Jackson's wife. He stated that he had "a run in" with Mr. Cox in the lamphouse after Mr. Cox threw his shoes off a bench during a shift change. He stated that Mr. Cox threatened "to kick my butt," and challenged him to a fight (Tr. 292). Nothing came of the threat, but Mr. Stafford stated that Mr. Cox often made remarks to him about sleeping on the job and that he was loud (Tr. 293).

Neil J. Pleasants stated that he is the senior vice-president of the Brooks Run Coal Company. He confirmed that his company does not mine coal, but does operate a preparation plant, and has six contractors who mine coal on lands leased by the company. He confirmed that the respondent has a contract to mine coal on one of the leases, and to deliver the coal to the plant at a fixed contractual price. The respondent is responsible for hiring and firing its miners, and fixing wages. The Brooks Run engineering department does fix the spads and direction of mining underground to assure itself that mining is being conducted in accordance with the mine plan, and does have an input as to whether mining should be discontinued or abandoned, and does have the authority to fix or limit mine production (Tr. 299-300). However, Brooks Run has no control over any management decisions made by the respondent, nor does it dictate any Saturday work. Brooks Run simply asks the respondent for so much coal, and "it's left up to them how they work to do it" (Tr. 301).

Mr. Pleasants stated that he received a telephone call on the morning of May 11, 1985, from an individual who he later determined was Mr. Cox. He never previously met Mr. Cox or Mr. Poole, and Mr. Cox did not give his name when he spoke with him. Mr. Pleasants stated that Mr. Cox told him that "there was some trouble at our mine." Mr. Cox also informed him that Mr. Jackson was forcing the men to work on Saturday, and that Mr. Cox did not think this was right. Mr. Cox also informed him he was involved with little league baseball and needed to be off on Saturdays, and that Mr. Jackson was going to discharge someone for missing work. Mr. Pleasants believed that Mr. Cox was concerned because he and Mr. Poole were in trouble for not working on Saturday, and that Mr. Cox called him to see if he could do something about it. Mr. Pleasants informed Mr. Cox that he would call Mr. Jackson, and he was concerned because Mr. Cox indicated that he could cause

Mr. Jackson some trouble if he didn't take them back. Mr. Pleasants was also concerned because he was not sure of the kind of trouble Mr. Cox had in mind, and he speculated that it may involve miners walking off the job or refusing to work (Tr. 302-305).

Mr. Pleasants stated that Mr. Cox also informed him that he did not believe that the labor law required him to work on Saturday against his will, and that he also mentioned "something about making complaints." In this regard, Mr. Pleasants stated as follows (Tr. 306-307):

> Q. Did he mention anything about making complaints to anyone?
>
> A. That he had made them or would make them?
>
> Q. Would make them.
>
> A. Yes, he said something about making complaints -- he would complain to the -- well maybe to the labor regulators to -- he talked about maybe going to some of the enforcement agencies and making some complaints also.
>
> Q. Did he tell you what the nature of the complaints would be?
>
> A. I can't remember that he told me anything specifically. He may have but I can't remember.
>
> Q. Did he say he was going to do that regardless of what Mr. Jackson did? Or did he tie it to a threat if he didn't get a job back?
>
> A. To me, as I remember, he didn't say either way. I guess I kind of got the indication that maybe he, if things didn't work out to suit him, that he didn't get his job back, that he would go. He didn't say either way he'd go or wouldn't go if he didn't.
>
> Q. He said he might go?
>
> A. Yes.

Mr. Pleasants reviewed a copy of a memorandum of June 18, 1985, which he prepared in connection with his telephone conversation with Mr. Cox on May 11, 1985, and he indicated that in referring to Mr. Jackson, Mr. Cox stated "that old man has pushed me as far as I'm going to be pushed" (exhibit C-11; Tr. 308). Mr. Pleasants stated that he was not concerned about Mr. Cox going to any "regulatory agencies" because he knew that regular inspections of the mines are always done, and that under the contract with the respondent, Mr. Jackson is required to operate the mine in accordance with the law. Mr. Pleasants stated that his primary concern was whether or not Mr. Cox's belief that he should not be required to work on Saturdays would escalate into a work stoppage and possibly affect other nearby mines (Tr. 309).

Mr. Pleasants confirmed that he telephoned Mr. Jackson after speaking with Mr. Cox, but Mr. Jackson was underground and returned his call later in the afternoon. In response to questions about his conversation with Mr. Jackson, Mr. Pleasants stated as follows (Tr. 310-314):

> Q. Do you recall that conversation with Mr. Jackson?
>
> A. Well, again, not word for word, but I remember when he called me back I asked him what was going on at the mines. Had he fired some people? How many people had he fired that day? Or what kind of problems he was having at his mine.
>
> Q. What did he say?
>
> A. He said that, yes, he had discharged one man, and he may have got a little bit worried about it. He got a little excited or a little worried about maybe losing the work force. And he said, tell me what the problem is. So I told him that a man had called me. I didn't know who the man was, but he said he was upset about having to work on Saturday, and that I guess maybe it was his nephew that had been discharged and he felt maybe he was too. And I told him about the fellow coaching little league. And from that Carson said, well, he knew who it was. He could tell me who it was.
>
> Q. What else did he tell you?

A. He said then I discharged one man, but now there will be two.

Q. When he said this was this before you had told Carson Jackson the complaints that Mr. Cox had made known to you?

A. I believe it was, because I think I just now told you what I said to Carson before then.

Q. That he said he was upset about working Saturdays.

A. Yes.

Q. And he was upset about his nephew being fired?

A. Right.

Q. And then that's when he told you he'd figured out who it was, and Mr. Jackson said, well, I fired two?

A. Right.

Q. Did you go on to tell Mr. Jackson after that the other things that Mr. Cox had told you?

A. Pretty much so, yes. I told him -- well I asked him about the other men.

* * * * * * *

THE WITNESS: Well I went on to ask Carson then if the rest of his men were upset, or if he thought because he had discharged these two men that they would get upset, and possibly that we'd have a work stoppage. And I did go on to tell him that --

BY MR. GARRETT:

Q. Did you discuss that with Mr. Jackson?

A. Yes, sir.

Q. And did he -- what did he tell you about the possibility of a work stoppage?

A. Well he said he didn't believe so. But he said, I feel I have to take this action anyway. And of course it's his mine.

Q. It was his decision?

A. It was his decision.

Q. Now after that what all did you all talk about, if anything?

A. Well I'm trying to think what else he said. I went on to tell him that Cox -- I didn't know who it was, but the fellow that called me had said he would try to cause him some trouble, I thought, from the remarks that he had made there.

Q. If he got fired he'd cause him some trouble?

A. Yes.

Q. And did you tell him what Mr. Cox had said, what kind of trouble he'd cause him?

A. Yes. He said he would of course cause him trouble with the men, because he felt some of the other people felt that way, so he'd go to the agencies -- to the regulatory agencies and try to cause him some trouble that way. I kind of got the idea anyway he'd cause some trouble.

Mr. Pleasants stated that Mr. Jackson explained to him that he had fired Mr. Poole because he missed work and that he had previouisly warned him that he would be fired if he missed the next scheduled work shift. Mr. Pleasants further stated that Mr. Jackson advised him that he was going to fire Mr. Cox "because he had come to me making a complaint, and he felt by doing that he was going over his head and managing that mine and coming to somebody else to make a complaint, somebody that maybe he thought he could get Carson in trouble with" (Tr. 315).

Mr. Pleasants confirmed that Mr. Poole and Mr. Cox came to his office on Monday, May 13, 1985, after they had been fired, and Mr. Pleasants believed that they expected him to intercede in their behalf with Mr. Jackson. Mr. Pleasants could not recall whether Mr. Cox said anything about what he would do if he didn't get his job back, but after reviewing his memorandum he confirmed the accuracy of his prior statement indicating that Mr. Cox told him that "they were going to take this matter to the Labor Board and regulatory agencies." Mr. Pleasants also confirmed that on Saturday, May 11, 1985, Mr. Cox told him that if he was discharged he was going to cause trouble by going to the agencies (Tr. 317).

On cross-examination, Mr. Pleasants confirmed that his recollection of his telephone conversation with Mr. Cox was better as of the date of his memorandum than it was during his hearing testimony. Mr. Pleasants testified further as to the sequence of his conversation with Mr. Jackson vis-a-vis his prior conversation with Mr. Cox, and he explained as follows (Tr. 320):

> Q. Would it be perhaps the same sequence in which you relayed this conversation from Cox to you to Mr. Jackson? Would that be a fair conclusion that the same sequence in which you were told this would be the same sequence that you relayed this to Mr. Jackson?
>
> A. The way I -- what I related to Mr. Jackson first was I asked him what was going on at the mines. Then I told him that a fellow had called me, worried about his nephew's job, also a little worried about his own job, and that he played little league ball and couldn't be there on Saturday. And at that time Mr. Jackson stopped me and told me that he was now firing two people.

In response to further questions, Mr. Pleasants confirmed that any adverse ruling against the respondent in this case will not affect its coal supply to Brooks Run, but the threat of a work stoppage would be a legitimate business concern of his company, and that he had this concern on May 11, 1985 (Tr. 325-326). Mr. Pleasants also indicated his concern for mine safety, and he did not believe in mining coal using "short-cuts," and that to do so is not cost effective (Tr. 327).

Complainant's Arguments

In his posthearing brief, complainant's counsel asserts that the evidence in this case establishes numerous instances of mine safety violations on the part of the respondent, and that they provide an ample predecate or base to support a conclusion that Mr. Cox would have justifiably reported these violations to mine management as well as to the appropriate mine enforcement agencies. Counsel also asserts that there is testimony by Mr. Cox and others, that Mr. Cox reported safety violations to mine management officials, and that within a week or two prior to his discharge on May 13, 1985, Mr. Cox threatened to his foreman, Rodney Blankenship, to talk to the next MSHA mine inspector to come into the mine. Counsel also cites the November 4, 1986, deposition of respondent's president, Carson Jackson, at transcript page 35, where counsel claims that Mr. Jackson admitted that Mr. Cox threatened at least twenty times to go to MSHA.

Counsel points out further that prior to his discharge, Mr. Cox had "taken the steps of complaining" to two different MSHA inspectors about certain mine safety violations, and that the final nexus regarding his protected activity occurred on Saturday, May 11, 1985, when Mr. Cox communicated his threat "to go to the agencies" to Mr. Neil Pleasants, a business associate of Mr. Jackson. Counsel argues that this threat was communicated to Mr. Jackson by Mr. Pleasants during a telephone conversation following Mr. Cox's call to Mr. Pleasants, and that the decision by Mr. Jackson to discharge Mr. Cox was made after Mr. Pleasants advised Mr. Jackson of Mr. Cox's threats "to go to the agencies." Counsel rejects any notion that Mr. Jackson decided to discharge Mr. Cox before it was made known to him by Mr. Pleasants that Mr. Cox had threatened "to go to the agencies," and argues that the sequence of events as communicated by Mr. Pleasants to Mr. Jackson, and as documented by Mr. Pleasants in his prior statement of June 1985, more accurately reflects that Mr. Jackson decided to discharge Mr. Cox after the phone call from Mr. Pleasants, and after Mr. Pleasant's informed Mr. Jackson of Mr. Cox's threats to "go to the agencies."

In addition to Mr. Cox's purported safety complaints to mine management, and his threats to "go to the agencies," as communicated by Mr. Pleasants to Mr. Jackson, counsel asserts that Mr. Cox was a particularly vociferous individual in respect to voicing his views on safety matters, and that one witness called by the respondent during the hearing, Bobby Carpenter, testified that at one time Mr. Jackson threatened to fire Mr. Cox, and on another occasion, he overheard

Mr. Blankenship tell Mr. Cox "don't do anything to make me fire you."

Counsel asserts that even though Mr. Cox's initial motivation for his telephone call to Mr. Pleasants on Saturday, May 11, 1985, may have been to help save his nephew's (Michael Poole) job, Mr. Cox unequivocally told Mr. Pleasants that he was going to complain to "MSHA," the "agencies," or the "labor board." Counsel asserts that once these threats were communicated to Mr. Jackson, they formed the basis for Mr. Jackson's decision to discharge Mr. Cox, and coupled with Mr. Cox's prior complaints and threats to discharge him some 2 weeks before his actual discharge, was the motivating reason for his discharge, and that but for these threats Mr. Cox would not have been fired. Counsel concludes that all of the foregoing series of events, including Mr. Cox's antecedent threats to talk to an MSHA inspector, his reporting of safety complaints to his foreman Rodney Blankenship within the last 2 weeks of his employment with the respondent, and the final transmission to Mr. Jackson of Mr. Cox's threats to go to the mine enforcement authorities, more than meet the threshold requirement of "protected activity" under the Act.

Counsel does not concede that this is a "mixed motive" case. Assuming that it is, counsel concludes that the respondent has not established that it would have discharged Mr. Cox in any event for any unprotected activities alone, and that it has failed to meet the test enunciated by the Pasula line of cases. Counsel concludes further that Mr. Cox has established that he was discharged, not for the contradictory diverse reasons advanced by the respondent, but because of protected activity within the meaning of section 105(c) of the Act.

Respondent's Arguments

In its defense, the respondent states that while it had no complaints concerning Mr. Cox's work as a roof bolter operator during 1984, he was involved in four accidents during the course of the year while operating the bolter, and that he was taken off the bolter and given a different work assignment because of these repeated accidents. Respondent asserts that after missing a regularly scheduled Saturday work day in June, 1984, and his removal as a roof bolt operator, Mr. Cox became disenchanted with Mr. Jackson's management of the mine. Respondent asserts that Mr. Cox made no secret of his belief that the "labor board" would not condone management's Saturday work requirement, and that he attempted to incite other miners not to work on Saturdays, and made statements that he would "whip" Mr. Jackson or any other member of management who

attempted to discharge him. As examples of Mr. Cox's resentment of authority, respondent states that Mr. Cox continued to ride the belt out of the mine after being warned by Mr. Jackson not to, and challenged management's authority to reassign him after he was taken off the roof bolter.

The respondent points out that although Mr. Cox professed a keen interest in alleged safety violations, and went so far as to record the believed violations in a journal for 2 weeks commencing on Saturday, August 18, 1984, he never showed it to management. Further, although Mr. Cox had two informal discussions with MSHA inspectors who advised him of his rights and of the appropriate procedure for filing a complaint, Mr. Cox never filed a complaint with MSHA. Mr. Cox also failed to participate in a company sponsored safety program because he would not be paid overtime, and by his own admission, rarely, if ever, made any safety complaints to Mr. Jackson.

The respondent states that Saturday, May 11, 1985, was a regularly scheduled work day, and that both Mr. Poole and Mr. Cox were aware of this, and they were not excused from working by management, nor did they discuss their intention not to appear for work with Mr. Jackson. After telephoning Mr. Cox on the morning of Saturday, May 11, 1985, to ascertain whether he and Mr. Poole were coming to work, Mr. Jackson was informed by Mr. Cox that Mr. Poole did not intend to work that day. Mr. Jackson then advised Mr. Cox to inform Mr. Poole that he was discharged because of his absenteeism and to come to the mine on Monday, May 13, 1985, "to pick up his time." When Mr. Cox became argumentative and challenged the propriety of the discharge of Mr. Poole, Mr. Jackson advised Mr. Cox that it was his decision to make, and that if Mr. Cox was not satisfied with the decision, he should also "pick up his time."

Respondent states that despite the fact that all of its employees, including Mr. Cox, had been advised that the management of the Brooks Run Coal Company was separate from the management of the respondent's mine and were warned not to discuss management decisions with officials of Brooks Run, Mr. Cox decided on May 11, 1985, to contact Mr. Neal Pleasants, the vice-president of Brooks Run, concerning Mr. Poole's discharge, and did so to enlist his assistance in influencing Mr. Jackson to reconsider his decision to discharge Mr. Poole. Realizing that Mr. Jackson would not appreciate this contact, Mr. Cox did not identify himself to Mr. Pleasants, and he advised Mr. Pleasants that there would be "trouble" at his mine if Mr. Poole was not reinstated. Mr. Cox also complained to Mr. Pleasants about the respondent's decisions requiring Saturday work, threatened to go to the "labor board," generally

discussed the dissatisfaction of the workforce at the respondent's mine, and also discussed his intention "to go to the agencies" (presumably MSHA) about the way Mr. Jackson ran his mine.

Respondent asserts that after receiving the call from Mr. Cox, Mr. Pleasants became concerned about the threat to the Brooks Run operations, and he believed that the "trouble" referred to by Mr. Cox would be a work stoppage at Brooks Run's contractors' mines which supplied coal to its preparation plant. For this reason, Mr. Pleasants called Mr. Jackson to inquire about the matter. Upon learning of the phone call to Mr. Pleasants, Mr. Jackson decided to discharge Mr. Cox, and that his decision was without input from any other management officials. Thereafter, on the morning of May 13, 1985, Mr. Jackson summoned Mr. Poole and Mr. Cox to his office and gave them their discharge slips. Mr. Jackson explained to Mr. Poole that he was discharged for excessive absenteeism, and he explained to Mr. Cox that he was discharged for trying to take over the management of the respondent's mine.

Respondent maintains that on the facts of this case, Mr. Cox has not demonstrated a prima facie case, much less carried his ultimate burden of proof that he was discharged for protected activities. Even assuming that Mr. Cox has established a prima facie case, the respondent asserts that Mr. Cox has failed to establish that he was discharged for protected activity rather than a legitimate business purpose, i.e., insubordinate and offensive conduct which culminated in his attempt to interfere with the decision to discharge Mr. Poole.

Respondent asserts that Mr. Cox was discharged for interferring with mine management's decisions to discharge Mr. Poole and to schedule work on Saturday which was made a condition of employment at the mine. Respondent also maintains that Mr. Cox had a history of poor work attitude and resentment of authority, and that the reason for his discharge has been consistently maintained and established by the respondent.

Respondent suggests that Mr. Cox has had a difficult time in deciding precisely what the protected activity was that he engaged in that formed the basis of his claims of alleged discrimination. With regard to any communicated safety complaints by Mr. Cox, a requirement enunciated by the Commission in Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034 (July 1986), the respondent takes the position that Mr. Cox has a serious problem with this aspect of his case. Respondent points out

that while Mr. Cox produced a journal of alleged safety violations maintained for a 2-week period in 1984, he failed to establish that he ever shared the information with mine management or mine inspectors. Similarly, although Mr. Cox was advised of his rights to file safety complaints with MSHA, he failed to carry out his threat to do so and gave no intention that he intended to do so. With regard to his asserted complaints to his section foreman Rodney Blankenship, concerning a variety of alleged unsafe conditions involving roof control, ventilation, and explosives, the respondent concludes that the weight of the credible evidence establishes that Mr. Cox did not overtly make specific complaints to Mr. Blankenship or to Mr. Jackson, and that he himself engaged freely in the alleged unsafe practices of which he complained.

Respondent asserts that Mr. Cox expressed many of his safety concerns defacto, and that they cannot form a nexus between his discharge and his alleged protected activity, Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982). As an example, respondent points out that Mr. Cox alleged for the first time during the hearing that certain preshift and onshift reports were improperly kept and that dust records were allegedly incorrect or altered. However, he never reviewed these records prior to his discharge and never reviewed the mine bulletin board for the posting of MSHA enforcement action prior to his discharge.

Respondent asserts that it would appear that anytime a complaint may have been raised by Mr. Cox, it was in the context of a threat resulting from his own dissatisfaction with a management decision involving unprotected activity (i.e., his removal from the roof-bolting machine; the discharge of Mr. Poole; the requirement to work on Saturdays). Mr. Cox's intention to expose alleged violative conditions was always expressed in conditional terms, and respondent concludes that Mr. Cox could be persuaded not to complain if managerial decisions involving unprotected activity could be altered to suit Mr. Cox. Respondent further concludes that Mr. Cox's admitted and repeated participation in the alleged violative conduct belies any true concern on his part for mine safety. Respondent further concludes that an employee attempting to demonstrate a discriminatory motive must show that he at least intended to notify appropriate authorities. Baker v. North American Coal Company, 8 IBMA 164 (1977). Assuming Mr. Cox had any intention, it could only be interference with decisions concerning unprotected activity, which ultimately led to his discharge.

Even assuming that Mr. Cox linked some protected activity with his discharge, the respondent maintains that his discharge was motivated by unprotected activity and would have taken place regardless. Certainly, the repeated demonstration of a poor work attitude, such as the general hostility toward management, contempt for Saturday work assignments, coupled with the refusal to work on Saturdays, and attempts to incite others not to work on Saturdays, are sufficient reasons alone to discharge an employee. Klimczak v. General Crushed Stone Company, 5 FMSHRC 684 (April 1983), aff'd sub. nom. 732 F.2d 142 (2d Cir. 1984) (miner failed to make out a prima facie case of discrimination where the record indicated his discharge resulted from a series of unexcused absences and a poor work attitude including refusal to work on Saturdays); Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984), (although prima facie case was made out, the miner's discharge was proper because it was also motivated by the employee's insubordinate conduct and attitude problem which resulted after his removal from the operation of a bulldozer and his reassignment to a different position).

Respondent argues that the evidence in this case establishes that Mr. Cox's attitude problem and resentment of authority grew after his removal from the roof bolter in 1984, and that this resentment manifested itself in a variety of ways, which Mr. Cox maintains were related to protected activity under section 105(c) of the Act. However, respondent points out that Mr. Cox's blatant defiance of Mr. Jackson's specific warning that Mr. Cox's comments concerning Mr. Poole's discharge on May 11, 1985, were not welcome, and Mr. Cox's call to Mr. Pleasants with the sole intention of interferring with Mr. Jackson's decision to discharge Poole for excessive absenteeism, goes beyond any form of protected activity under section 105. Mr. Cox's conduct in contacting Mr. Pleasants was so offensive and disruptive that Mr. Jackson was left with no other course but to discharge Mr. Cox. Mr. Cox's alleged protection in undertaking this action by calling Mr. Pleasants rests on the slim reed of the fortuitous mentioning of "going to the agencies" (presumably MSHA) regarding the way Mr. Jackson's mine was run. However, the primary gist of Mr. Cox's conversation, as understood by Mr. Pleasants, and as conveyed by him to Mr. Jackson, was to threaten a work stoppage at Brooks Run's contract mines of which the respondent is one.

Respondent cites a case decided under the National Labor Relations Act which it believes is similar to the one at bar involving a threatening call made by an employee to a business associate of his employer. The first Circuit held that "an

employee's conduct may be so offensive, disruptive, or destructive of the employer's business as to go beyond the protection of Section 7, [of the NLRA] even if the goals of the conduct are within the protection of Section 7." Keosaian v. National Labor Relations Board, 630 F.2d 36, 38 (1st Cir. 1980). In Keosaian, an employee's conduct in unilaterally telephoning his employer's bank, representing himself as an attorney for a proposed credit union, telling the bank's attorney that his employer had engaged in misrepresentations, and threatening legal action went well beyond the boundary of protected activity under the NLRA. In other words, the threatening call was grounds for discharge even if less offensive conduct by the employee in furtherance of engaging in protected activity would have been protected.

Respondent concludes that on the facts of his case, Mr. Cox cannot even claim that the purpose of his phone call to Mr. Pleasants was aimed at furthering any protected activity. Rather, his conduct was disruptive, offensive, and in contravention of a direct order, and as such, was a permissible basis for discharge, particularly when viewed in the context of his poor work attitude and contempt for authority. Certainly the prior warnings not to engage in such conduct provide indication of the fact that the discharge of Mr. Cox was related to unprotected activity alone. See, Bradley v. Belva Coal Co., 4 FMSHRC 982 (Rev. Comm. 1982). Respondent further concludes that it is not the function of the trier of fact to pass upon the wisdom or fairness of the basis for the prior warning. It is the trier of fact's responsibility only to determine if the employee violated the warning and his action in doing so motivated his discharge.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (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 Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either

that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. __, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this 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. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. Cox's Protected Activity

Section 105(c)(1) prohibits a mine operator from discharging a miner, or otherwise discriminating against him for making safety complaints to MSHA or to mine management. That section also prohibits a mine operator from discriminating against a miner, or otherwise interferring with any of his statutory rights under the Act. A miner is protected against any retaliatory action by the respondent because of any safety complaints he may have made to MSHA or to mine management. He is also protected against retaliation for exercising his section 103(g) right to request an inspection of the mine by MSHA when he has reasonable grounds to believe that violations exist in the mine. Further, I believe that section 105(c)(1) is broad enough to protect a miner against retaliation for threatening to contact or inform mine enforcement agencies about perceived safety violations in the mine.

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746

(D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984). The fact that a mine operator addresses a miner's safety concerns or complaints, and which are later determined not constitute violations, or the fact that the complaining miner filed no safety complaints with any governmental enforcement agencies, does not remove the Act's protection from any preceding complaints, Sammons v. Mine Services Company, supra, at 6 FMSHRC 1396-97.

In this case, Mr. Cox claims that his safety complaints to mine management, coupled with his threats to go to MSHA or to other governmental "agencies" with his complaints, were the motivating factors which prompted Mr. Jackson to discharge him on May 13, 1985. While it is clear from the record that Mr. Cox never filed any safety complaints with MSHA or any state mining inspectors prior to his discharge, although he was advised to do during conversations with two MSHA inspectors, and that he never disclosed the contents of a safety journal he was keeping some 8 months before his discharge, Mr. Cox claims that shortly before his discharge he intended to file safety complaints with MSHA. He also claims that he had always intended to file such complaints but simply did not know the procedure for doing so. In order to address these issues, a review of Mr. Cox's purported safety complaints, and the alleged safety violations which he claims were rampant in the mine, all of which he claims served as a basis for his discharge, is in order.

The evidence in this case establishes that miners were engaged in unsafe practices during the time that Mr. Cox was employed at the mine, and that mine management may have been aware of them. Some of these practices, if proved, would constitute violations of MSHA's mandatory safety standards, and possibly, state mining laws. For example, the admissions and testimony of several miners reflects that powder and caps were stored and kept on equipment rather than in the required storage magazines, ventilation curtains which were required to be in the down position to control the air flow and dust were kept rolled up and out of the way during mining, and respirable dust sampling devices may have been turned off or tampered with. However, the record also establishes that Mr. Cox himself freely engaged in some of these practices long before he was discharged. The record establishes that Mr. Cox operated his scoop with the ventilation curtains

rolled up, stored powder and caps on his roof-bolting machine, failed to always use his ATRS system, rode the belt out of the mine after being warned by Mr. Jackson not to do so, and was admonished at least once by his foreman not to bolt out of sequence or work under unsupported roof.

Although Mr. Cox alluded to certain violations concerning the roof bolter ATRS system, no evidence was forthcoming to establish any violations, or that mine management was involved in any unsafe practices concerning the ATRS. As a matter of fact, Mr. Cox conceded that the ATRS was used at his discretion, depending on the roof conditions, and I can only conclude that any failure to use that system when roof conditions may have warranted it was the result of Mr. Cox's personal decision not to use it.

With regard to Mr. Cox's assertions concerning the preshift and onshift books, his allegations that they contained erroneous entries and did not accurately reflect mine violations, made for the first time at the hearing, are unsubstantiated. As a matter of fact, although he had a right to do so, Mr. Cox never reviewed those mine records prior to his discharge, and during the hearing he presented no credible evidence to support any violations for erroneous or illegal entries.

In his original complaint, Mr. Cox asserted that Mr. Jackson "got rid of any miners who stood up for their safety rights." However, no evidence was forthcoming to even suggest that any miners were ever fired or disciplined by mine management for making safety complaints or "standing up for their safety rights." As a matter of fact, Mr. Jackson's testimony that Mr. Poole and Mr. Cox were the only two miners that he has ever fired at the mine stands unrebutted.

With regard to Mr. Cox's allegations concerning unsafe roof conditions, Mr. Poole testified that roof falls occurred in virtually every entry during the period immediately prior to his discharge. However, Mr. Poole could offer nothing further to substantiate his statement, and he had no knowledge as to whether any of the falls were reported by mine management to MSHA or to any state officials. When asked to be specific about any unsafe roof conditions, Mr. Poole referred to a "double linear," and to an area near a rectifier in the No. 5 entry, which he believed had some loose rock. Mr. Cox could offer no specific information with respect to any roof violations, and his testimony, as well as that of Mr. Poole is general and nonspecific, and no evidence was forthcoming with

respect to any roof control violations or unsafe roof conditions either immediately prior to Mr. Cox's discharge or in the past.

Practically all of the witnesses who testified in this case alluded to "bad top" or "adverse roof conditions" to one degree or another in the mine. However, I find no evidence of any consistently bad top or unsafe roof conditions, nor do I find any basis for concluding that the respondent totally ignored the roof conditions or received any violations or citations for roof control violations. All of the witnesses called by Mr. Cox confirmed that mine management addressed their roof concerns by either installing longer roof bolts, or constructing cribs and belt canopies in certain areas where roof falls had occurred. Cutting machine operator Wayne Lee confirmed that roof conditions were freely discussed among the miners and Mr. Jackson and Mr. Blankenship, and that corrective action was always taken, albeit on one occasion, 2 or 3 days passed before a roof condition was corrected. Mr. Lee indicated that in certain instances when bad top was encountered, Mr. Jackson ordered additional roof bolting and rebolting, and also instructed that more coal pillars be left to support the roof. Mr. Lee also confirmed that Mr. Blankenship discussed the roof-control plan with his crew.

Roof bolter operator Ramsey confirmed that anytime he reported bad top conditions to his foreman, the foreman would instruct him to install longer bolts or cribs. On two occasions where there were roof falls on a belt, management took steps to support the area with cribs and canopies, and instructed the men as to the proper roof control procedures. On several occasions when he was observed bolting out of sequence, both Mr. Jackson and foreman Blankenship instructed him to do it the proper way.

Coal drill operator Aaron Bender testified that management never left adverse roof conditions unattended, and that his foreman always addressed his concerns when bad top was encountered by ordering the installation of longer bolts and cautioning him to watch the roof, and to rebolt any adverse roof areas.

Scoop operator Steve Mullins testified that steps were taken to resecure any areas where falls had occurred, and that cribs, headers, and canopies were installed in fall areas to secure the roof.

Mr. Poole himself conceded that management took steps to support the roof in "a lot of the areas," took extra steps to

insure supported roof "in a few places," and while he alleged that some of his complaints about adverse roof conditions were ignored, the only specific information he had to offer was that discussed earlier.

The miners called by the respondent consistently testified that adverse roof conditions called to the attention of mine management were always addressed and corrective action was taken to support the roof. Respondent produced copies of reported roof falls which occurred in the mine on April 4, 10, 19, and May 7, 1985, and none of them involved any injury or damage to equipment (Exhibits C-2(a), (b), (c), (d)). These falls were reported to MSHA, and they were investigated (exhibits C-2(e), (f), (g)). However, there is no evidence that any citations or violations were ever issued, and this fact was corroborated by Mr. Robert Massey, the responsible company official who maintains the mine records.

The only instance of record of any failure by management to promptly address any adverse roof condition was supplied by electrician Roger Groves, who testified for Mr. Cox. Mr. Groves testified that in the 5 years he has worked in the mine, he had one occasion to complain about bad top where the roof had dropped in a roadway and was taking weight. After he called the condition to Mr. Jackson's attention, Mr. Groves stated that mining continued for about a week before corrective action was taken. However, Mr. Groves could supply no further details about this incident, and he confirmed that the roof was otherwise always bolted in accordance with the roof-control plan, and that foreman Blankenship frequently discussed the plan with the miners. Mr. Groves also confirmed that he saw no evidence that management ever did anything to endanger miners under unsupported roof.

The record establishes that at no time during his employment at the mine did Mr. Cox formally complain to any mine inspector about any purported unsafe conditions in the mine. Although he claimed he never had an opportunity to do so because someone from mine management was always present, Mr. Cox never availed himself of the opportunity to use the MSHA "hotline," even though he was aware that he could do so. Further, although he spoke with two MSHA inspectors prior to his discharge about his safety concerns and the manner in which Mr. Jackson was running the mine, at no time did Mr. Cox follow their suggestions that he file a safety complaint with the apppropriate MSHA office.

Most of the miners who testified in this case confirmed that they often discussed mine conditions among themselves,

and that Mr. Cox was included in these group discussions. Eight miners testified that they either never heard Mr. Cox specifically or overtly complain to mine management, or they had no knowledge of such complaints. None of them were aware of any safety complaints by Mr. Cox to state or Federal mine safety officials, and only one miner was aware that Mr. Cox was keeping a journal of purported mine violations.

Although roof bolter Bobby Carpenter testified that he never heard Mr. Cox complain to management about safety, he acknowledged that in a prior statement given to MSHA during its investigation of Mr. Cox's complaint, he stated that Mr. Cox "did a lot of hollering" to Mr. Jackson and foreman Blankenship, and that Mr. Cox "was always complaining about a lot of things . . . to some extent a lot of it did have to do with health and safety." Mr. Carpenter also confirmed that Mr. Cox talked about "air at the face and the ventilation curtains being rolled up" Mr. Carpenter also confirmed that Mr. Cox also complained about how the mine was being managed, questioned management decisions not necessarily related to safety, and the fact that he did not like Saturday work.

Mr. Cox testified that while he did complain to Mr. Jackson about his safety concerns, these complaints were "few" and "rare." Mr. Cox stated that most of his complaints were made to Mr. Blankenship, his foreman and part owner of the mine, and that the complaints concerned the roof taking weight in the No. 5 entry, and the fact that powder and caps were kept on equipment. Mr. Blankenship declined to testify as to whether Mr. Cox or anyone else had ever made safety complaints to him. Mr. Jackson denied that miners other than Mr. Cox ever directly complained to him, and he confirmed that in the event complaints were made, he probably would not hear all of them.

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that Mr. Cox has established that he made safety complaints to mine management prior to his discharge on May 13, 1985. I believe Mr. Cox's assertions that he complained to his section foreman Blankenship about the bad top, the ventilation curtains being rolled up, and the practice of storing powder and caps on the equipment. I also believe that Mr. Cox has established that he made similar complaints when he spoke with two MSHA inspectors prior to his discharge. All of these complaints, albeit made informally during conversations with mine management and the inspectors, constitutes protected activity under section 105(c) of the Act, and the respondent

is prohibited from retaliating against Mr. Cox for making the complaints.

With regard to Mr. Cox's alleged threats to go to MSHA or to any other mine enforcement agencies with his complaints prior to his discharge, there is a difference of opinion among the parties as to whether those threats were safety related, or whether they were made in connection with Mr. Jackson's discharge of Mr. Poole and the respondent's Saturday work requirement policy. If Mr. Cox can establish that his threats were safety related, they were protected activity, and the respondent would be prohibited from retaliating against Mr. Cox for those threats. A discussion of these issues appears later in this decision.

Mr. Jackson's Motivation for Mr. Cox's Discharge

The evidence in this case establishes that the respondent operates a small, non-union mine, and it is undisputed that as its president, Mr. Jackson exercised practically autonomous authority to hire, fire, and discipline the work force, and that he fixed company policy with respect to work assignments and other personnel matters. The evidence also establishes that the only management official involved in the decision to discharge Mr. Cox was Mr. Jackson. Mr. Cox has not rebutted the fact that Mr. Jackson acted alone in making that decision, nor has he rebutted the fact that all employees were aware of the fact that notwithstanding the presence of other co-owners who worked the mine, Mr. Jackson was "the boss."

The record establishes that both Mr. Jackson and Mr. Cox are men of limited educational backgrounds. Further, after viewing them on the stand during the course of the 3-days of hearing in this case, they impressed me as strong-willed personalities who do not shy away from making their respective points of view known to the court or to trial counsel who represented them. During the course of the hearing, Mr. Jackson was quick to personally respond to Mr. Cox's counsel's suggestion that he may have been under the influence of tranquilizers during his testimony, or that he was not telling the truth (Tr. 203-205). Likewise, Mr. Cox displayed a similar temperament in responding to some questions from the court, and during certain periods of cross-examination testing his credibility. In short, they impressed me as two individuals, who given the right conditions, are prone to anger, and would not hesitate to become argumentative in their efforts to persuade each other as to the correctness of their respective

positions. Under the circumstances, I find credible the testimony in this case that although Mr. Cox and Mr. Jackson generally got along with each other, they were both prone to losing their temper, and at times cursed each other and otherwise took out their anger and frustrations on each other.

Although the record indicated some prior differences between Mr. Cox and Mr. Jackson, I cannot conclude that there is any evidence to support any overt hostility or animus by mine management towards Mr. Cox, or any disparate treatment of Mr. Cox because of his asserted safety concerns. To the contrary, I conclude that Mr. Jackson exhibited a high level of tolerance towards Mr. Poole and Mr. Cox. Mr. Jackson hired Mr. Cox when he was out of work, and he subsequently hired Mr. Cox's nephew Michael Poole after Mr. Cox asked Mr. Jackson to give him a job. The respondent advanced Mr. Poole money when he was in need after a death in his wife's family, and also sponsored Mr. Cox's daughter in a beauty contest with a monetary donation. During a lay-off period, Mr. Jackson accommodated Mr. Cox through certain earnings statements to enable him to draw unemployment, and took him back after the lay-off. Mr. Jackson also allowed him to change shifts to meet a doctor's appointment. Although Saturday work was treated as a regularly scheduled work day by management, it nonetheless compensated miners for Saturday work by paying them premium pay.

The record establishes that between February, 1984 and May, 1985, Mr. Poole had an absenteeism problem, and he was warned on several occasions that he would be discharged if his attendance did not improve. Although both Mr. Poole and Mr. Cox were aware of the fact that occasional Saturday and overtime work were conditions of employment, they nonetheless voiced their displeasure over Saturday work, and made it known to management and their fellow miners that they did not like to work on Saturdays. Mr. Cox went further and advised several of his fellow miners that they did not have to work on Saturdays if they didn't want to.

Although Mr. Jackson considered Mr. Cox to be a good worker, he had several encounters with him over certain work assignments, and had to speak to him on several occasions about certain unsafe practices. On one occasion, after warning Mr. Cox not to ride the belt out of the mine, Mr. Cox continued to ride the belt, and Mr. Jackson had to resort to shutting down the belt, forcing Mr. Cox to walk out of the mine. On other occasions, either Mr. Jackson or Mr. Blankenship warned Mr. Cox about working under unsupported roof and bolting out of sequence. On yet another occasion when Mr. Cox failed to show

up on a scheduled Saturday work day, and was taken off a roof bolter at the suggestion of an MSHA inspector because he had been involved in four roof bolt accidents, Mr. Cox became upset to the point where Mr. Jackson threatened to give him an "unsatisfactory work slip," only to recant and allowed him to return to work. As a matter of fact, after this incident, Mr. Cox was reassigned to work building stoppings. However, out of consideration for his back condition, Mr. Blankenship, whom Mr. Cox considered his friend, interceded on his behalf and transferred him to work on a scoop, and Mr. Jackson agreed to the transfer.

In his original complaint filed with MSHA, Mr. Cox admitted that he and Mr. Jackson "had been at odds before because of the way the mine run." Bobby Carpenter testified that Mr. Cox "did a lot of hollering" to Mr. Jackson and to Mr. Blankenship, and that Mr. Cox complained about how the mine was being managed, and about management decisions that were unrelated to safety (Tr. 269). Foreman Blankenship testified that he considered Mr. Cox to be "a bully," and that Mr. Cox had at one time "threatened to whip me in front of the other men" (Tr. 157). Johnny Stafford testified that on one occasion, Mr. Cox "threatened to kick my butt," and challenged him to a fight (Tr. 292). Mr. Jackson testified that he warned Mr. Cox about his tardiness to work and his complaints about how Mr. Jackson was managing the mine. Mr. Jackson confirmed that Mr. Cox was the only employee who caused him problems, and that Mr. Cox's threats "to whip his ass" upset him. Mr. Jackson also confirmed that while he considered Mr. Cox to be a good worker, Mr. Cox had problems in taking orders, did things the way he wanted to, resented authority, and that after the incident in June 1984 when he was taken off the roof bolter, Mr. Cox resented doing what was asked of him, and resisted any Saturday work. Yet, given all of these prior incidents which I believe would give mine management reasonable pause to reflect as to whether or not Mr. Cox should continue in its employ, Mr. Jackson did not fire Mr. Cox.

In his initial complaint filed with MSHA, Mr. Cox made a statement that Mr. Jackson "tried to fire me on June of 1984 because of safety in the mines." Mr. Cox also asserted that miners have been laid off because of their safety complaints. However, during the hearing, Mr. Cox admitted that Mr. Jackson's purported attempts to fire him amounted to Mr. Jackson's intent to give Mr. Cox an "unsatisfactory work" slip for not working on a scheduled Saturday, and because of Mr. Cox's protests after being taken off the roof bolter. Mr. Cox admitted that Mr. Jackson's proposed disciplinary action resulted from Mr. Cox's refusal to work on Saturday

because he had to bale hay. Mr. Cox further admitted during the hearing that he knew of no miner who was ever laid off and not called back to work because of any safety complaints made to management (Tr. 183-184). Thus, Mr. Cox's testimony during the hearing belies his prior complaint statements that Mr. Jackson threatened to fire him for safety reasons, and that miners have been laid off for making safety complaints, and raises a serious question as to his credibility.

The aforementioned June 1984 incident took place approximately 8 months before Mr. Cox's discharge. It was at that time that Mr. Cox purportedly made the statement to Mr. Jackson that "we are going to run the mine the way the law says," and when foreman Blankenship purportedly told Mr. Cox "don't do anything to make me fire you." I cannot conclude that the purported statement by Mr. Cox was a threat to complain to MSHA, nor can I conclude that Mr. Blankenship's purported response amounted to a threat to fire Mr. Cox for any threats to go to MSHA. The June 1984 incident resulted from Mr. Cox's refusal to work on a Saturday when he had other things to do, and his removal from the roof bolter at the suggestion of an MSHA inspector because he was "accident prone." Mr. Cox was angry because he first believed Mr. Jackson took him off the bolter to punish him for not working on Saturday, and Mr. Jackson was angry because Mr. Cox would not work and because an MSHA inspector had to speak to him about his accident frequency rate involving Mr. Cox's work as a bolter. Although Mr. Jackson assigned Mr. Cox to work on stoppings, a job requiring much physical labor, he recanted after foreman Blankenship interceded on his behalf, and out of consideration for Mr. Cox's back condition, Mr. Jackson assigned him to a scoop. Given all of these circumstances, I conclude that the June 1984 incident had nothing to do with Mr. Cox's safety concerns or complaints.

After the June 1984 incident, Mr. Cox began keeping a journal in which he made entries concerning mine conditions which he believed were unsafe and in violation of the law. The journal was kept for only 2 weeks, beginning in mid-August through September 2, 1984, some 8 months before Mr. Cox's discharge. Mr. Cox testified that he kept the journal at home and intended to use it as "insurance" in the event of any future adverse action against him. However, Mr. Cox admitted that he never showed the journal to anyone, including the MSHA inspectors to whom he spoke, and there is absolutely no evidence that Mr. Jackson or anyone else in management ever knew about the journal. Although Mr. Cox testified that he mentioned the journal to Mr. Jackson's son, Kit, and that he "might have intended" for the son to tell his father, I doubt

that Mr. Cox would disclose his "insurance," which he kept at home, at a time when his job was not in jeopardy. Given the lack of any credible evidence or inference that Mr. Jackson knew about the journal or Mr. Cox's visits with the inspectors, I conclude and find that these events played no role in Mr. Jackson's decision to discharge Mr. Cox.

Mr. Cox admitted that he told some of his fellow miners that they did not have to work on Saturdays. Although he denied telling them that the company could do nothing about it because of the "labor board," Mr. Cox further admitted that he told the miners "if you've got other things that you want to do, just don't come in to work" (Tr. 128-129). Donnie Crum testified that Mr. Cox told him that he was not going to work on Saturday, May 11, 1985, and that if the respondent forced him to, "the labor board would take care of it and the company couldn't do anything about it" (Tr. 233). William Griffin testified that he worked a lot of overtime on Saturdays, and that Mr. Cox called him a "company suck" for doing so (Tr. 284). I find all of this testimony to be credible, and it lends credence and support to Mr. Jackson's assertions that Mr. Cox was trying to undermine his authority with respect to his policy concerning Saturday work requirements.

During his direct testimony, Mr. Cox confirmed that Mr. Jackson told him on Saturday, May 11, 1985, that he was tired of Mr. Poole "laying off" the job, and that Mr. Cox was to inform Mr. Poole to come in and "pick up his time." Mr. Cox also confirmed that he placed the call to Mr. Pleasants in an attempt to get Mr. Poole's job back. At that point in time, I am convinced that Mr. Cox knew that Mr. Jackson had discharged Mr. Poole because of his absenteeism, and I so find. On cross-examination, however, Mr. Cox stated that he was not under the impression that Mr. Jackson "was fed up" with Mr. Poole over his absences, and he believed that Mr. Jackson found an opportunity to get rid of Mr. Poole because of his safety complaints. I find Mr. Cox's impression of his conversations with Mr. Jackson to be contradictory, and find nothing in the record to support Mr. Cox's opinion that Mr. Poole was fired for any reason other than an absenteeism problem for which he was warned many times by Mr. Jackson.

Mr. Cox admitted that he disagreed with Mr. Jackson's decision to fire his nephew, and that he told him so during their conversation on Saturday, May 11, 1985. During that conversation, Mr. Cox questioned Mr. Jackson's treatment of Mr. Poole, and made some comments about the attendance record of Mr. Jackson's son, Kit. This provoked Mr. Jackson to the point where he informed Mr. Cox that if he were unhappy with

his decision to fire his nephew, he too could "pick up his time." At that point in time, I believe one could reasonably conclude that Mr. Jackson was in a mood to fire Mr. Cox along with his nephew, subject only to Mr. Cox's following through with Mr. Jackson's comment that he could "pick up his time."

I have carefully reviewed all of Mr. Cox's statements made to MSHA after his discharge and during the investigation of his complaint, and nowhere do I find any statements by Mr. Cox that he ever threatened to go to the "Labor Board" or any other mine enforcement agencies, that he ever intended to do so, or that he ever told anyone in mine management about any such purported threats. Mr. Poole's prior statements likewise contain no such information. The only prior statement by Mr. Cox raising any inference of a threat to go to MSHA is his assertion that "during April 1985" he told Mr. Blankenship that he was going to speak to an MSHA inspector on his next visit to the mine about the roof conditions. However, there is no evidence that Mr. Jackson knew about this statement, and I cannot conclude that it had anything to do with Mr. Cox's discharge.

At page four of his brief, Mr. Cox's counsel finds it "significant" that in his deposition of November 4, 1986, Mr. Jackson implied that Mr. Cox had threatened 20 times to go to MSHA. I have carefully reviewed Mr. Jackson's testimony in that deposition and cannot conclude or infer that Mr. Cox threatened to go to MSHA. Mr. Jackson testified that Mr. Cox threatened to go to the "Labor Board" about his discharge of Mr. Poole, and that Mr. Cox told him that he could not require anyone to work on Saturday if they did not want to, and that he could not fire Mr. Poole for refusing to work on Saturday. Mr. Jackson further testified that it was in this context that Mr. Cox threatened that the "Labor Board will eat me up," and Mr. Jackson further testified that he had no idea who Mr. Cox was talking about when he used the term "Labor Board" (Tr. 35-38). I find Mr. Jackson's testimony to be credible, and I conclude that Mr. Cox's prior threats to go to the "Labor Board" concerned matters unrelated to any safety concerns on his part.

I find that the respondent's policy prohibiting its employees from contacting the Brooks Run Coal Company on managerial decisions and policies made by the respondent was well known among the workforce, including Mr. Cox. Mr. Jackson had previously warned the workforce that any further contacts with Brooks Run would be viewed by him as an effort to question or undermine his operational authority to run his own mine and would be considered a dischargeable offense. Mr. Cox admitted

that at the time he placed the call to Mr. Pleasants on May 11, 1985, he did not identify himself to Mr. Pleasants out of fear that his job would be jeopardized for placing the call (Tr. 159). This supports my conclusion that Mr. Cox was aware of the policy and that he was concerned that his violation of this policy could cost him his job.

The crux of Mr. Cox's case lies in the telephone call he placed to Mr. Pleasants on Saturday, May 11, 1985, after a heated telephone exchange with Mr. Jackson over the discharge of Mr. Poole. At that time, Mr. Cox said nothing to Mr. Jackson about going to MSHA or "to the agencies" about any of his complaints, or about Mr. Jackson's discharge of Mr. Poole. Mr. Jackson came close to discharging Mr. Cox at that point in time, but did not do so. However, Mr. Jackson told Mr. Cox in no uncertain terms that if he (Cox) were not satisfied with his decision to fire Mr. Poole, that he too could "pick up his time." Had Mr. Cox taken up the offer and "picked up his time," I believe one could reasonably conclude that Mr. Jackson also fired Mr. Cox for questioning his decision to fire Mr. Poole, and for questioning his Saturday work policy.

Mr. Cox's assertions that he and Mr. Poole had always intended to go to MSHA and to other appropriate mine enforcement agencies are rejected as self-serving declarations made by Mr. Cox after he found himself out of a job. When called in rebuttal at the hearing after testifying on direct, and after Mr. Cox's testimony, Mr. Poole asserted that he and Mr. Cox had always intended to go to the "labor board or the governmental agencies" regardless of whether or not they were discharged. When asked whether he would have gone to MSHA if Mr. Poole were given his job back, Mr. Cox relied "not right at that time" (Tr. 161). This raises serious doubts in my mind that but for his discharge, Mr. Cox ever intended to file any complaints with MSHA or anyone else.

Mr. Cox admitted that he placed the call to Mr. Pleasants in order to attempt to influence him to intercede with Mr. Jackson and save his nephew's job. Mr. Cox also admitted that he told Mr. Pleasants that there would be trouble at his mine if Mr. Poole were discharged (Tr. 158). Mr. Poole conceded that Mr. Cox placed the call to Mr. Pleasants in an effort to convince Mr. Pleasants to intercede with Mr. Jackson over his discharge. Mr. Poole confirmed that Mr. Cox told Mr. Pleasants that there would be trouble at his mine if something was not done about getting Mr. Poole's job back (Tr. 282-283).

Mr. Pleasants expressed serious concerns over Mr. Cox's threats of trouble at his mine, as well as the other mines which supplied coal to Brooks Run, and his concerns were over what he viewed to be threats of labor trouble by Mr. Cox over the discharge of Mr. Poole and the respondent's Saturday work policy. Although Mr. Cox and Mr. Poole denied that Mr. Cox made any statements to Mr. Pleasants whch may have led Mr. Pleasants to conclude that Mr. Cox was threatening a possible work stoppage at the mines supplying coal to Brooks Run, I simply do not believe them. Given the background of Mr. Cox's reluctance to work on Saturdays, his prior threats to take that issue to the "labor board," and his prior corroborated statements to other miners that they did not have to work on Saturdays and that management could do nothing to force them to work, I find Mr. Pleasant's version of his conversation with Mr. Cox to be credible.

I conclude that Mr. Cox's telephone call to Mr. Pleasants had nothing to do with any safety concerns on the part of Mr. Cox or Mr. Poole. The call was clearly made in an attempt to influence Mr. Pleasants to intercede on behalf of Mr. Poole and to pressure Mr. Jackson to rescind his discharge of Mr. Poole. Mr. Cox's threats of trouble at the mines which supplied coal to Brooks Run, and his threats to "go to the agencies" if Mr. Poole were not given his job back, were not made by Mr. Cox out of any safety concern. I conclude and find that Mr. Cox's telephone contact with Mr. Pleasants, and his threats in connection with Mr. Poole's discharge and the respondent's Saturday work policy, were clearly in violation of Mr. Jackson's policy that no one was to contact Brooks Run questioning managerial policy decisions made by the respondent, and constituted unprotected activity for which Mr. Cox could be justifiably dismissed.

Mr. Pleasants testified that when he advised Mr. Jackson of Mr. Cox's telephone call, Mr. Jackson confirmed that he had fired Mr. Poole because of his absenteeism. When Mr. Pleasants advised Mr. Jackson that the caller had also complained that the respondent's Saturday work policy was interferring with his little league coaching duties, Mr. Jackson immediately recognized that the caller had been Mr. Cox and stated to Mr. Pleasants that "I discharged one man, but now there will be two." Mr. Jackson explained to Mr. Pleasants that he was discharging Mr. Cox for "going over his head" with his complaints to Mr. Pleasants. I believe that Mr. Jackson made the decision to discharge Mr. Cox as soon as he learned that it was Mr. Cox who had placed the call to Mr. Pleasants, and that he did so because of that contact, and not because of any threats by Mr. Cox to "go to the agencies" with any safety complaints. I

believe that Mr. Jackson was fed up with Mr. Cox and Mr. Poole, and that Mr. Cox's call to Mr. Pleasants, which came shortly after Mr. Jackson's call to Mr. Cox in which they exchanged heated words over Mr. Poole's discharge, and the Saturday work policy, was simply too much for Mr. Jackson to tolerate, and he reacted swiftly by making the decision to fire Mr. Cox.

The complainant's arguments that Mr. Jackson decided to fire Mr. Cox only after being informed by Mr. Pleasants of Mr. Cox's threats "to go to the agencies" with his complaints of unsafe practices in the respondent's mine are rejected. I have reviewed Mr. Pleasants prior memorandum of June 18, 1985, documenting his telephone conversation with Mr. Cox, and find nothing inconsistent with Mr. Pleasants' testimony during the hearing. The memorandum is not a verbatim record of the conversation in question, and it was prepared over a month after the call. I believe the memorandum is a simply record of the call, and I cannot conclude that it supports any inference that Mr. Jackson decided to fire Mr. Cox after being advised of Mr. Cox's threats "to go to the agencies." Given Mr. Jackson's frustration with Mr. Cox and Mr. Poole because of their failure to work on Saturday, Mr. Jackson's prior exchange with Mr. Cox over the discharge of Mr. Poole, and Mr. Cox's telephone contact with Mr. Pleasants, I believe Mr. Jackson's testimony that Mr. Cox's threats to go to the agencies or to MSHA had nothing to do with his decision to fire Mr. Cox.

I find Mr. Jackson's version as to why he discharged Mr. Cox to be credible. I further conclude and find that Mr. Jackson was justified in discharging Mr. Cox for attempting to undermine and interfere with his authority with respect to the Saturday work policy, his decision to discharge Mr. Poole, and Mr. Cox's violation of company policy with respect to contacts with the Brooks Run Coal Company. I further conclude and find that each of these occurrences, taken as a whole, constituted "unsatisfactory service," and support Mr. Cox's discharge.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of

discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 9 1987

HARLAN L. THURMAN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 86-121-D
QUEEN ANNE COAL COMPANY, Respondent	:	BARB CE 86-51

CORRECTED DECISION

Appearances: James C. Shastid, Esq., Knoxville, Tennessee, for Complainant;
Charles A. Wagner, Esq., Knoxville, Tennessee, for Respondent

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under Section 105(c) of the Federal Mine Safety and Health Act of 1977 30 U.S.C. § 815(c) (the Act) alleging that he was illegally discriminated against in that, in essence, he was forced to quit his job with Respondent due to the danger to him as a consequence of harassment from co-workers and his foreman.

Pursuant to notice of September 16, 1986, the case was set for hearing in Knoxville, Tennessee on November 4, 1986. On October 22, 1986, Respondent filed a Motion for Continuance. On October 29, 1986, a Order was issued granting the Motion for Continuance and scheduling the case for hearing on December 2, 1986. On November 24, 1986, Respondent filed a Motion to Dismiss on the ground that (1) the Complaint was not timely filed, and (2) the Complaint failed to state a violation of 30 U.S.C. § 815(c)(1). At the hearing on December 2, 1986 an oral argument was presented by the Parties as to Respondent's Motion. After listening to the arguments, I denied the Motion to Dismiss that was based upon the ground that the complaint was not timely filed. I reserved decision on the Motion to Dismiss which was made on the grounds that the complaint failed to state a violation of Section 815(c)(1), supra.

The case was subsequently heard in Knoxville, Tennessee on December 2, 1986. At the hearing Complainant was represented by James C. Shastid, and Respondent was represented by Charles A. Wagner, III. Harlan Thurman and Deborah Thurman testified for Complainant. Robert Swisher, Dempsey Lindsey, Crawford Harness, Jeffry Mason, and Dewayne Mason testified for Respondent. On December 9, 1986, a letter was received from Complainant in which he advised that Attorney James Shastid was no longer representing him. This was confirmed in a letter from Mr. Shastid received on December 12, 1986. Subsequent to the hearing, the Parties, on February 2, 1987 filed posthearing briefs. On February 17, 1987, a reply brief was filed by Complainant. On the same date a letter was received from Counsel for Respondent who, in essence, waived his right to file a Reply Brief.

Findings of Fact

The Complainant, Harlan L. Thurman, had been employed as a miner by the Respondent, Queen Anne Coal Company, for 3 years prior to March 1986. During that time, he worked the night shift with the same personnel.

The Complainant testified that in the 3 years that he worked for the Respondent there was no outside man. Robert Swisher, the President, and one of the owners of Respondent testified that there has not been any outside man at Respondent's mine for approximately 9 or 10 years. Thurman, in essence, testified that during the 3 years he worked for Respondent, his co-workers and foreman continuously harassed him. He said that they put urine in his tea, that his clothes were tied up, that dishwashing liquid was poured over his clothes, that there was grease placed on the seat of his vehicle, there were logs placed under the vehicle's wheels, and a headlight was broken on his vehicle. He also said that in the summer of 1985 he was sent to work alone by his foreman Crawford Harness. It also was Thurman's testimony that when he started to work for Respondent there was an incident when only four men were on the shift and a miner was being operated. In the summer of 1985 Complainant made a complaint to Dempsey Lindsey, the Respondent's superintendent, that Crawford had cursed him over a mistake in transporting certain supplies. Complainant also made a complaint to Lindsey, in the summer of 1985, that the men had left him alone when he had to get a scoop cart out of the mud.

Complainant's work shift usually commenced at 4:00 p.m. and concluded at 1:30 a.m. On March 6, 1986, the Complainant started to work on the shift at 4:30 p.m. and left early at 10:30 p.m., in essence, because he felt that the harassment from his foreman and co-worker, coupled with the lack of an outside man, created a

dangerous condition to him underground. Prior to March 6, 1986, the Complainant had not made any safety complaints to MSHA Officials, or company management officials.

On March 7, 1986, the Complainant went to see Emroy Haggard, the bookkeeper and part-owner of the Respondent, and told him, in essence, that Respondent's employees were taking coal. He also "explained to him what had been going on and some of the stuff that had been happening". (Tr. 32). Haggard then set up a meeting for the Complainant with Swisher the following Monday. At that meeting Complainant indicated that the men on the shift were harassing him. Thurman had told him that at one time that Crawford stuck his fist in his face and threatened to whip him. Swisher also said that Thurman told him that the men on the shift were: stealing company coal, had broken the headlight on his truck while it was on Respondent's site, had urinated in his food, and had locked him inside the gate. Thurman also told Swisher that there was no outside man. He also told Swisher that Harness does not have any education. Thurman had also told him that when he first started to work for Respondent his shift ran a miner with only four people on the shift.

Swisher than convened a meeting the following Thursday with himself, Thurman and the men on the shift along with Foreman Dempsey. At that meeting, in essence, Complainant's complaints were reiterated, then Swisher told the men on the shift that he would not tolerate any horseplay. According to Thurman, Swisher told him then to go back to work. Swisher also asked Lindsey to find Thurman a job on the day shift.

After the meeting Thurman intended to return to work. However, shortly after he left, Thurman returned to the office and told Dempsey and Swisher that, in essence, that he could no longer work underground with the men on the shift. Thurman gave his reason that he feared for his safety because Dempsey and Harness were "like they were a clique". (Tr. 107). Swisher told Lindsey to try to get Thurman a job on the day shift. However, Lindsey has testified that in general it is difficult to get men from the day shift to transfer to the night shift, and that in this case none of the day shift men wanted to trade with Thurman and work on the night shift. Lindsey also talked to the president and manager of another mining company, where Thurman had previously worked, with regard to obtaining a job for Thurman. Thurman did not return to work after he left early on March 6, and subsequently obtained other nonmining employment.

Issues

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

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

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

Conclusions of Law

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

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected Activity

Thurman's complaints to Swisher on or about March 10, 1986, with regard to the lack of an outside man, and complaints the following Thursday that there was an incident whereby a miner was operated with only four men in the section, both contained allegations of safety violations and as such are considered protected activities. The balance of the complaints made to Swisher, Haggard, and Lindsey, all had to do with allegations of harassment by Thurman's co-employees, were not protected activities (see Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251 (July 1983)). In the same way, complaints to Swisher and Haggard with regard to co-workers taking Respondent's coal, are not safety related and thus are not protected activities.

Adverse Action

Complainant, in essence, complains of four adverse actions by Respondent:

1. Swisher told Thurman to go back to work on about March 13, 1986, after Swisher had heard Thurman's various complaints.

2. The fact that Respondent had not found a job for Thurman on its day shift.

3. The fact that the Respondent had not cured its alleged violation of not having an outside man.

4. Swisher threatened Thurman by telling him about a former employee of Respondent who was killed when a tank that he had put a torch to had blown up.

There is no evidence that Respondent took any adverse action against Thurman which was motivated in any part by safety complaints. Indeed, I find that although Thurman at the hearing complained of unsafe practices such as not having an outside man and operating a miner with only four men, there is no evidence that Thurman made any complaint about these conditions to any government official, or agent of Respondent prior to the date that he left work, i.e., March 6, 1986. Thurman alleges that after he made various complaints to Swisher on or about March 10 and March 13, 1986, Swisher told him to go back to work. I hold that Swisher's comments to Complainant, in indicating on or about March 10, 1986, that Thurman should go back to work, did not constitute any adverse action. Surely, having Thurman return to his usual job can not be found to be an adverse action. Similarly, although Thurman might reasonably have felt that for him to return to his section, where he was subject to harassment, would be a danger to him, this can not constitute any type of constructive discharge. In this connection, it is manifest that the Act does not contemplate protecting a miner from harassment from a co-worker, when that harassment is not motivated by the miner's safety complaints. In this case, there is no evidence that harassments from Thurman's co-workers were motivated in any part by Thurman's complaints about not having an outside man. Indeed, all evidence indicates that Thurman's complaints in this regard occurred subsequent to the date that he left work. Also there is no evidence that the harassment from co-workers were abetted or encourged by management. Indeed, Swisher's uncontradicted testimony was to the effect that at the meeting with Thurman's co-workers on March 6, 1986, after Thurman had complained of harassment, he (Swisher) told them to stop engaging in horseplay.

Also, it is clear that Respondent did not commit any adverse action in not finding Thurman a job on the day shift. Not only is there no evidence that this was not in any way motivated by Thurman's protected activities but to the contrary, the only evidence in record, testimony by Dempsey, is that none of the day shift wanted to switch shifts with Thurman. To require Respondent to create a position for Thurman on the day shift, would unduely interfere with its business decision in managing its mine.

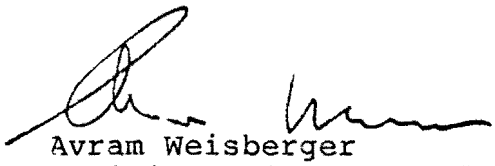
Thurman might have felt threatened by hearing Swisher telling him of a former miner, who had some type of emotional problem, who was killed in an accident at the mine. However, there was not evidence that Swisher, in telling of this incident, had any intent to threaten Thurman. Nor is there any evidence that his telling of this incident in any way was motivated by Thurman's protected activities. Indeed, Swisher testified that he told of the incident in order to relate his care for his employees.

Complainant appears to be arguing that inasmuch as Respondent continues to operate without an outside man at the mine, that this is an adverse action against him. It is clear that although failure to provide a miner with a safe work place might be a violation under the Act but that "such a failure does not without more consititute discrimination." (Lund v. Anamax Mining Company 4 FMSHRC 249, 251 (February 1982)).

Therefore, based upon the above I conclude that Thurman failed to establish the second element of a prima facie case i.e., that he did not show that there was an adverse action by Respondent motivated by in any part by safety complaints. I conclude that accordingly Complainant has not established that he was discriminated against under Section 105(c) of the Act.

Order

Based upon the above Findings of Fact and Conclusions of Law, it is ORDERED that this proceeding be DISMISSED. As such, Respondent's Motion to Dismiss is GRANTED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 11 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 86-139-R
	:	Citation No. 2810267; 9/22/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 5 Mine

DECISION

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

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act" to challenge Citation No. 2810267 issued to Jim Walter Resources Inc. (Jim Walter) by the Secretary of Labor on September 22, 1986.

The citation as amended at hearing charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.309(a) and reads as follows:[1]/

> Methane from 1.1% to 1.2% was detected with a G-70 methane detector, in the main return aircourse of the No. 3, 5, 6 and 7 sections from spad No. 2821 outby to spad No. 2174, the overcast of No. 5 and No. 7 section track. Also the main return aircourses from spad No. 2242 extending inby to spad No. 2827 where the No. 5 section left return joins the left return of the No. 7 section. Also extending up the No. 5 section left return from spad No. 2827 to the working face. Bottle samples were taken to substantiate this citation.

[1]/As further amended at hearing without objection, the citation also charges a violation of the regulatory standard at 30 C.F.R. § 75.316.

The regulatory standard at 30 C.F.R. § 75.309(a) reads,as relevant hereto, as follows: "if, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane."

The mere discovery of 1.0 volume per centum or more of methane in a split of air returning from a working section is clearly not sufficient to constitute a violation of this part of the standard. See Secretary v. Mid Continent Coal and Coke Company, 1 IBMA 250 (1972). The essence of the violation is the failure to make "changes or adjustments . . . at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane."

In this case it is not disputed that methane gas in excess of 1.0 volume per centum was found by Carl Early, an inspector for the Federal Mine Safety and Health Administration (MSHA) on September 22, 1986. While the citation shows on its face that it was issued by Inspector Early at 7:00 a.m. on September 22, 1986, there is no statement or evidence as to the time lapse between the discovery of the cited methane readings and the issuance of the citation or regarding what, if any, efforts were made to correct the problem. Indeed Inspector Early testified that he did not know when the operator began action to correct the cited condition but conceded that he was told by Ray Hutchins, the Mine Foreman upon notification that the methane readings were in excess of 1% and the citation at bar was being issued, that he "would start immediate action to improve ventilation." Early also acknowleged that "mine management" told him that they had idled another section and erected an equalizing overcast.[2/]

MSHA Supervisory Inspector Donald Mize accompanied Early on his September 22, inspection. Mize could not recall whether he had asked the foreman whether or not he was planning on taking any other action to improve the ventilation. Mize told Early to issue the subject citation because he "thought" mine management was not making progress toward correcting the problem.

[2/] Although the Secretary alleged at hearing that the mine operator also failed to make "changes or adjustments . . . at once" following the discovery of methane in excess of 1% on the Thursday, Friday and Sunday preceding the issuance of the citation at bar those alleged violations were not set forth in the citation and accordingly are not before me. In any event the Secretary produced no evidence to show that the methane had not been reduced to below 1% subsequent to those excess readings on the preceding Thursday, Friday and Sunday.

According to both Thomas McNider, Deputy Manager for ventilation, and Ronny Ganey, a ventilation engineer, work to improve ventilation had been ongoing before and after the instant citation was issued. More specifically Ganey testified that when he arrived at the mine at 7:00 a.m. on September 22, 1986, he found that Foreman Jerald Thomas had been working to correct the ventilation for that entire night. The problem was eventually corrected by placing overcasts in service, correcting leaky line curtains, erecting a check curtain and patching brattices.

Within this framework of evidence I cannot find that the Secretary has sustained his burden of proving that the operator failed to make "changes or adjustments . . . at once in the ventilation in the mine so that such returning air shall contain less than 1.0% volume per centum of methane," upon the discovery of methane at 7:00 a.m. on September 22, 1986 in excess of that concentration. The credible evidence shows that the citation was issued immediately upon the discovery of the violative methane and Respondent was given no opportunity to make the requisite changes or adjustments. Accordingly the citation was issued prematurely and cannot be sustained for the alleged violation of the standard at 30 C.F.R. § 309(a).

The Secretary also maintains in its amended citation however that the facts alleged in the original citation also constitute a separate violation of the operator's Ventilation System and Dust Control Plan (Ventilation Plan) under the standard at 30 C.F.R § 75.316. It is not disputed that the alleged violation is based upon the last paragraph of page 2 of the Secretary's cover letter approving the operator's Ventilation Plan. Those provision require that "when methane content in a main return exceeds 1.0 volume per centum of methane, mine management shall submit a plan detailing additional evaluation procedures and safeguards which will be utilized to insure safety."

Based on the factual allegations in the citation that the methane content in the main return air course exceeded 1.0 volume per centum of methane and the notation that the citation was issued at 7:00 p.m. on September 22, 1986, it is apparent that under the noted provisions mine management was then required to "submit a plan detailing additional evaluation procedures and safeguards which will be utilized to insure safety."

The evidence in this case shows that a plan was indeed submitted to MSHA on the following day i.e., Septmeber 23, 1986. That plan was returned to the mine operator for

"necessary correction(s)" by letter dated September 24, 1986 (Exhibit G-8). In an attachment to that letter MSHA specified the "corrections" that the operator should address in any further submissions. By letter dated September 26, 1986, and received by MSHA on September 30, 1986, the operator again submitted a "plan" but, it appears did not specifically address the corrections deemed "necessary" by MSHA.

There is no evidence however that at the time the mine operator wrote its letter of September 30, that it then had received the MSHA letter dated September 24. The amended citation charging the instant violation was issued October 7, 1986. The record shows that on October 15, 1986, after the issuance of that amended citation, MSHA responded to the mine operator specifying, for the first time, certain detailed requirements that the operator "shall include, [in its plan] but [was] not necessarily limited to."

Since no time is specified within which "mine management shall submit a plan" that time must been deemed to be a "reasonable time." Under the circumstances of this case I do not find that a reasonable time was provided by the Secretary between the notification to mine management by the issuance of the citation on September 22, 1986, of methane in excess of 1%, and the failure to submit a plan meeting the Secretary's approval.

The evidence shows that mine management submitted what may be construed to be a "plan" on September 23, 1986, the day after the citation was issued. It followed with another submission on September 26, 1986. Although these submissions were not "approved" by MSHA it is apparent that the specific reasons for disapproval (or the specific changes needed in these submissions to obtain MSHA approval) were not communicated to the mine operator until MSHA sent its letter dated October 15, 1986, some 8 days after it had issued its amended citation. Under these circumstances I do not believe the mine operator was given a reasonable time to have its plan approved. The operator must be given reasonable time to develop and submit a plan acceptable to the Secretary before a citation can properly be issued under the cited provisions. Accordingly the violation is not proven and the allegations in this regard must be dismissed.

Since I have found no violation in regard to matters alleged by the Secretary in the citation at bar there is no need to decide whether or not the Secretary had the legal authority in the first instance to require the mine operator to comply with the provisions set forth in the last paragraph of page 2 of his cover letter approving the operator's Ventilation Plan. It is clear however that the Secretary has the authority to require the inclusion of reasonable requirements in such a Ventilation Plan pursuant to section 303(o) of the

Act and that those requirements are enforceable under the Act as a mandatory standard. See Ziegler Coal Company v. Kleppe, 536 F.2d 398 (D.C.C.A. 1976). See also Secretary v. Jim Walter Resources, Inc., Docket No. SE 86-83, Judge Broderick, January 21, 1987, petition for review granted February 25, 1987.

Under all the circumstances, Citation No. 2810267 (and the amendments thereto) is dismissed and the Contest herein is granted.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 11 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 86-141-R
	:	Order No. 2811695; 9/22/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 86-142-R
	:	Order No. 2811621; 6/23/86
	:	No. 5 Mine

DECISION

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

Before: Judge Melick

These consolidated cases are before me upon the applications for review filed by Jim Walter Resources Inc., (Jim Walter) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge the issuance by the Secretary of Labor of two "imminent danger" withdrawal orders under section 107(a) of the Act.[1/] At hearing the parties elected to proceed on stipulations of fact. The issue before me is whether an "imminent danger" existed as alleged and within the framework of the stipulated evidence.

1/ Section 107(a) of the Act provides as follows:
If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The order in this case, No. 2811695, issued September 22, 1986, reads as follows:

> Methane in excess of 1.5 per centum was detected not less than 12 inches from the roof face and ribs in the face of the No. 4 entry in the 005 section. A G 70 methane detector with a probe was used; however a bottle sample could not be taken due to the face being cut beyond the last row of roof bolts and the area was not supported with roof bolts.

The agreed stipulations of fact are as follows:

> In the face area in the No. 4 entry, inby the last open crosscut, 3 measurements of methane were taken. Those 3 measurements in the face area were 1.7% methane, 1.8% methane and 2.0% methane, and that the miners had not been withdrawn from this area. . . . the readings were taken with a hand-held methanometer; they were not bottle samples." (Tr. 71).

It was subsequently also stipulated that "the air was tested in a working place."

Section 3(j) of the Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Secretary argues in his post-hearing brief that the presence of 1.5 volume per centum or more of methane in the air at any working place constitutes such an "imminent danger" per se. According to the Secretary an "imminent danger" is thereby established and warrants the issuance of a section 107(a) withdrawal order under the authority of section 303(h)(2) of the Act.[2/]

[2/] Under section 303(h)(2) of the Act when the air at any working place contains 1.5 volume per centum or more of methane "all persons, except those referred to in section 104(d) of [the] Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane."

The Secretary argues that the former Department of Interior Board of Mine Operations Appeals (the Board) found in Pittsburgh Coal Co., 2 IBMA 277 (1973), that the issuance of an "imminent danger" withdrawal order under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the virtually identical predecessor to section 107(a) of the Act) was mandated by the presence of the factors set forth in section 303(h)(2). In the Pittsburgh Coal Co. decision the Board adopted the analysis in the decision of the judge below concerning the relationship between an "imminent danger" withdrawal order and section 303(h)(2) (of the 1969 Act). The judge's analysis was as follows:

> Under section 104(a) an inspector "shall issue" a withdrawal order to clear designated mine areas if upon inspection a condition of imminent danger is found to exist. In similar language the latter part of section 303(h)(2) provides for a withdrawal of miners, though it does not express itself in terms of imminent danger. By requiring a withdrawal of miners upon the detection of a 1.5 volume per centum the Act seems to be recognizing a condition of imminent danger.
>
> As defined in section 3(j) of the Act, "imminent danger includes a condition which could reasonably be expected to cause death or serious physical harm before such condition * * * can be abated." If Congress has determined by statute that a 1.5 volume per centum reading is sufficient to require the drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger. Congress in 303(h)(2) has intentionally left no room for doubt or discretion in what it viewed as an imminent danger. Considering the nature of the gas, the perilous conditions created by it, and insignificant quantum of energy necessary to cause an ignition - there is a sufficient basis to characterize a 1.5 percent concentration as one of imminent danger.
>
> The seriousness with which congress viewed the methane problem can be seen by the 303(h)(1) requirement of an initial preshift examination for the gas to be repeated at twenty minute intervals thereafter. The deadly history of the gas in the last thirty years bears ample witness to the intent of Congress to reduce this major cause of death. [footnote omitted] It can reasonably be inferred that the withdrawal requirement of 303(h)(2) presumes the existence of a condition of imminent danger. This being the case, the issuance of an 104(a) order would appear to be the appropriate

method of notifying an operator of what is required of him under the Act, where he has not upon his own initiative withdrawn the miners from the area affected by the methane.

In addition the Board observed in its decision that:

"[I]n the section-by-section analysis of section 204(h)(2), subsequently enacted as section 303(h)(2) of the Federal Coal Mine Health and Safety Act of 1969, the report of the Senate Committee [footnote omitted] states as follows:

* * * If the air contains 1.5 percent of methane, withdrawal of the miners by the operator or inspector, if he is present, is required * * * Long experience has shown that the methane, when present is dangerous. The explosion range is between 5 and 15 percent. Once it reaches 1.5 percent it can accumulate rapidly. Thus, action must be taken promptly before it reaches 1.5. percent. (Emphasis added)

In our view this expression of Congressional intent is sufficient to override the arguments advanced by the appellant and to sustain the Judge's decision on this point."

While this Commission has stated in Secretary v. Pittsburgh and Midway Coal Mining Company, 2 FMSHRC 787 (1980) that it would examine anew the question of what conditions and practices constitute an "imminent danger" the legal analysis of the Board concerning the issuance of "imminent danger" withdrawal orders under the conditions set forth in section 303(h)(2) is persuasive and I accordingly apply that analysis to this case.

It is not disputed in this case that there was at least 1.5 volume per centum of methane in the air in the face area in the No. 4 entry inby the last open crosscut and that the miners therein had not been withdrawn. Within the above framework of law an "imminent danger" therefore existed and the withdrawal order was properly issued in this case pursuant to sections 303(h)(2) and 107(a) of the Act. See also Consolidation Coal Company v. Secretary of Labor, 4 FMSHRC 1960 (Judge Kennedy, 1982).

DOCKET NO. SE 86-142-R

The order in this case, No. 2811621, also issued under section 107(a) of the Act reads as follows:

> The methane content when tested not less than 12 inches from the roof face or ribs was in excess of 1.5 volume per centum in the No. 1 entry 1.5%, No. 2 entry 1.3%, No. 3 entry 1.5% and No. 4 entry 1.8% on the No. 3 section. Air sample was collected.

The order was modified on June 24, 1986, the date following its issuance, to identify the area affected as the "No. 3 entry inby spad No. 4386 crosscut right and face of No. 4 entry inby No. 4386 spad."

The parties again stipulated the facts at issue and those stipulations are as follows:

> Methane concentrations in the No. 1 entry was 1.5%; in the No. 2 entry 1.3%; in the No. 3 entry 1.5%; in the No. 4 entry 1.8%. . . . the section was not producing coal at the time of the inspection; that power was energized on the battery charger, . . . that the crew of miners was inby the last open crosscut working on a rock fall which occurred in the face of No. 4 entry. No. 5 mine is subject to the 5-day spot inspections pursuant to section 103(i) of the Act and Mr. Gaither was inspecting the mine subject to spot inspection." (Tr. 60, 61, 67).

It was later further stipulated that the "air was tested in . . . working place[s]."

Within the framework of these stipulations and the applicable law previously noted it is clear that an "imminent danger" existed in those entries cited in Order No. 2811621 on June 23, 1986. Accordingly this order was also properly issued under section 107(a) of the Act.

Order No. 2811621 was again modified on September 22, 1986, and that modification (No. 2811621-2) reads as follows:

> Methane in excess of 1.5 per centum was detected in the left and right split of air current returning off the No. 3 section beginning at spad No. 2856 on left side in No. 1 entry and spad No. 3855 on right side in No. 4 entry and extending inby to the Nos. 1, 2, 3, and 4 faces in No. 3 section. Bottle samples were taken to substantiate the findings. Order No. 2811621 dated 6-26-86 is hereby modified to show area or equipment to be closed. Nos. 1, 2, 3, and 4 entries beginning at spad No. 2856 in No. 1 entry across to spad No. 3855 in No. 4 entry and extending inby to the Nos. 1, 2, 3, and 4, faces in No. 3 section.

The parties stipulated the essential facts as follows:

> [A]t Spad Number 3713, bottle sample revealed 1.65 percent methane. At Spad Number 3897, bottle sample revealed 1.67 percent methane. At the left regulator, Number 3 section, bottle sample revealed 1.7 percent methane. At Spad Number 4238, bottle sample revealed 1.76 percent methane. Power was on power center located at intake air. Power center was energized running a drill for degasification under an MSHA approved supplement to the ventilation plan, which was approved on 8-18-86. At the time methane content was less than 1.0 percent in the area where the drill was placed, and the aforementioned areas where all within the areas closed by the modification dated 9-22-86 (Tr. 69).

It was subsequently further stipulated that the air was tested "in a split of air returning from a working section."

The Secretary here argues that section 303(i)(2) of the Act requires the issuance of an "imminent danger" withdrawal order when the factors cited therein are found to exist, just as section 303(h)(2) has been found to require the issuance of such an order.

Section 303(i)(2) provides as follows:

> If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons, except those persons referred to in section 104(d) of this Act, shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of methane.

I agree with the Secretary. Section 303(i)(2) sets forth criteria under which miners are to be withdrawn under conditions of "imminent danger" equivalent to those set forth in section 303(h)(2). The rationale of the Pittsburgh Coal Co. case in issuing "imminent danger" withdrawal orders under the authority of section 303(h)(2) is accordingly applicable here as well. Thus when the conditions set forth in section 303(i)(2) are found to exist an "imminent danger" also exists and a withdrawal order pursuant to section 107(a) may properly be issued.

Accordingly order of withdrawal No. 2811621 and its modification dated September 22, 1986, were both properly issued under section 107(a) of the Act and are hereby affirmed.

ORDER

Orders of withdrawal No. 2811698 and No. 2811621 (and the modification thereto dated September 22, 1986) are hereby affirmed. The contests of those orders are accordingly denied.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 11 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-386 A.C. No. 46-01455-03630
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	
CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 86-339-R Order No. 2713222; 4/22/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Osage No. 3

DECISION

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

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to challenge a withdrawal order issued by the Secretary of Labor under section 104(d)(1) of the Act, and for review of civil penalties proposed by the Secretary for the violation alleged therein. For the reasons that follow I find that Consolidation Coal Company (Consol) did not violate the cited standard and accordingly that the withdrawal order and the civil penalty proceedings herein must be dismissed.

The order at bar, No. 2713222, alleges a violation of the standard at 30 C.F.R. § 75.305 and charges as follows:

> A weekly examination of the abandoned areas of 11 North inby the 1 West Junction, which, insofar as safety considerations permit are safe to be traveled by the weekly examiner are not being examined by a certified person as required by 30 C.F.R. 75.305 in

that, the intake and return airways which were safe to travel when inspected 4/21/86 showed no evidence that examinations have been being [sic] made. Last date observed in the return airways was September 1985.

The cited standard, as relevant hereto, provides as follows:

> . . . examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, should be made at least once each week by a certified person designated by the operator . . . insofar as safety considerations permit, abandoned areas. . . . The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. . . The record of these examinations, tests and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

It is undisputed in this case that the cited areas were indeed "abandoned areas" within the meaning of the cited standard. The parties disagree however concerning whether "safety considerations permit[ed]" the examinations in the abandoned areas at issue. The Secretary argues that safety considerations did in fact permit such examinations and Consol argues that safety considerations did not permit such examinations.

The testimony of Inspector Lynn Workley of the Federal Mine Safety and Health Administration (MSHA) is inconsistent. On the one hand Workley testified that he walked, along with a representative of the mine operator, Don Morrison and a union representative, some 2 thousand feet into the abandoned area, and that it was not unsafe. On the other hand Workley maintained that it was hazardous for anyone to proceed in that area because of the likelihood of fatal roof falls from "bad roof" and the possiblity of a trolly wire in the abandoned area becoming energized and causing a fire.

Mine Superintendant Joseph Pride agreed that the abandoned area was unsafe. According to Pride the cited area had been abandoned 5 years before and had not been inspected under the provisions of the cited regulation because it was deemed to be an unsafe area.

John Morrison, Consol's mine safety escort who accompanied Workley on April 21, 1986, considered the abandoned area to be "highly unsafe." He observed that in many locations the bottom had "humped up" and that the roof and rib conditions were "bad." In some places rock had already fallen from the roof and ribs. Indeed, in order to penetrate the abandoned area it was necessary for the inspection party to "zig-zag" and "backtrack" around the most dangerous conditions.

Joseph Jimmie, a union safety escort accompanying Workley when he abated the order on April 26, 1986, also considered the abandoned area to be a serious hazard. He also found the "top" to be "bad" with evidence of roof falls in many of the headings. Jimmy recalled that the inspection party therefore had to "zig-zag" back-and-forth around the entries in order to penetrate the abandoned area.

Within this framework of evidence it is quite clear that the mine operator could reasonably have found that "safety considerations" did not permit the examinations set forth in section 75.305 to be conducted in the cited area. In reaching this conclusion I have not disregarded the Secretary's argument that one could infer from the fact that the operator did not "danger off" the cited area that it considered to be abandoned and not safe to inspect (under section 75.305), that it did not in fact consider that area unsafe. It is readily apparent however that the inspector himself did not deem it necessary that such abandoned area be "dangered off" since no such violation was cited and no such requirement was made a condition of abatement. Under the circumstances I find no violation and the order must therefore be vacated.

ORDER

Order No. 2713222 is vacated, Civil Penalty Proceeding Docket No. WEVA 86-386 is dismissed, and Contest Proceeding Docket No. WEVA 86-339-R is granted.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 12 1987

JAMES H. HARMON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 86-375-D
	:	MSHA Case No. MORG CD 85-9
CONSOLIDATION COAL COMPANY, Respondent	:	Humphrey No. 7 Mine

DECISION

Appearances: Jeff Harris, Esq., Morgantown, West Virginia, for the Complainant;
Thomas N. McJunkin, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant James H. Harmon against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Harmon filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and so advised Mr. Harmon by letter dated May 12, 1986. Mr. Harmon then filed a pro se complaint with this Commission, and he subsequently obtained counsel to represent him in this matter. A hearing on the merits of the complaint was held in Morgantown, West Virginia, and the parties appeared and participated fully therein. The respondent filed a posthearing brief. Mr. Harmon's counsel withdrew from the case after the hearing, and did not file a brief. However, I have considered the oral arguments made by Mr. Harmon's counsel during the course of the hearing, as well as the respondent's arguments.

The complainant alleges that he was removed as a member of the mine safety committee by mine management because of his safety concerns and activities as a member of the safety

committee, and that his removal constitutes discrimination under the Act. The respondent asserts that the complainant was removed from the safety committee because he and the other members "arbitrarily and capriciously" shut down a track haulage area of the mine, and that his removal from the safety committee was in full compliance with the terms of the applicable National Bituminous Coal Wage Agreement of 1984. The respondent states that the complainant's removal from the safety committee was also challenged pursuant to the applicable contractual binding arbitration procedures, and that his removal was upheld. In addition, respondent states that the complainant's state discrimination complaint challenging his removal from the safety committee was rejected after protracted hearings before the West Virginia Coal Mine Safety Board of Appeals.

Issues

The principal issue in this case is whether or not the complainant's removal from the mine safety committee by the respondent was discriminatory under section 105(c) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) and 110(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Factual Background

Mr. Harmon has been a member of the United Mine Workers of America and an employee of the respondent for approximately 10 years. In May of 1984, he was elected by the local union at the mine to serve on the Mine Health and Safety Committee, an entity which exists at mines covered by the National Bituminous Coal Wage Agreement of 1984 (Wage Agreement) by virtue of Article III(d)(1) of that contract which provides in pertinent part as follows (exhibit R-1):

ARTICLE III- HEALTH AND SAFETY

Section (d) Mine Health and Safety Committee

(1) At each mine there shall be a Mine Health and Safety Committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union . . . .

* * * * * * *

(3) The Mine Health and Safety Committee may inspect any portion of a mine . . . if the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. In those special instances where the Committee believes that an imminent danger exists and the Committee recommends that the Employer remove all Employees from the involved area, the Employer is required to follow the Committee's recommendations and remove the Employees from the involved area immediately . . . .

* * * * * * *

(5) If the Mine Health and Safety Committee in closing down an area of the mine acts arbitrarily and capriciously, a member or members of such Committee may be removed from the Committee. An Employer seeking to remove a Committee member shall so notify the affected Committeeman and the other members of the Mine Health and Safety Committee. If the Committee objects to such removal, the matter shall be submitted to and decided by the appropriate panel arbitrator. If the Employer requests removal of the entire Committee, the matter automatically shall be submitted to arbitration and the Committee will continue to serve until the case is submitted to and decided by the arbitrator. A Committee member shall not be suspended or discharged for his official action as a Committee member. (Emphasis added.)

On the morning of December 12, 1984, Mr. Harmon and two other safety committeemen, Mr. Thomas Turpin and Mr. David Laurie, acting in their capacities as safety committeemen, closed a section of the mine's main haulage track line under

the purported authority of Article III(d)(3) of the Wage Agreement. The area affected was the location of a derailment which had occurred the previous day. On December 14, 1984, mine management exercised its rights under Article III(d)(5) of the Wage Agreement to remove the three committeemen from the safety committee for acting arbitrarily and capriciously in shutting down the track haulage 2 days earlier.

The removal of the safety committeemen was challenged and submitted to binding arbitration pursuant to the terms of the Wage Agreement. On January 28, 1985, Arbitrator Thomas M. Phalen rendered a decision upholding the removal of Mr. Harmon and his co-committeemen from the safety committee.

By a letter dated January 7, 1985 to Mr. Richard Bassick of the Mine Health and Safety Administration, Mr. Harmon, Mr. Turpin, and Mr. Laurie filed a complaint in connection with the incident alleging discrimination under section 105(c) of the Act. By letter of May 12, 1985, MSHA advised the complainants that review of the matter revealed no basis for their complaint.

On January 21, 1985, the three aggrieved committeemen filed another complaint challenging their removal from the safety committee, this time alleging discrimination under state law. After hearings, the West Virginia Board of Mine Safety Appeals rejected the complaint in a decision dated June 17, 1986.

This matter is presently before me on the complaint of Mr. Harmon that his removal from the safety committee constitutes discrimination under section 105(c) of the Act. The two other individuals who were removed from the safety committee with Mr. Harmon have not joined in this complaint.

Complainant's Testimony and Evidence

James H. Harmon, the complainant in this case, stated that he has been employed by the respondent for over 10 years, and that he works at the Bowers Portal of the Humphrey No. 7 Mine. He confirmed that he was working the day shift on December 11, 1984, as a pumper, and that he was a member of the mine safety committee, and had been a member since May, 1984. On that day he learned that a derailment accident had occurred, with possible serious injuries to a miner. He learned about the accident by overhearing the mine dispatcher on the radio calling supervisors to make them aware of the accident. Since he was a member of the safety committee, Mr. Harmon wanted to go to the scene of the accident, but

before doing so, he had to have the permission of his shift foreman so that he could be relieved from his regular duties. He travelled the main track trying to locate his immediate supervisor to excuse him from work to go to the accident scene, and after doing so, he eventually arrived at the scene of the accident approximately and hour and a half later (Tr. 15-23).

Mr. Harmon confirmed that during his tenure as a safety committeeman, he was never refused permission to be excused from work to perform his safety committeeman's duties (Tr. 23). Mr. Harmon conceded that he was not refused permission on December 11, 1984, but questioned why he had to be "passed around," and had to go through so many supervisors to obtain permission to be excused from work to go to the scene of the accident (Tr. 24).

Mr. Harmon stated that when he arrived at the scene of the accident at the Sandstone Portal, he learned that the injured man had been taken out of the mine, and that after walking some distance, he was taken out by jeep and taken to the hospital by ambulance for treatment of his injuries. Mr. Harmon identified the injured miner as Dennis Van Kirk, and he stated that Bowers Portal Superintendent Blaine Myers informed him that Mr. Van Kirk had a hand injury and had been struck by a piece of rock (Tr. 26). Mr. Harmon stated that he observed rock which was about to fall, and some rock falling in the area where the cars had left the track, and clean up work was in progress. Mr. Harmon stated that "everything seemed to be going in order, just some minor things, but they were taken care of" (Tr. 30).

Mr. Harmon stated that he observed four roof arches that were badly damaged in the accident, observed some bad roof, and he described the conditions which he observed. He confirmed that he was concerned about the exposed roof top conditions, gob which had fallen on the track, and he believed that another derailment could occur as equipment was allowed to run through the area. He believed that the bad top conditions had existed prior to the accident, and that the roof had been exposed when the derailment damaged the arches and knocked out the roof cribs and planks (Tr. 32-34). Mr. Harmon stated that the derailed empty cars had been removed, but he was concerned that people were working around the bad top conditions. The gob had been cleaned off the track "pretty fair," but one of the laborers, Joe Pattotta, complained to him that "they're going to try and bring another trip up through." Mr. Harmon was concerned that another trip of cars would be brought through the area, and since cleanup had not

been finished, and the top was still exposed, and he had no doubt that attempting to bring another trip of cars through would cause another derailment (Tr. 35).

Mr. Harmon stated that Mr. Turpin complained to him that there was a lack of adequate self rescuers available, and not enough transportation to take the men working on the shift out of the mine. Mr. Harmon confirmed that he ascertained that there were sufficient self-rescuers and adequate transportation available, and that Mr. Turpin's complaints were not valid. Mr. Harmon stated that Mr. Turpin was concerned that there was not enough transportation available for the men to leave the mine since it was quitting time and the men wanted to go home (Tr. 37).

Mr. Harmon stated that "Everything was going smooth" and that "they was making an honest attempt to correct the situation. I had no problem with that" (Tr. 38). However, Mr. Harmon said that he was upset when he heard general mine foreman Clarence Amick order Sandstone Portal superintendent George Krynicki to clear the area so that a trip of coal cars could be brought through. Mr. Harmon explained his efforts to prevent additional coal car trips from coming through the accident area as follows (Tr. 39-43):

> I requested Blaine to not run no equipment through this area. He asked me if it was dangerous. I repeated back to him, "I request no equipment through this area." He said, "Well, do you feel it is dangerous?" I said, "Yes, I feel it's dangerous." He refused. He said, "Jim, we want to run this trip through here." I said, "No." For the third time I said, "I request that you not run no equipment in here until you get the boards up and arches tied together, so that there ain't going to be anymore accidents. If I have to, I'll use the threat of hanging a danger board." I use that expression of hanging a danger board as a bluff in my mind, because I am not allowed, even as a safety committeeman, to hang a danger board, according to the state law. The only person that can do so is a certified person of the state. Knowing that, I used the threat. I wanted to make my point clear that I wanted the area closed down. He still refused, he said,

"Jimmy, you get out of the area because we're bringing a trip up right now."

* * * * * * *

THE WITNESS: Well, I asked him three times. As you have stated, I have been on the Safety Committee, at that point, seven or eight months. We've been on safety runs, estimated ten or twelve safety runs up until that point, that I had participated on. We had shut the areas down throughout the mines for different reasons. Rather, Dave Laurie has, as he is spokesman. He is the chairman of the Safety Committee, and I am under him. We had no problem. He asked to shut this area down long enough to have the problem taken care of. I had to ask him three times. After the first time I was shocked. It just seemed after Mr. Amick gave the orders, something just snapped in Mr. Krynicki and Blaine. They were taking care of the area, I had no problem with that. Then, I was shocked after I asked them the first time, and I was shocked after I asked them the second time, and I asked them the third time, and even using the threat of hanging the danger board.

JUDGE KOUTRAS: Let me ask you this now. If they were taking care of the problem, if it were taken care of there, you had no problem. What was the problem? That you felt that they should have--?

THE WITNESS: The top was exposed, sir. There was no roof support over that top.

JUDGE KOUTRAS: Were they aware of that?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did they have some difference of opinion with you as to the condition of the top?

THE WITNESS: They apparently, after the order of Mr. Amick, was going to do what Mr. Amick said.

JUDGE KOUTRAS: Was Mr. Amick there?

THE WITNESS: He was outside using the phone for communications.

JUDGE KOUTRAS: So, Mr. Amick was outside telling them where to run the trip through. Was he aware of the situation and what the conditions were?

THE WITNESS: I don't know if George or Blaine made him aware of the situation.

JUDGE KOUTRAS: Let us assume that they did.

THE WITNESS: If they made him aware of the situation, of the bad top, and he run the coal through anyways--.

JUDGE KOUTRAS: No. Let us assume that they told Mr. Amick that the top is not that bad, or whatever. Let us assume that Mr. Krynicki and Mr. Myers felt that the top was all right, contrary to what you felt. And they communicated that to Mr. Amick. Do you think that when Mr. Amick said to run coal, that he took them at their word?

THE WITNESS: I could agree with that, yes.

Mr. Harmon confirmed that on prior occasions when Mr. Laurie requested mine management to shut down an area of the mine until it could be cleaned up, management agreed and had no problem. In the case at hand, Mr. Harmon agreed that there was a difference of opinion as to whether or not the prevailing conditions after the accident warranted the closing of the area (Tr. 44). Mr. Harmon confirmed that after his unsuccessful efforts to have the area closed, he advised Mr. Myers that he was going to call in the Federal and state agencies, and on his way out of the area, he went to the track spur and attempted to contact the motorman who was bringing in a trip at slow speed by radio to make him aware of the situation, and to possibly convince him to invoke his own miner's rights and not bring in the trip (Tr. 45). However, he could not contact the motorman by radio, and by that time the coal trip had gone through the area (Tr. 45).

Mr. Harmon stated that after the coal trip passed through the area, Mr. Turpin, who was the union president, advised him

that he would contact safety committee chairman David Laurie at his home to advise him of the situation. Mr. Turpin had no authority to act as a safety committeeman at that time on the day shift because he was filling in as the safety committeeman on the midnight shift (Tr. 46). Mr. Laurie could not be located, and Mr. Harmon left the mine and went home to await a call from Mr. Laurie, but he did not call him that day (Tr. 47). Mr. Harmon confirmed that he did not initially call any Federal or state mine officials because he wanted to clear it first with Mr. Laurie. Mr. Harmon also confirmed that he was aware of the fact that he could have called in the mine inspectors on his own, but opted not to do so without first consulting Mr. Laurie (Tr. 49).

Mr. Harmon stated that before leaving the mine, he heard Mr. Krynicki give orders for the oncoming shift to continue doing cleanup work at the accident scene, and Mr. Harmon assumed that additional coal trips would continue to travel through the area (Tr. 50). Although he could have returned to the area on the midnight shift to talk to the miners about any dangerous conditions, and possibly advise them of their individual rights not to work in the area that he considered to be dangerous, Mr. Harmon stated that "that thought never entered my mind." Mr. Harmon stated that his intent was to contact Mr. Laurie so that they could both visit the area to decide what to do. Mr. Harmon confirmed that he did not return to the mine during the next intervening afternoon shift, and was still trying to contact Mr. Laurie. He returned to the mine on the next midnight shift, which was his next sheduled "safety run," and encountered Mr. Laurie at that time (Tr. 53).

Mr. Harmon stated that after making Mr. Laurie aware of the situation, they went to the accident area and observed the work that had been done. Several men were still working in the area, and safety precaution lights had been installed. Most of the arches were not strapped, and Mr. Laurie climbed up and looked at the roof conditions, and agreed with Mr. Harmon's assessment that the roof over the arches was still bad. Mr. Harmon stated that he was concerned that the arches were not completely installed, and since the bad top was still there, he was afraid that if it fell, it would affect the arches. Mr. Laurie was of the opinion that the work could have been completed within an hour or so, and he wanted to close the area down until the work was finished. Company safety escort Ben Strahin advised Mr. Laurie that a coal trip was coming, and it passed through the area. At that point in time, Mr. Turpin and Mr. Harmon advised Mr. Laurie that they would back him up in any decision to

close the area down, and Mr. Laurie advised Mr. Strahin that "we want to shut this area down until we get the arch work finished." Mr. Strahin replied that he did not have the authority to close the area down, and Mr. Harmon stated that their intent was to request mine management to stop production and shut the area down until the work on the arches could be completed (Tr. 59-60). Mr. Harmon explained the procedure for requesting management to close an area down as follows (Tr. 61-62):

> THE WITNESS: * * * Up until that point we never had a problem. They disputed whether it's a violation, or if it needed to be corrected. But, they always took care of the situation. Because a copy of the safety runs is sent to the district of the union, and one to MSHA, and if necessary, to the state. If a serious situation still exists after we make a request to the company, we inform MSHA or the state that the situation exists, and they come in.
>
> We asked then to close the area down. Ben said, "I don't have the power to do so." He asked him again, in good faith, he wanted the area shut down so that the work could be done and nobody would get hurt. That was what our main concern was, that nobody get hurt. Or a fatality. Ben again said, "I don't have the power to do so." * * *

Mr. Harmon stated that after Mr. Strahin declined to shut the area down, Mr. Laurie requested that foreman Rusty Tingler do so. Mr. Tingler also declined, and after requesting Mr. Strahin to contact Mr. Amick at his home, Mr. Strahin advised them that they would have to go outside to telephone Mr. Amick. Before leaving the area, Mr. Laurie told Mr. Strahin "I want the area shut down, call Amick on the Phone." Mr. Strahin again declined and replied to Mr. Laurie "If you want me to shut that area down you are going to have to put it down on paper." Mr. Laurie then wrote out a statement which he signed along with Mr. Harmon and Mr. Turpin (Tr. 63, exhibit R-2), and the statement reads as follows:

> I fill (sic) this safety committee is acting in good faith. In that where they had the wreck on day shift they put in four new arches and did not tie them together. We fill (sic) they could vibrate loose and fall since they

are not tied together. Also we fill (sic) that additional support should be put on top of the arches. Once the arches are tied together we will allow them to start running coal again.

After executing the statement, Mr. Laurie asked Mr. Strahin to call the dispatcher to stop all trips from coming through the area, but Mr. Strahin declined. Mr. Laurie then called the dispatcher himself and requested him to stop all traffic. One trip which was on the way was allowed to pass through, and after it passed through, the dispatcher shut the area down as requested by Mr. Laurie (Tr. 64). Mr. Laurie then called the state and federal mine inspectors. When they arrived, Mr. Harmon, Mr. Laurie, and Mr. Turpin went back to the area with the inspectors, and the conditions had been corrected. Mr. Harmon estimated that it took an hour and a half to perform the work, and he stated that "they called a lot of people up there to correct the situation" (Tr. 68, 73).

Mr. Harmon stated that a safety committeeman had the authority to request management to shut an area of the mine down, and he was of the opinion that as a certified person, Mr. Laurie had the authority to shut an area down under state law (Tr. 70). Mr. Harmon confirmed that management had not given Mr. Laurie permission to shut the area down, nor did management agree that the area should be shut down. He also confirmed that Mr. Laurie called the dispatcher and shut the area down (Tr. 71).

Mr. Harmon stated that while the majority of the corrective work was finished when the inspectors arrived, MSHA Inspector Boleck issued a citation "on strap and some guarding," and the state inspector also issued a citation for a welding violation (Tr. 72-73). The inspectors did not look over the arches to examine the roof conditions as Mr. Laurie had done because the arches were all in place and the inspectors accepted them as roof support and issued no roof violations (Tr. 74). Inspector Boleck asked Mr. Laurie if he was satisfied with the condition of the roof arches, and Mr. Laurie stated that he was. The inspector also agreed, and he permitted the area to be reopened, and everything went back to normal (Tr 75-76).

Mr. Harmon stated that on December 14, 1984, at a regular safety meeting between management and the safety committee, Mr. Amick gave him and Mr. Turpin a letter stating that they acted "arbitrary and conspicuously" and that he wanted them removed from the safety committee (Tr. 75). Mr. Harmon

asserted that after his removal from the safety committee, he felt that management, through Mr. Krynicki did not like him, assigned him certain uncomfortable job tasks, made disparaging remarks about him, and that the company safety escort would "dog him" during the inspection rounds with inspectors (Tr. 86-90). Prior to his removal from the safety committee, Mr. Harmon had disagreements with management, and he asserted that his shift foreman cursed him several times because he complained to him about certain safety violations and upset him (Tr. 91). Mr. Harmon also stated that Mr. Myers remarked that he spent a lot of time in his office complaining (Tr. 92). Mr. Harmon stated that he felt intimidated by Mr. Myers' statement that he made more complaints than the other safety committeemen, and that Mr. Myers "frowns when I go back to see him about a safety complaint" (Tr. 93). Mr. Harmon confirmed that he could think of no incidents of intimidation prior to his removal from the safety committee (Tr. 94).

When asked by the Court to explain his reasons for filing his complaint, Mr. Harmon responded as follows (Tr. 94-95):

> THE WITNESS: I felt like I'm innocent of the situation and that I have been discriminated against though. The main reason why I was removed was because I fought for the miner's rights and stood up, and was back in Blaine's office more, probably, than anybody else. I feel that they, I don't know the right word to say. I filed that because I felt that was the proper way to do things.
>
> JUDGE KOUTRAS: No, but the point is, do you understand the company's theory, and why they removed you and the other two safety committeemen.
>
> THE WITNESS: They said that I am acting arbitrary and conspicuously. I don't --
>
> JUDGE KOUTRAS: Capriciously, all right.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: That is conspicuous too, in that context, but go ahead.
>
> THE WITNESS: But, there was no underhandedness, there was no sneaking around, nothing like that. I just wanted to get the situation

corrected, and by trying to correct the situation over a safety matter, they removed me off the Safety Committee. Now, we have shut areas down before, and they never tried anything, had us removed over situations of that nature. Even, as I mentioned, when we had to call the federal inspector, Mitchell, up that one time, they never said nothing to us.

JUDGE KOUTRAS: They never said anything?

THE WITNESS: They never tried removing us or nothing like that. What's the difference now?

JUDGE KOUTRAS: On these past incidents, did they ever do things that you felt were harassing or intimidating?

THE WITNESS: No, not really. I don't think so.

And, at (Tr. 97-98):

JUDGE KOUTRAS: Do you think that the company, in this case, that Consolidation removed the three safety committeemen because they called the state and federal people in? Or do you think they removed you for some other reason?

THE WITNESS: I believe they removed us because we shut the area down, as Mr. Amick has stated, that that is the bottleneck of the mines, and by shutting that down, in a sense, close the whole mines down. Even though they can remain working back there.

JUDGE KOUTRAS: I understand that. But, the company took the position that you had no authority to shut it down. That you acted contrary to the wage agreement, and the arbitrator found the company was right on that score. So did the State of West Virginia Board of Appeals, when they reviewed the case. Did they not sustain the company's position that they felt that the committeemen acted outside their authority, by shutting the mine down?

THE WITNESS: That's what they say.

JUDGE KOUTRAS: You do not--

THE WITNESS: I don't agree with it.

JUDGE KOUTRAS: Why do you not agree with it?

THE WITNESS: Because, we done everything legal, and normal. Just like the past safety runs, and shut areas down, we done everything.

JUDGE KOUTRAS: But, you never shut them down in the past, have you?

THE WITNESS: Yes, we have. Yes.

JUDGE KOUTRAS: How did you shut it? You mean Mr. Laurie has called up somebody and shut an area down?

THE WITNESS: Yes. We've had other areas shut down, yes sir.

JUDGE KOUTRAS: But, is this with the agreement of management? Did you request management to shut it down, and then they shut it down?

THE WITNESS: Yes.

JUDGE KOUTRAS: Give me an incident where you requested management to shut it down, they did not, and the safety committeemen shut it down anyway.

THE WITNESS: I can't. I don't know of any.

JUDGE KOUTRAS: Never been any, have there?

THE WITNESS: No.

JUDGE KOUTRAS: This is the first one?

THE WITNESS: Yes.

In response to questions from the respondent's counsel, Mr. Harmon stated as follows (Tr. 104-106):

Q. I was wondering, Mr. Harmon, if it is correct; the discrimination that you are seeking here is the removal from the Safety Committee?

A. Yes.

Q. What, in your view, was the reason that you were removed from the Safety Committee? What conduct did you engage in that resulted in that conduct, that response by management, which you believe is discriminatory?

A. I tried to get the situation corrected on dayshift. I even approached, in a sense, used the danger board type threat, to have the situation corrected. And, it was not. We have always asked management in the past to correct things, and they went ahead. But, it seemed that after they got an order. Mr. Blaine Myers and Mr. Krynicki, got the order from Amick to run coal through there anyway, they just went from safe to being unsafe. My next response was to get ahold of Dave Laurie, and have him act upon it.

Q. Excuse me. I probably did not ask the question very clearly. You went through that very well before. Do you believe that you have been removed from the safety committee if the mine had not been shut down by the safety committee?

A. We never had any action brought before us before by shutting the haulage down for other situations.

Q. The question was, do you believe, you alleged you would have not been removed from the Safety Committee, if the mine had not been shut down. The Safety Committee had not closed the mine, would you have been removed from the safety committee, in your view?

A. I don't know.

Q. It is your view that the action that was taken, the removal from the Safety Committee,

was related to your action in closing the mine down, is that correct?

A. Yes.

Q. Have there been other occasions on which you have notified federal or state officials, pursuant to your state or federal mine rights?

A. Like I said, notified Mr. Mitchell one time, on that particular track on the Seven North country.

Q. In those occasions, was anyone removed from the Safety Committee?

A. No.

Q. The major difference here, was that the safety committee acted under Article Three of the contract, to close the mine down?

A. That's what Dave stated, and that's the first time I ever heard him use that phrase, so to speak. He never used that phrase in other situations.

Q. You are aware in the testimony to the state that Mr. Laurie testified that his statement was, it was under Article Three?

A. Yes.

Q. So, is that a fair statement? Under Article Three you were acting to close the mine down?

A. That's what Dave said to Ben Strahin.

Q. What I am trying to get to, that it was your exercise of your rights under the contract, to close the mine down, that resulted in the management's response, which was to remove you from the safety Committee. Is that correct?

A. Yes.

Mr. Harmon confirmed that as a safety committeeman, he made more safety complaints to mine management than did Mr. Laurie or Mr. Turpin, and he estimated that he brought 50 safety violations or complaints to management's attention, and wrote up about 20 section 103(g) inspection requests (Tr. 124). He confirmed that the remedy he is seeking is his reinstatement as a safety committeeman (Tr. 126).

Mr. Harmon confirmed that on one occasion when he had a mine inspector close a track area for an hour or two and issued citations, no action was taken against any of the safety committeemen by management (Tr. 127). On another occasion when he threatened to shutdown the parking lot because of pot holes, management corrected the conditions (Tr. 125).

Mr. Harmon stated that while he considered the conditions at the accident scene to be an imminent danger, "something that could cause a fatality right away," he did not use the phrase "imminent danger" but used "dangerous or hazardous" (Tr. 129). Even so, he conceded that he then went home to await a call from Mr. Laurie, and that 8 hours had passed since he initially viewed the conditions and men were still working there (Tr. 130-131). He also conceded that he travelled through the area and did not warn anyone about any "imminently dangerous" conditions (Tr. 134), and that Mr. Laurie permitted a trip of cars to pass through the area (Tr. 162).

Although Mr. Harmon was of the opinion that under section 103(g) of the Act, a safety committeeman has the authority to shutdown any mine area, he conceded that under that section of the law, he is only authorized to request an immediate inspection of the area by an MSHA inspector, as opposed to shutting the area down himself (Tr. 137-138). When asked why he did not exercise his section 103(g) rights on December 11, Mr. Harmon responded "we were trying to get the work done within the mines, instead of having to go as far as calling a state or federal inspector in there" (Tr. 139). Mr. Harmon acknowledged that at the time he requested Mr. Myers to shut the area down, he did not refer to Article Three of the Wage Agreement, nor did he use the phrase "imminent danger" (Tr. 146).

Mr. Harmon confirmed that other than being removed from the safety committee, he was not removed from his normal job classification, was not discharged, and was not otherwise disciplined (Tr. 163). He also confirmed that his removal from the safety committee was made pursuant to the terms of

the contract, and that on past occasions when state inspectors were called to the mine by safety committeemen, no action was taken against them by management (Tr. 163-164). Mr. Harmon conceded that in all of the prior instances when he made safety complaints or requested section 103(g) inspections, management reacted favorably to his complaint and took corrective action to his satisfaction and did not harass or intimidate him (Tr. 173-174).

Respondent's Testimony and Evidence

Clarence Amick, General Mine Superintendent, testified as to his background and responsibilities. He stated that under the Wage Agreement the mine safety committee has the right to request mine management to shutdown an area of the mine if they determine that an imminent danger exists, and management is obligated to do so (Tr. 184). In the instant case, Mr. Amick stated that any imminent danger which may have existed at the time of the accident at 11:00 a.m., certainly did not exist at 4:00 p.m. when Mr. Myers and Mr. Krynicki spoke with him. Corrective action had been taking place since the accident, and it was safe to proceed with caution through the area at the time the committeemen shut the area down (Tr. 186).

Mr. Amick confirmed that Mr. Harmon and the other safety committeemen were removed pursuant to contract provision Article Three, Section (d)(5) for arbitrarily and capriciously shutting down the area in question. He denied that the removal was in any way connected with the committee calling in the state and federal inspectors, and he confirmed that they had done this in the past on many occasions and were not removed. He stated that in all of his years in mining, he has never before had to remove any members of a mine safety committee (Tr. 187). He was aware of no state or federal law that gives the safety committee the right to close an area of the mine (Tr. 188).

Mr. Amick stated that mine management has never taken any action against any committeemen for bringing safety matters which need to be corrected to its attention, and he confirmed that the committeemen in question did not lose their jobs, and their job classifications were not changed in any way. Once the committeemen were removed, they were allowed to stay on until the arbitrator ruled on their case (Tr. 188-189).

On cross-examination, Mr. Amick confirmed that he sent letters to the safety committeemen in question advising them of their removal, and informing them of the reasons for his

action (Tr. 190). Mr. Amick believed that Mr. Harmon and the other committeemen used bad judgment, and they had no right to close the area. Mr. Amick stated that he relied on the judgment of Mr. Myers and Mr. Krynicki, who have many years of mining experience, in assessing any hazard or danger which may have existed in the area at the time it was closed down by the safety committee (Tr. 191).

Mr. Amick stated that he treated all three committeemen equally, and since they all signed the statement at the time they closed the area, he believed that it was a collective decision and that they should all be removed from the safety committee (Tr. 193). Mr. Amick stated that he has always encouraged the safety committee to bring things that are wrong to his attention so that corrective action may be taken. However, by shutting down the mine area, the safety committee took charge of directing the work force, which is solely management's prerogative (Tr. 195). At the time the area was closed, no one mentioned any "imminent danger," and since the mine was closed as a result of the accident, and it was physically impossible to move any equipment through the area. It remained closed until his superintendents, Mr. Myers and Mr. Krynicki, "gave me the O.K. that it was safe to proceed through at that time" (Tr. 197). The superintendents are competent, and he relied on their judgment that the area was safe, and no one informed him that Mr. Harmon felt differently until sometime later (Tr. 199).

Mr. Amick confirmed that he made the decision to remove Mr. Harmon and the other committeemen from the safety committee (Tr. 201-202). Although other options were discussed with his staff, it was decided to remove them pursuant to the contract provision in question (Tr. 203). He did not discuss the matter with the affected committeemen because he didn't believe it was necessary, and he believed that their position was clear by the statement which they signed at the time they acted to close the area (Tr. 204).

In response to further questions, Mr. Amick confirmed that the area in question was closed for approximately an hour and forty-five minutes as a result of the action of the committeemen, and the committee had no right to order the dispatcher not to permit further trips through the area (Tr. 207). Mr. Amick stated that he has never faulted Mr. Harmon for any actions he has taken as a safety committeeman, and he confirmed that he has spoken to his staff about some of the incidents of alleged harassment alluded to by Mr. Harmon, and that he does not condone it (Tr. 209).

Mr. Amick stated that his decision to remove Mr. Harmon from the safety committee was not influenced by his prior activities as a member of the committee, and that "the main crux of the problem, was, what happened that night" (Tr. 213). He stated that he has always worked with the safety committees, but could not tolerate the committee's action in shutting down the haulage on the evening in question, and that this is the first time this had ever happened (Tr. 215). He stated further as follows (Tr. 216):

> A. They shut the mine down. They did it by directing the work force, and they had no authority to do either one. Even Section Three, that gives him the authority to request that management shut the mine down, and management has to do it, even then they don't shut the mine down. Even when they exercise Article Three, if you'll read it.
>
> Q. That was your consideration then, in terms of removal?
>
> A. Yes.
>
> Q. That was your only consideration?
>
> A. That was my consideration at the time.

Mr. Amick stated that had the committee declared the area to be an imminent danger, the superintendents on the scene, after consultation with him, would have been obligated to close the area. In addition, any individual miner could have exercised his individual rights not to work in the area if he believed he was in danger. If the committee had not acted arbitrarily and capriciously in shutting down the area, he would not have removed them from the safety committee. The committeemen did not declare the area in question an imminent danger. On a prior occasion when the committee called in a federal inspector on the Seven North haulage area, they did not consider it an imminent danger, but no action was taken against them for contacting the inspector (Tr. 219). Mr. Amick stated that the men who were delayed coming out of the mine at the time of the accident were paid time and a half for having to stay over their regular shift (Tr. 220).

Blaine K. Myers, Bowers Portal Superintendent, explained his contacts and discussions with Mr. Harmon at the time of the derailment on December 11, 1984. Mr. Myers confirmed that the individual who was injured did not suffer any lost

time, and he worked the next day (Tr. 221-222). Mr. Myers stated that he and Mr. Krynicki were at the scene of the derailment looking over the situation and directing the rehabilitation of the area, and the area had been closed until shortly after 4:00 when the first trip was allowed through (Tr. 223). Mr. Harmon was concerned about some spillage, and mentioned no other conditions which he believed to be hazardous. Mr. Myers stated that he asked Mr. Harmon whether he considered the situation to be an imminent danger, and that Mr. Harmon replied, "Well, I'll have the state and federal inspectors here in the morning and we'll see" and left the area (Tr. 225). At that point in time, Mr. Myers stated that the top was not exposed, and that work had been done on the arches, and he climbed up on the arches and he observed no top areas which were not covered with wood (Tr. 226). Mr. Myers further explained as follows (Tr. 227-229):

> Q. Now, he testified earlier, that he demanded three times that the area be closed down, because of conditions of the roof which he says was exposed. How do you respond to that?
>
> A. I've got two responses. Number one, it's absolutely untrue. He made no mention of any bad top to me, throughout the day. Number two, when the roof was exposed, the area was shut down. We were in the process of rehabilitating the area, it was shut down. There was nothing done in that area except the rehabilitation work. It's beyond me, to understand where that comment came from.
>
> Q. After he turned and walked away, after you had asked him whether or not there was an imminent danger, what happened?
>
> A. We moved the supply cars into the side track, called the dispatcher and told him that the area was open, and ready for traffic.
>
> Q. Had Mr. Turpin been in the area during the day?
>
> A. Mr. Turpin worked on the rehabilitation work the entire day, yes.
>
> Q. Would he have seen the top during the time it was exposed?

A. Yes, he would have.

Q. Did he, you testified that Mr. Harmon did not, did Mr. Turpin express to you, on the afternoon of the 11th, concerns that there was a dangerous condition, as a result of the condition of the roof?

A. No.

Q. Did that area have to be fire bossed before it was reopened?

A. Yes, it did.

Q. Was it fire bossed?

A. Yes, it was.

Q. Who was the fire boss?

A. Dill Kendall. He's the rank and file pumper who portals at Mt. Morris, who fire bossed that area that day.

Q. Did anybody, during the rehabilitation work, or afterwards, during the haulage, once it was recommenced, suggest that the conditions were unsafe and invoke the rights not to work in the area?

A. No.

Q. Let us go back. After the haulage was started back up, about what time was that?

A. Right at the four o'clock area, a few minutes before, a few minutes after.

Q. Where was Mr. Harmon at this time?

A. At this time he was at Three North Junction waiting for the trip to pass so he could proceed on to Bowers Portal.

Q. Did traffic continue through the evening shift, to your knowledge?

A. Yes, it did.

Q. Throughout that time, were there any complaints regarding the safety of the haulage area?

A. Not to my knowledge.

Mr. Myers confirmed that on December 12, he was aware of the fact that Mr. Amick was going to send Mr. Harmon and the other committeemen letters removing them from the safety committee. Mr. Myers was also aware that Mr. Harmon has contacted federal and state mine officials, and no disciplinary action was taken against him. He confirmed that the action taken against him to remove him from the committee was solely pursuant to the contract (Tr. 230).

On cross-examination, Mr. Myers reiterated that Mr. Harmon made no mention of any bad top, and although the top was exposed at the time of the accident for 3 or 4 hours, repairs were made and the area was rehabilitated. During the rehabilitation work where there was some unsupported roof, the men doing the work were cautioned not to work in those areas or the top was supported. He stated that "we didn't ignore the top. We paid attention to it, and took care of what needed to be taken care of in order to safely rehabilitate the area" (Tr. 233).

Mr. Myers stated that Mr. Harmon works out of his portal, and he was aware of the fact that he was an active committeeman and had made numerous complaints. Mr. Myers confirmed that most of the complaints were made to him, and that the inspectors to whom complaints were made were at his portal. Mr. Myers did not believe that Mr. Harmon was taking his job "too seriously," and he stated that he encouraged him to bring any safety problems to his attention so that they could be taken care of. He stated that he had no bad feelings or resentment towards Mr. Harmon, and that he was not the only one who complained (Tr. 236). Mr. Myers believed that Mr. Harmon was sincere in carrying out his safety committee duties, but believed that he "over-reacted" when he demanded that "we clean up this little pile of spillage there, beside the track" (Tr. 238). He further explained as follows (Tr. 239):

Q. Do you think, in joining as a member of the safety committee, in the closure of that area of the mine after it had already been reopened, was a case of his being mistaken, going overboard, if you will?

A. Well, when he agreed that that area should be shut down, yes, that's going overboard. That's going out of bounds.

Q. You would agree that the committee exercised their Article Three rights, and management's response under the Article was appropriate?

A. Absolutely.

Q. Would that response, in your view, be appropriate regardless of who the individuals involved were?

A. Yes.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (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 Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 801 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Doge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. __, 76 L.Ed.2d

667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

The crux of Mr. Harmon's complaint lies in his belief that the respondent removed him from the mine safety committee in retaliation for his vigorous activities as a member of the safety committee. With regard to the safety committee's unilateral closing down of the haulage section in question on December 12, 1984, the incident which precipitated his removal from the safety committee, Mr. Harmon asserted that the committee had closed down areas of the mine in the past and no action was taken by management to remove them from the safety committee. Under the circumstances, Mr. Harmon concludes that the respondent discriminated against him by removing him from the safety committee, and he implies that he was removed because of his overall safety concerns and activities as a member of the safety committee. Further, although stated in general and nonspecific terms, Mr. Harmon also alleged that the respondent sought to intimidate or harass him prior to his removal because of his activities as a member of the safety committee, and he views his removal from the safety committee as yet another incident of intimidation by mine management.

Mr. Harmon's counsel conceded that Mr. Harmon's allegations of intimidation and harassment prior to his removal from the safety committee, made for the first time during the hearing, were not included as part of his original discrimination complaint (Tr. 113). When asked how Mr. Harmon intended to substantiate these allegations, counsel responded "he has no direct testimony, or anything like that. I guess, he is more, seemingly to me, indicated that it was more of an attitude of just expressions that were made to him, that kind of thing, that indicated to him at the time" (Tr. 144).

The record establishes that Mr. Harmon was an aggressive and active member of the mine safety committee. He alluded to some fifty safety complaints which he filed with mine management, and to the initiation of some 20 section 103(g) inspections which resulted in at least 15 inspection visits to the mine by MSHA inspectors (Tr. 173-174). However, Mr. Harmon conceded that mine management always attended to, and took care of his complaints, and in those instances where he and mine management had differences of opinions as to the existence of any violative conditions, he freely requested section 103(g) inspections by MSHA with no interference by mine management (Tr. 173-174).

Mr. Harmon conceded that prior to his removal from the safety committee, mine management addressed his safety complaints in a manner that was to his satisfaction. He also conceded that he performed his safety committeeman's job unimpeded by mine management, and that he did so with no harassment or intimidation by management (Tr. 174). Although he alluded to certain cursing by a shift foreman, and certain remarks and "frowns" by superintendent Myers over his safety committeeman's duties, Mr. Harmon confirmed that he could think of no incidents of intimidation by mine management prior to his removal from the safety committee (Tr. 94).

Mr. Harmon conceded that in his capacity as a safety committeeman he had occasions to call in state and federal inspectors, and that mine management did nothing to harass or intimidate him (Tr. 94). Mr. Harmon also conceded that management never attempted to remove him from the safety committee as a result of these past incidents (Tr. 95, 105). He also conceded that when past requests for shutting down any mine area were made to mine management, management reacted favorably to the requests and never attempted to remove the safety committeemen for making the requests (Tr. 97-98). Mr. Harmon also confirmed that during his tenure as a committeeman, he was never refused permission to be excused from work to perform his safety committeeman's duties (Tr. 23).

After careful review of the record as a whole, I find no credible testimony or evidence to support any conclusion that Mr. Harmon was harassed, intimidated, or otherwise impeded by mine management in the exercise of his duties as a member of the mine safety committee prior to the time that he was removed from that committee, and his allegations in this regard are rejected. I conclude and find that Mr. Harmon has failed to make out a prima facie case on this aspect of his complaint.

With regard to the concerted action by the safety committee in shutting down the track haulageway, although the record reflects that committee chairman David Laurie actually gave the order to the dispatcher to shutdown the track haulage, and then called in the state and federal mine inspectors, Mr. Harmon and the other member of the safety committee were at the scene, concurred and agreed with the decision to close the area, signed the statement reflecting their joint responsibility for their action, and they all waited for and accompanied the inspectors back to the area after it was closed.

Under the circumstances, I conclude that each of the committeemen, including Mr. Harmon, bear equal individual responsibility and accountability for their collective action in shutting down the area in question.

It is clear that Mr. Harmon had a protected right to serve on the safety committee, and the respondent may not discriminate against him because of his duties as a committeeman. Mr. Harmon had a right to file complaints, request section 103(g) inspections, and inform mine inspectors of conditions which he believed were unsafe, and management is prohibited from interferring with these activities, and may not harass, intimidate, or otherwise unduly impede Mr. Harmon's participation in those activities. However, Mr. Harmon's service as a member of the safety committee does not insulate him from non-discriminatory personnel actions, UMWA ex rel Billy Dale Wise v. Consolidation Coal Company, 4 FMSHRC 1307 (July 1982), aff'd by the Commission at 6 FMSHRC 1447 (June 1984); Ronnie R. Ross, et. al v. Monterey Coal Company, et. al., 3 FMSHRC 1171 (May 1981).

The facts in this case do not suggest a situation in which Mr. Harmon sought to exercise his own personal right to refuse to work or to walk away from a condition which he believed to be unsafe. Acting in concert with the other two members of the safety committee, Mr. Harmon effectively closed the mine. Mr. Harmon believes that he acted within his committeeman's authority in shutting down the track haulage area, and he disagrees with the two prior determinations which are adverse to his position. Mr. Harmon's belief that he acted properly is based on his assertion that the safety committee had closed the mine before with no adverse reaction from mine management. However, Mr. Harmon could cite no prior instances where the safety committee closed any area of the mine, and he conceded that this had not been done, and admitted that the incident which prompted his removal from the safety committee was the first one (Tr. 97-98).

The respondent's assertion that the Commission lacks jurisdiction with respect to any contractual matters under the Wage Agreement, and has no jurisdiction to restore Mr. Harmon to the safety committee are not well taken. If it can be established that Mr. Harmon's removal from the safety committee was discriminatory, the Commission and its Judges have broad authority under section 105(c) of the Act to order an "appropriate" remedy to abate any violation of that section, Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985).

It seems clear to me from the record in this case that Mr. Harmon's removal from the safety committee was prompted by his actions which resulted in the shutting down of the track haulage area in question. It is also clear that the committee's action in calling in state and federal inspectors to inspect the area after they had shut it down had nothing to do with Mr. Harmon's removal from the committee. Mr. Harmon conceded that the respondent removed him from the safety committee because he and the other members closed the track haulage area (Tr. 97). This action by the committee effectively closed the mine and interrupted production. Mr. Harmon also conceded that his removal from the safety committee was made pursuant to the terms of the Wage Agreement, and that he was not otherwise disciplined, and suffered no change in his normal job classification (Tr. 163). Under the circumstances, the critical issue presented is whether or not Mr. Harmon had a protected right to close the track haulageway.

Although Mr. Harmon voiced his displeasure over being "passed around" so many layers of supervisors before finally being permitted to go to the scene of the derailment, I find nothing to suggest that management was deliberately or unduly trying to prevent Mr. Harmon from going there, and he was ultimately allowed to go, and arrived there later than he would have liked. Mr. Harmon confirmed that during his tenure as a committeeman, he was never refused permission to be excused from work to attend to his safety committeeman's duties (Tr. 23). In this regard, I take note of the fact that a safety committeeman may not necessarily need management's permission to absent himself from work to attend to his mine safety committee duties, Local Union 1110 and Robert L. Carney v. Consolidation Coal Company, 1 FMSHRC 338 (May 1979).

It is obvious that Mr. Harmon disagrees with the result of the two prior adverse determinations affirming mine management's action in removing him from the safety committee. Mr. Harmon's disagreement with those decisions lies in his apparent lack of understanding or failure to comprehend why he was not removed from the committee in the past when the safety committee closed certain areas of the mine. However, under the applicable Wage Agreement provision in question, it is clear that the safety committee has no authority to unilaterally close any area of the mine. The committee's authority is limited to making recommendations to mine management that miners be withdrawn in those special instances where the committee believes that an imminent danger exists. Once the committee communicates its belief to mine management that an

imminently dangerous condition exists in any area of the mine, management is obligated and required to follow the committee's recommendations and remove the miners.

The respondent asserts that it was acting entirely within its rights under the Wage Agreement in removing Mr. Harmon from the safety committee, and that its action was an appropriate and legitimate exercise of its contractual authority and discretion to remove a safety committeeman who exceeded his authority in shutting down an area of the mine, conduct which the respondent views as clearly neither authorized nor protected by section 105 of the Mine Act. In support of its conclusions, the respondent relies on the January 28, 1985, decision of Arbitrator Thomas M. Phelan, and the June 17, 1986, decision of the West Virginia Coal Mine Safety Board of Appeal, denying Mr. Harmon's discrimination complaint under state law (Exhibits R-5 and R-11).

In the arbitration proceeding, the arbitrator concluded as follows at page 17 of his decision:

> For the reasons stated in the above analysis, I find that there was no imminent danger in the area closed down by the Safety Committee and there was no reasonably based belief on the part of the Committeemen that an imminent danger existed there. The action of the Committeemen was therefore arbitrary and capricious and warrants their removal from the Safety Committee. They shall be removed for the duration of the 1984 National Agreement.

In its decision dismissing Mr. Harmon's state discrimination complaint, the state board concluded in pertinent part as follows in its order dismissing his complaint:

> Mr. Kelleman and Mr. Snyder find, by a preponderance of the evidence, that the case presented by the Petitioners did not demonstrate that there was an "imminent danger" under the law which would allow the removal of the men and therefore there was no discrimination involving any Petitioner in this case and deny Petitioner Robert Harmon and Petitioner John David Laurie their request to be placed back on the Mine Safety Committee at the Humphrey Number Seven Mine.

Although I am not bound by the prior decisions of the arbitrator or the state board of appeals, I may nonetheless give deference to an arbitrator's "specialized competence" in interpreting a provision of the controlling Wage Agreement, Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); 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 (3d Cir. 1981).

The issue with respect to the existence of any "imminent danger" at the scene of the derailment, and the asserted justification for the safety committee's action in shutting down the haulage area, was painstakingly considered during the two prior proceedings concerning Mr. Harmon's complaints. I have carefully reviewed the voluminous record of those prior proceedings, and I am favorably persuaded as to the correctness of these decisions, particularly with respect to the issue of the existence of any imminent danger.

As pointed out by the respondent at pages 7-8, of its posthearing brief, although Mr. Harmon asserted that the conditions he observed on the afternoon of December 11, 1984, constituted an "imminent danger," he showered, went home, permitted 8 hours to pass, and was aware of the fact that men were working in and travelling through the area, before taking action to close it down. Mr. Harmon himself travelled through the area, the area had been firebossed by the UMWA before haulage was reestablished, and no miners, including Mr. Harmon or the other members of the safety committee, exercised their individual right not to work in the area (Tr. 132-136). Further, the record establishes that traffic was moving through the area while Mr. Harmon was at home, men were working to correct the conditions, and in fact, after the area was ordered closed down by Mr. Laurie, he permitted a trip of coal cars to pass through the area.

Mr. Harmon conceded that he never used the term "imminent danger" during his discussions with Mr. Myers, nor did he use that term in his discussion of the contractual provision with Mr. Myers (Tr. 139, 146). Mr. Amick and Mr. Myers corroborated that neither Mr. Harmon or any other members of the safety committee mentioned anything about any "imminent danger" at the time the committee shut the haulage area down, and I take note of the fact that the joint statement signed by Mr. Harmon and the other two committeemen (exhibit R-2), justifying their action, makes no mention of any "imminent danger."

Under all of the aforementioned circumstances, and on the basis of the entire record as a whole, I conclude and find that it does not support any conclusion of the existence of any imminent danger at the time of the closing of the track haulage area by the safety committee. Since no imminent danger existed, I further conclude and find that the action by the safety committee was unauthorized and contrary to the clear terms of the applicable Wage Agreement provision relied on by the respondent to remove Mr. Harmon from the safety committee, and that Mr. Harmon's participation in that decision was not protected activity. I further find no credible evidence to support any conclusion that the respondent's action in removing Mr. Harmon from the safety committee was motivated in any way by management's desire to punish him, or to otherwise retaliate against him, for his vigorous enforcement activities as a member of the safety committee. I also conclude that the respondent's removal of Mr. Harmon from the safety committee was well within its discretionary managerial rights to direct the workforce and manage its own mine.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of discrimination by the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Adminitrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 16 1987

RONALD TOLBERT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 86-123-D
CHANEY CREEK COAL CORP., Respondent	:	Dollar Branch Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Complainant;
Thomas W. Miller, Esq., Miller, Griffin & Marks, Lexington, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Ronald Tolbert under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging that Chaney Creek Coal Corporation (Chaney Creek) failed to hire him (or rescinded its February 25, 1986, hiring of him) in violation of section 105(c)(1) of the Act because he testified in a discrimination proceeding against Chaney Creek on behalf of another coal miner.[1/]

1/ Section 105(c)(1) of the Act provides in part as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . or applicant for employment in any coal or other mine subject to this Act because such miner . . . or applicant for employment . . . has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that the discriminatory action taken against him was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). The Respondent may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

If the Respondent cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The Respondent bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). The Supreme Court has approved the National Labor Relation's Boards virtually identical analysis for discrimination cases arising under the National Labor Relation's Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

The Complainant herein was laid off from his underground mining job with Chaney Creek in February, 1985. On January 15, 1986, while still on layoff status, Tolbert testified on behalf of former co-worker Odell Maggard in a section 105(c) case against Chaney Creek. (See Maggard v. Chaney Creek Coal Corp., 8 FMSHRC 806 (1986)). Tolbert testified in that case that he had been shocked in Chaney Creek's White Oak mine by the same electrical trailing cable which Maggard claimed had shocked him and which led to Maggard's protected work refusal. Tolbert's testimony therefore provided important corroboration for Maggard who subsequently prevailed in his case against Chaney Creek. It is not disputed that Tolbert, by testifying in Maggard's 105(c) case, thereby engaged in protected activity.

The issue then is whether Chaney Creek was motivated in any part by this protected activity. Pasula, supra. The evidence in this regard is circumstantial. Tolbert maintains that he was hired by Superintendent Clyde Collins at the mine site and told to report for work later that day after

completing some administrative paperwork at Chaney Creek's office in London, Kentucky. He further maintains that it was the standard practice for Collins to hire the men he wanted before sending them over to complete the paperwork. According to Tolbert it was only after Chaney Creek personnel director Steve Shell was told of Tolbert's participation in the earlier 105(c) trial against Chaney Creek that he was suddenly denied employment. Chaney Creek on the other hand has advanced several different reasons for its failure to hire (or its discharge of) Tolbert but in any event denies that it relied in any part on Tolbert's protected activity. For the reasons set forth in this decision I find Tolbert's allegations to be credible. At the same time I find Chaney Creek's purported defenses to be without credible evidentiary support.

It is essentially undisputed that on February 25, 1986, approximately six weeks after his testimony in Maggard's case, Tolbert went to the White Oak mine seeking employment. He arrived around 9:30 or 10:00 a.m., and asked Richard Woodard the "outside man" if Chaney Creek was hiring. Woodard told Tolbert that he would have to talk to Clyde Collins, the mine superintendent who was then underground.

While Tolbert was waiting for Collins he helped Woodard shovel around the outside beltline. When some rocks from the moving beltline fell onto the head drive, Woodard climbed onto the hopper to remove them. In doing so, Woodard fell into and became wedged in the hopper. Unable to get out and afraid he would be carried over the top of the stacker, Woodard hollered for help. Tolbert heard Woodard's cries for help, cut off the power to the beltline and helped him get out.

Because Tolbert had come to Woodard's rescue, Woodard said he would talk to Collins about hiring Tolbert. When Collins later came out of the mine, Woodard reported what Tolbert had done, and told Collins that he would be appreciative if Collins would give Tolbert a job.

The evidence about subsequent events is in dispute. According to Tolbert, he waited in the parts shed while Collins, Woodard and Terry Wilson, the "outside foreman", met in the adjoining mine office. After a few minutes, Wilson motioned for Tolbert to come to the office. According to Tolbert, Woodard then told him that he had a job servicing equipment and helping with the roof bolting on the third shift. Woodard gave Tolbert directions to Chaney Creek's office in London, Kentucky, and told Tolbert to report there

to have his "paperwork filled out." Tolbert says that he then asked Collins what time he should report to work that night, and Collins allegedly told him to "be sure and be here no later than 20 'til eleven" with his work gear "to start work."

I find that the credible evidence supports Tolbert's testimony that Clyde Collins indeed told him on February 25th to report to work that night on the 3rd shift. In this regard Terry Wilson confirmed that "Clyde Collins told [Tolbert] to go to London [the location of Chaney Creek's offices] to sign up and come out on 3rd shift that night." Woodard also tends to corroborate Tolbert. Although Woodard claims he did not hear Collins tell Tolbert to report to work that night, he nevertheless testifed that he had the impression on February 25th, that Tolbert "had a job if everything was approved and he went over [to the Chaney Creek offices] and done the paper work." In addition Woodard acknowledged that he stated at his deposition that Collins "indicated that he would hire [Tolbert] if he went over there and everything was approved."[2/]

The evidence also shows that Collins had good reason to hire Tolbert that day. It is not disputed that Tolbert had just saved Woodard from possible serious injuries and Woodard had asked Collins to reward him with a job. Woodard acknowledged that Tolbert "really helped me out" and testified that he told Collins he would appreciate it if Collins gave Tolbert a job.

While Collins denied at hearing that he had hired Tolbert I do not find Collins' testimony to be credible in critical respects. It is significant to note that on February 25th the date Tolbert maintains he was hired by Collins, Collins did not know that Tolbert had testified

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2/ Woodard testified at his deposition that Collins said he would hire Tolbert "if he went over there and everything was approved". He testified at hearing on the other hand that Collins said he would hire Tolbert after he filled out an application at Chaney Creek office but only "if he needed him." If Collins did not know whether he needed Tolbert at that time it is unlikely under the procedure then followed by Chaney Creek that Collins would have bothered to send Tolbert to the mine offices to fill out an application. Under the circumstances I give but little credence to Woodard's testimony that Tolbert's hiring was subject to essentially a second determination by Collins of whether he was "needed".

against the interests of Chaney Creek in Maggard's section 105(c) case. Collins' motivation for his testimony at hearing arose only after Chaney Creek officials had failed to hire Tolbert because of his prior testimony.

A number of inconsistancies between Collins' testimony and the testimony of other witnesses called on behalf of Chaney Creek also shed doubt on Collins credibility. Thus, contrary to Woodard's admission, Collins denied that Woodard had even asked him to give Tolbert a job. Collins testified that he "never discussed hiring [Tolbert]" with Woodard. Collins also testified that Steve Shell, Chaney Creek's Personnel Director, had informed him that Tolbert's miner identification card was not up to date, while Shell testified that had never discussed the matter with Collins. In addition the evidence shows that Collins told the special investigator for the Federal Mine Safety and Health Administration (MSHA) that he did not even know if Tolbert had gone to the London office to fill out an application after he left the mine on February 25, whereas Collins admitted at hearing that Tolbert had called him from Chaney Creek's London office that same afternoon. Collins' testimony that he simply told Tolbert to fill out an application at the London office because he might hire him in a day or two is also not consistent with Tolbert's failure to have checked back with Collins as Collins alleges.

Moreover the credible evidence in this case clearly demonstrates that Clyde Collins regularly told prospective employees that they were hired and that they were hired before he told them to fill out a job application at Chaney Creek's London offices. Indeed six miners who began work at the White Oak mine from the beginning of January through the beginning of March 1986 all testified that they were not instructed to fill out a job application until after Collins told them they were hired.[3/] Before the date these miners were hired and instructed to report to the London office all had previously asked Collins for a job and were simply told to check with Collins again. None were told to submit a job application on the occasion or occasions they were not hired. Thus, for example, Bobby Hensley had asked Collins for a job 5 or 6 times before being hired and was not told on those occasions to fill out a job application. In addition Matt Gross had spoken with Collins 20 to 25 times before the date

[3/] See the testimony of James Miracle, Elmer Davis, Robert Hensley, Lawrence Shepherd, Gleniss Nelson, and Matt Gross.

he was hired without being told to report to the London office.

The record also shows that 19 of the 30 miners hired during the weeks ending January 5, 1986 through March 9, 1986, began work on the same date they filled out their job application. The record further shows that another 7 miners started work the next workday after their application was completed. Thus 26 out of the 30 miners who were hired during the relevant period began work either the same day or the next work day after their employment application was completed. Of the 4 remaining miners, 3 began 2 workdays after submitting their job application, and 1 began 6 days thereafter.[4]/

Consistent with this pattern or practice at Chaney Creek, Outside Foreman Terry Wilson, who is familiar with Collins' hiring procedures, testified that when Collins "decided to hire [new employees] he would tell them to go to London and fill out an application." Thus it may reasonably be inferred that Tolbert had indeed already been hired by Collins before he went to the London office. Within this framework of evidence I conclude that Collins had indeed offered Tolbert a job on February 25th subject only to Tolbert's completing the formalities of filling out a job application form at Chaney Creek's offices in London, and to a rarely exercised disapproval by that office.

In any event after Tolbert left the White Oak Mine after being told to report to work that night, he stopped at his home, then drove to Chaney Creek's London office. Tolbert says that he told Personnel Director, Steve Shell at Chaney Creek's office that he had been hired to begin work on the third shift that night at White Oak mine. Shell told Tolbert to come into his office to complete his paperwork. Shell filled out Tolbert's employment application in his office, and then gave Tolbert a Chaney Creek Coal Corporation employee handbook.[5]/ Shell than asked Tolbert for a copy of

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[4]/ Although there were actually 33 miners hired at the White Oak mine during this period, the record shows that employment applications for 3 of the miners could not be located by Chaney Creek.

[5]/ It is stated in the introduction to the handbook that "[t]his handbook is to familiarize the employee of Chaney Creek Coal Corporation with the company policies in mining practices, personnel management and safety rules." (emphasis added).

his Kentucky miner identification card.[6]/ Tolbert, apparently gave Shell an out-of-date 1984 card. Shell then told Tolbert that he would be back in a few minutes, and left his office.

While Shell was completing Tolbert's application, but before leaving his office, Daryl Napier walked by Shell's office and saw Tolbert. Napier was Chaney Creek's representative at the Odell Maggard discrimination hearing and was present during Tolbert's testimony at that proceeding. Shell was gone from his office, out of Tolbert's sight, for about 5 minutes. When he returned, Shell reviewed the employee handbook with Tolbert for 5 or 10 minutes. After reading through the handbook with Tolbert, Shell told Tolbert that he could not hire him "because he'd hired too many men that day." When Tolbert told him that Collins had already given him a job on the third shift, Shell repeated that he could not hire Tolbert because he had hired too many men that day.

As Tolbert was leaving to return home he saw Daryl Napier loading supplies. Tolbert approached Napier and told him that Collins had hired him for the third shift and had instructed him to come to London to get his paperwork filled out, but now the company would not hire him. Tolbert asked Napier if the fact that he had testified against the company was being held against him, and Napier purportedly replied, "I wouldn't think so, that would be hard to say."

Napier suggested that Tolbert call Clyde Collins at the White Oak mine to be sure he had been hired. When Tolbert told Napier that there was no point in calling Collins because Collins had already told Tolbert he'd been hired Napier insisted that Tolbert call. Napier and Tolbert then went back into Chaney Creek's office, where Napier dialed the White Oak mine from a telephone on the receptionist's desk by

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[6]/ This card is issued annually by the Kentucky Department of Mines & Minerals to miners who have completed their annual retraining. The card lists the miner's name, identification number, qualified occupations, and an expiration date. The card expires on the last day of the given calendar year.

the front door.[7]/ Tolbert says that he then explained to Collins that Shell had said Chaney Creek could not hire him, and he asked Collins "what was going on." Collins then told Tolbert that he could not hire him because the continuous miner had broken down and he was going to have to lay some men off. Tolbert then left the Chaney Creek office and returned home.

The following day, February 26, 1986, Tolbert returned to the White Oak mine to talk again with Clyde Collins. Tolbert again asked Collins "what was going on," and he asked the superintendent if the company had decided not to hire him because of his prior testimony. Collins purportedly told Tolbert that he did not know. Although Collins had told Tolbert the previous afternoon that the continuous miner had broken down, the mine was producing coal on the 26th. Indeed, Chaney Creek's production reports for February 25 and 26, 1986 suggest the continuous miner did not require any major repairs on those dates.

Although Tolbert had given Shell his expired 1984 miner identification card at Chaney Creek's office on February 25, 1986, Shell failed to notice that the card was out-of-date and did not discuss the matter with Tolbert. Indeed Shell readily acknowledged at hearing that the fact that Tolbert's miner identification card was expired had nothing to do with the decision not to hire him.

According to Terry Wilson, on February 26th he asked Collins if Tolbert had reported to work the night before. Collins purportedly told Wilson that the company had called him "from the office" and told him not to put Tolbert to work because Tolbert "had testified in a case against them."[8]/

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[7]/ While Shell testified that he, not Napier, suggested that Tolbert call Collins, he was vague and equivocal as to why he wanted Tolbert to make the call. Shell testified at one point that it was because he wanted to save Tolbert the trip of driving back to the mine so Tolbert could find out "when he might be hired or something along that line" and at another point testified that it was because he (Shell) was just "curious [about] what was going on."

[8]/ Even assuming, arguendo, that Wilson had been subsequently fired from Chaney Creek for allegedly stealing gas and thereby may have been motivated by ill will, I nevertheless find his testimony internally consistent, forthcoming and credible.

Although Chaney Creek hired approximately 47 new miners from February 25, 1986, through July 7, 1986, Tolbert was not among those hired. In fact, although given opportunity to do so Chaney Creek had still not hired Tolbert as of the date of the hearing.

In defense Chaney Creek argues in its post hearing brief that Tolbert was not hired for two independent and unprotected reasons i.e., that there was a temporary hiring freeze in effect on February 25, 1986, and that Tolbert did not have a current miner's card. The former reason was advanced only after Tolbert had been given an employee handbook on February 25th, when Shell purportedly told Tolbert that Chaney Creek could not hire him because it had hired too many men that day. However, when Tolbert called Collins at the White Oak mine shortly therafter, Collins said that he could not hire him because the continuous miner had broken down and he would have to lay some miners off.

Shell testified that he told Tolbert on February 25th that there was a "hiring freeze" at the White Oak mine. However in Shell's sworn statement to an MSHA investigator on May 1, 1986, he failed to even mention any such hiring freeze as a reason Tolbert was not hired. Rather, Shell stated that he told Tolbert to call Collins in order to get a starting date, but that Collins did not give him a date. Shell's complete statement to MSHA is as follows:

> "On February 25, 1986, Ronald Tolbert came into the office and said they told me to come in and fill out an application. I asked Tolbert if they (whoever sent him to fill out an application; I don't remember who he said sent him) told him when he was to report for work. Tolbert said that they did not give him a date.
>
> I filled out Tolbert's application, then I gave him the telephone to call the mine and talk to Clyde Collins, Superintendent, to get a starting date as to when he would start to work. After Tolbert talked to Collins, he said Collins told him that he would not be starting to work at Chaney Creek. No date was given as to when he would start to work.
>
> During the week of February 11, 1986, there had been five employees laid off at [Chaney Creek].
>
> Tolbert then went outside of the office and talked to Daryl Napier, Production Manager. I did not talk to Tolbert anymore.

It is the policy of this company for anyone to fill out an application before they are hired."

Collins, on the other hand, testified that when Tolbert called him on February 25th from the London office, Tolbert "asked me about a job and I told him to check back with me." However, this assertion likewise contradicts the sworn statement that Collins gave to the MSHA investigator on April 30, 1986. That statement is as follows:

> "On February 25, 1986, Ronald Tolbert came to the mine and asked me for a job. I told Tolbert that I was not hiring at the time, but maybe later. I told him if he wanted to he could go to the main office in London, Kentucky, and fill out an application. I did not tell Tolbert he was hired. Tolbert then left the mine. I don't know if he went to the main office and filled out an application or not.
>
> This is all I know about Tolbert."

Although neither Shell or Collins mentioned a hiring freeze when they gave their sworn statements to the MSHA investigator, Chaney Creek raised this defense in its October 8, 1986, response to the prehearing order issued by the undersigned in this proceeding. In that part of its response entitled "Statement of Issues," Chaney Creek stated that when Tolbert filled out his job application on February 25th, "Chaney Creek was not hiring any new miners, but rather was in the process of laying off several miners."

It may reasonably be inferred from this failure of the two principal members of Chaney Creek's management involved in this case to even mention a hiring freeze when questioned about the case approximately two months after Tolbert was denied employment, that the purported excuse was nothing more than a pretextual afterthought. In addition the underlying evidence refutes Chaney Creek's claim that there was a hiring freeze in effect on February 25th.

Shell testified that the freeze began "less than a week" before February 25th and lasted "approximately a week after February 25th." Kenneth Gilliam, Chaney Creek's safety director, testified that the hiring freeze had been in effect for "about a week" prior to February 25th and that Chaney Creek had not hired any employees or taken any job applications during that week. Chaney Creek's answers to Tolbert's requests for admissions reveal however that 13 miners were

hired at the White Oak mine between February 24th and March 4th, all during the alleged freeze. Indeed, three miners (Glennis Nelson, Lawrence Shepherd, and Tony A. Smith) were hired on February 24th, and one miner (Bobby Howard) was hired on February 25th, the same day that Tolbert was turned away. Two more miners (Alvin Caldwell and Gerald Lawson) were hired on February 28th, and 7 additional miners were hired the following week. Although Shell stated that it was their practice for Collins to call him when he hired a miner to replace another miner (who had quit, been discharged, or injured), and that he (Shell) would receive this information before the miner reported to the Chaney Creek office, Shell did not know whether any of the 13 miners hired between February 24th and March 4th had in fact replaced other miners.

It is also significant that Chaney Creek's prehearing assertion that it was "in the process of laying off several miners" on February 25th is contrary to the evidence of record. The evidence shows that not only were 13 miners hired during the alleged hiring freeze, but that no miners were laid off at the White Oak mine from mid-February to mid-April, 1986.

If there had been a hiring freeze at the White Oak mine on February 25th, as Respondent now alleges and if Shell had told Collins about the freeze as Shell testified, it is not reasonable to believe that Collins would have failed to tell Tolbert about the hiring freeze either when Tolbert was at the mine on the morning of February 25th, or when Tolbert called Collins later that day from the London office. Moreover, if there had been a hiring freeze, it is not reasonable to believe that Shell would then have told Tolbert to call Collins to get a starting date.

Collins testified that when Tolbert called him from the London office, Tolbert "asked about a job" and Collins told Tolbert to check back with him. However, if Collins had told Tolbert that morning to submit an application and then to check back with him in a couple of days, as Collins claims, it is not reasonable that Tolbert would have called Collins again a few hours later to ask about a job.

It is also noted that when Shell was first asked at hearing why Tolbert was not hired by Chaney Creek, Shell replied, "[a]t that period of time there was a . . . temporary hiring freeze." However, after it was established at hearing that many miners had been hired after February 25, 1986, Shell advanced another explanation. Thus when asked why Tolbert was not hired when the freeze was lifted, Shell

replied, "[h]e didn't go back to the mine is the only thing I can tell you."

The argument that Tolbert was not hired because he did not report back to the White Oak mine is not however reasonable under the circumstances. Although he denied hiring Tolbert, Collins testified that he did tell Tolbert on February 25th that he might hire him "in a day or two," and that Tolbert should check back with him. Shell testified that he told Tolbert on February 25th that Chaney Creek would not be hiring for only "a short period of time." Under the circumstances, it is not reasonable to believe that Tolbert, who was looking for a job, would not have reported back to the White Oak mine and/or to the London office in the next few days. It defies common sense to believe that a miner who is seemingly on the verge of obtaining a needed job would ignore instructions to contact his prospective employer again in a couple of days, but rather would opt for filing a discrimination complaint against that company.

Finally even assuming, arguendo, that there was a temporary hiring freeze at the White Oak mine in effect on February 25th, as Chaney Creek alleges, the fact remains that Tolbert was not hired when the freeze was admittedly lifted approximately one week later. Chaney Creek had hired approximately 47 new miners other than Tolbert between February 25th and July 7th. Moreover, 14 of these new employees were hired as either servicemen or roofbolters, the two jobs which Tolbert said he was told on February 25th that he would be performing. In addition, another 12 miners were hired during this period to perform unskilled work watching (and shovelling) either the belt drive or the beltline. These are jobs for which Tolbert, or any miner with 6 years experience would be well qualified.

Under the circumstances I find the Respondent's argument herein that it did not hire Tolbert because of a "hiring freeze", to be without credibility and a pretext.

Chaney Creek also argues in its posthearing brief that Tolbert was not hired because he did not have a current miner's card. Chaney Creek explains that it has had a policy that miners must be eligible to go underground i.e., they must have an up-to-date Kentucky miners identification card, showing that the miner has received his annual retraining sometime during the previous calendar year, before the company will hire them. However, the question of whether Tolbert had an up-to-date miner identification card when he went to the Chaney Creek office on February 25, 1986, is not material to this proceeding because the question of Tolbert's

training admittedly did not enter into Chaney Creek's decision not to hire him. See Pasula, supra.[9]/

Shell, Chaney Creek's personnel director, admitted at hearing that the fact that Tolbert's miner identification card was not up-to-date on February 25, 1986, had nothing to do with why Tolbert was not hired. Indeed, Shell admitted that he did not even notice at that time that Tolbert's card was expired, and that he did not discuss the matter with Tolbert.

Moreover neither Shell nor Collins even mentioned Tolbert's eligibility to go underground as a basis for not hiring him in their statements to the MSHA investigator. It may reasonably be inferred therefore that this issue was not considered by Chaney Creek as a factor in not hiring Tolbert. Indeed, Chaney Creek did not even raise the issue of Tolbert's eligibility to go underground as a defense in its Answer filed June 30, 1986; nor did the company raise the question in its "Statement of the Issues" in its October 8th response to the Prehearing Order. At that time, one week before the scheduled hearing, Chaney Creek's sole defense to Tolbert's claim was that it simply was not hiring on February 25th, but rather was "was in the process of laying off several miners." It is plainly apparent that this new defense arose for the first time at hearing only after it was discovered that the evidence would not support the earlier alleged defense.[10]/

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[9]/ The Commission stated in Pasula that:

> It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

[10]/ It is not disputed in this case that Chaney Creek ordinarily did require its new employees to be current in their training. The application forms submitted into evidence show that Chaney Creek customarily did verify whether its new employees had received their annual retraining. However, in this case, it is clear that Chaney Creek did not consider the matter and it is accordingly not relevant.

It is apparent moreover, that even if Chaney Creek officials had noticed that Tolbert's miner identification card was expired, it would have, according to prior practices, simply instructed Tolbert to obtain his annual retraining so that he could begin work. Both Shell and Collins admitted that Shell had never vetoed or rejected for employment any miner who Collins had sent to the London office to be formally hired. In fact, in only one instance did Shell not formally approve Collins' hiring decision. That instance involved two brothers, Elmer and Kermit Sizemore, whom Collins hired at the same time, but whose training was not up-to-date when Collins sent them to the London office. When Shell noticed that their training was not up-to-date, he simply instructed the miners to obtain their training. Both men then received their training within a few days and started to work immediately thereafter.

Under all the circumstances it is clear that the profferred defense, first proposed at the hearings in this case, that Tolbert was not qualified to be hired on February 25, 1986, because he did not then have an up-to-date miner's card is nothing more than another afterthought and pretext. Accordingly I find that Chaney Creek did indeed refuse to hire Tolbert solely because of his protected activity and that it was therefore in violation of section 105(c)(1) of the Act.

ORDER

Chaney Creek Coal Corp. is hereby directed to offer employment to Ronald Tolbert at no less than the current rate of pay in effect for the position of serviceman. The parties are further directed to confer to attempt to reach stipulations as to costs, damages, and attorney's fees in this case. If they are unable to reach stipulations as to all such matters on or before March 20, 1987, further hearings will be held on such matters on April 1, 1986, at 2:00 p.m. in London, Kentucky.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 16 1987

EMERY MINING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 86-101-R
v.	:	Order No. 2835373; 3/20/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 86-102-R
	:	Order No. 2835374; 3/20/86
	:	
	:	Deer Creek Mine

DECISION

Appearances: Timothy Biddle, Esq. and Susan Chetlin, Esq., Crowell & Moring, Washington, D.C., for Contestant; Edward J. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Morris

This is a consolidated contest proceeding initiated by contestant pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act).

In WEST 86-101-R Emery contested a 104(d)(1) order. The order, number 2835373, charges respondent with violating 30 C.F.R. § 75.1003(a). The order reads as follows:

> The trolley cut-out switches in 3rd West at the following locations were not guarded where persons normally work or are required to cross under to throw the switch handles: 3rd West switch, bottom of 3rd West hill, top of 3rd West hill, underground shop switch, "B" North, between 30 & 31 crosscut, "C" North, 3rd South switch, 3rd West North drive. There are some cut-out switches that are guarded in this entry. This condition was known by the company.

In WEST 86-102-R Emery similarly contested a Section 104(d)(1) order, number 2835374, which reads as follows:

> The energized trolley line was not guarded at the cut-out switches where men normally work or are required to cross under to work or throw the switch handles at the following locations in 1st South; numbers 53, 63, 69, 74, and 78 cross-cuts. This condition was known by the company to exist.

The standard allegedly violated, § 75.1003, in its entirety, provides as follows:

> Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:
>
> (a) At all points where men are required to work or pass regularly under the wires;
>
> (b) On both sides of all doors and stoppings; and
>
> (c) At man-trip stations.
>
> The Secretary or his authorized representatives shall specify other conditions where trolley wires and trolley feeder wires shall be adequately protected to prevent contact by any person, or shall require the use of improved methods to prevent such contact. Temporary guards shall be provided where trackmen and other persons work in proximity to trolley wires and trolley feeder wires.

After notice to the parties, a hearing on the merits took place in Denver, Colorado on July 29, 1986.

Stipulation

The parties stipulated that if the Secretary prevails on the issue of whether a violation occurred and on the issue of unwarrantability then the citation as issued is procedurally correct. Further, it was stipulated that exhibits of each party were authentic (Tr. 6, 7). It was also agreed that the handles on all of the switches 1/ were insulated (Tr. 57).

1/ The switches are sometimes referred to as blade switches, line switches or cut-off switches.

Issue

The issue focuses on the applicability of the regulation to blade switches on trolley wires.

Summary of the Evidence

The evidence is essentially uncontroverted.

William Ponceroff, a person experienced in mining, has been the supervisor of the MSHA Orangeville, Utah office since January 1986 (Tr. 12-15). His experience has included six months' dealing with trolley haulages (Tr. 15).

In February 1986 he accompanied MSHA Inspector Jones to Emery's Deer Creek Mine. While inspecting with Jones and Gary Christensen, the company representative, he observed a line switch that had been thrown but wasn't guarded. The inspector indicated they are regularly used because the rock dust car moves in and out of this area (Tr. 15, 16). A miner's hand is close to the wire when he reaches up to pull the switch. Christensen felt the switch didn't have to be guarded (Tr. 17). On leaving the mine into Main West, Ponceroff observed two switches. One was guarded and one was not (Tr. 17). Track problems included missing and loose bolts as well as gaps in the track (Tr. 18).

On February 27 Ponceroff discussed the blade switch guarding with Dixon Peacock, the company's Deer Creek representative. Ponceroff indicated that belt shovelers and supply people were operating along the track without a temporary guard (Tr. 19). At any time their vehicle could get off the track. If this occurred miners could only deenergize the trolley wire by throwing the blade switches. The miners could also contact the wire with a shovel handle or a scale bar. In some places portions of a miner's body could come in contact with the wire (Tr. 20). Since they didn't provide a temporary guard, the switches would be regularly used because miners could only perform their duties by pulling a line switch (Tr. 20). Ponceroff also observed miners unloading timbers under a trolley wire without deenergizing the wire (Tr. 21).

Dixon Peacock indicated he didn't know anything about using an MSHA approved temporary guard (Tr. 21). Emery was not cited when this condition was first observed in order to give the company time to install guards. Ponceroff made it clear that MSHA would enforce the regulation (Tr. 22).

To some extent Ponceroff's interpretation of the regulations is stricter than that of his predecessor. The company has cooperated with MSHA at the Wilberg and Cottonwood mines (Tr. 23 - 25).

Ponceroff agreed that on the February 14 inspection he observed miners working under the trolley wire where the blade switches were guarded (Tr. 28). In the inspector's view some of the line switches were installed in such a fashion that miners would have to pass under the trolley wire to throw them. This is because the handle was on the rib side of the switch (Tr. 29). All of the blade switches had to be guarded because miners were removing longwall shields and face equipment. In addition, they were required in areas where work was being done with scale bars and when timbers were installed on the rib side of the wire (Tr. 29 - 31). In the inspector's opinion it would constitute regularly working or passing under within the meaning of the regulation if the switch had to be thrown. The regulation does not require guards for all of the trolley lines (Tr. 30, 31).

The potential for derailment in this mine was great (Tr. 32). In the event of a derailment the line switch would be regularly used. Every switch, whether facing the rib or track side, should be covered along the main line because of the condition of the track (Tr. 33).

Between February 27 and March 30, Ponceroff did not receive any objections to his directive (Tr. 35).

The inspector believed that every blade switch would be used in the course of the life of the mine (Tr. 36). Some would be used more than others (Tr. 36). If a miner leaves an area where there is no actual mining he would normally use the switch to cut off the power (Tr. 36).

Photographs of an unguarded and a guarded line switch were received in evidence (Tr. 37, 42, 43; Ex. C1, C2, C3). If a miner reaches for the switch a guard prevents his hand from contacting the energized trolley wire (Tr. 37 - 39). In pulling the switch handle a miner's forearm would be above and within five or six inches of the energized trolley wire (Tr. 39, 41). This constitutes a significant shock or electrocution risk (Tr. 42).

If the blade switch is in place, normally energy flows in the energized line (Tr. 40). If the switch is disconnected then normally there is power to only one side of the switch (Tr. 41).

Vern Boston is an MSHA inspector at the Orangeville, Utah office (Tr. 46). At a staff meeting in March 1986, Boston was advised by his supervisor, Bill Ponceroff, that the blade switches on the trolley had to be guarded. The supervisor explained that there was exposure to hazards because they were regularly used (Tr. 46). Mr. Ponceroff also indicated to Boston that the company officials were correcting the condition (Tr. 47).

On entering the mine, Inspector Boston observed that no guards had been installed on any of the line switches on 1st South or 3rd West. In addition, no guards had been installed along the trolley lines (Tr. 48). The company indicated they were working to install the guards but the inspector saw no evidence to support this view. The inspector decided to issue a closure order when he counted the 14 unguarded switches. However, some were guarded (Tr. 49).

Mr. Peacock, without further explanation, only stated that the company was working to install the guards (Tr. 50). The inspector considered the company lacked due diligence because they were aware of the condition and permitted it to exist (Tr. 52).

The inspector discussed the situation with Dave Lauriski, a company safety director (Tr. 52).

In Boston's opinion blade switches would be used in the normal course of mining activity. These activities would include any belt maintenance, as well as greasing, shoveling spills and installing timbers (Tr. 55). In addition, he considered a derailment to be a regular occurrence (Tr. 68). In the inspector's opinion the violative condition constituted a significant hazard with a potential for shock (Tr. 57).

Inspector Boston felt that every blade switch should be guarded (Tr. 57). The very act of throwing the switch requires men to pass underneath the trolley wire (Tr. 58).

Inspector Boston issued order number 2835373 (contested in WEST 86-101-R) and order number 2835374 (contested in WEST 86-102-R) (Tr. 48; Govt. Ex. 1, 2, 3).

Dixon Peacock identified himself as the senior safety engineer for the company (Tr. 69, 70). He assists management in making the mine more productive as well as safe (Tr. 70).

On February 27, 1986, Peacock and Ponceroff discussed the guarding of all switches. Peacock discussed it with his immediate supervisor who felt no violation existed because the situation did not constitute "regular passage" (Tr. 71, 72). No further discussions took place with Mr. Ponceroff.

Peacock was later advised by Dick Jones and Ken Callihan that they were going to make a concentrated effort to install the switches (Tr. 72, 73, 78). The workers corrected 13 to 18 switches. It takes about an hour to install a guard (Tr. 74). There are about 50 to 65 switches in the mine (Tr. 74).

Approximately 600 employees work in the mine (Tr. 75).

The company tries to comply with the MSHA inspectors (Tr. 76).

Dominic William Oliveto, called as a witness by Emery, identified himself as the maintenance superintendent for the Deer Creek Mine (Tr. 81). The 50 blade switches in the mine disconnect the power inby or outby the switch or isolate the power at the beginning of each branch circuit (Tr. 82, 83).

A certified electrician, trained in electrical work and wearing protective gloves, throws these switches (Tr. 83, 85). All of the electrical equipment is inspected weekly (Tr. 83, 84). In most cases the electricity flows in both directions in the lines (Tr. 84).

Title 30, Section 75.509 provides that only a qualified person can work on energized equipment (Tr. 84). Other miners are instructed not to contact the wire. However, they are instructed to handle emergency situations; in addition, they are directed to cross under where ever the trolley is guarded (Tr. 86, 87).

Prior to March 20, 1986, the switches were guarded at the man trip and material stations. In addition, guards were used whenever the switch happened to be in front of a belt crossover or in a crosscut with a mandoor through it. These are regularly travelled areas (Tr. 94).

During the blitz electrical inspection of April 1985 no mention was made about guarding switches unless they were travelled under (Tr. 96).

Mr. Boston stated he wrote the citation because he had to cross under the switch to throw it on or off. Oliveto objected because it would prevent you from driving the trolley through it because the pull has to ride on it from the bottom (Tr. 97). Oliveto described the hazards involved in connection with some of the power guarding (Tr. 99).

One hand is used to throw an unguarded switch (Tr. 100).

Oliveto wasn't advised about the situation until after the citations were written on March 20 (Tr. 102).

No temporary guards have been used at the mine (Tr. 102). Section 310(d) of the Act requires temporary guards where trackmen and other persons work in proximity to trolley wires or trolley feeder wires (Tr. 103). When working on the track, the trolley wires are isolated by throwing one or two blade switches (Tr. 103).

Blade switches are required at various locations and intervals (Tr. 103, 104).

There were two methods available to guard the blade switches (Tr. 106). A various number of electricians are assigned to tracks and belt lines (Tr. 108).

The mine normally operates three shifts a day for a five-day week (Tr. 113).

Derailing is not uncommon but it is not a daily occurrence (Tr. 118).

Between February 27 and March 7 the blade switch problem was discussed with the mine foreman (Tr. 119, 120).

Discussion

Emery asserts that Section 75.1003(a) does not apply to blade switches because the regulation does not specifically mention switches. In the alternative, Emery states that the Secretary has failed to establish the applicability of the regulation in this factual setting.

Emery's threshold contention lacks merit. The relevant portion of the regulation requires that "trolley wires ... shall be guarded" under certain circumstances. The evidence establishes the trolley wires enter the cut-off switch at each side. By pulling the switch handle a miner can deenergize the trolley line (inby or outby depending on the flow of electricity). The switch is accordingly an integral unit of the trolley wire. In sum, the switch is merely a conduit through which the trolley wire passes. Accordingly, the switches are a part of the trolley wires. They They must be guarded at those locations mandated in the regulation. Specifically, these are the locations stated in paragraphs (a), (b) and (c) of Section 75.1003.

Emery in this case was cited for violating paragraph (a) which requires guarding "where men are required to work or pass regularly under the wires."

The Secretary has failed to offer any evidence to establish the violation. In WEST 86-101-R the Secretary's order encompassed nine specific locations. In WEST 86-102-R the order encompassed five specific locations.

There is no persuasive evidence that miners either worked or were required to pass regularly under the trolley wires at the locations cited in the orders. Inspector Boston testified there were no guards on any of the line switches on 1st South or 3rd West. But a mere lack of guards does not constitute a violation of the regulation.

Inspector Boston also described circumstances where the normal course of mining would require the use of switches. However, the regulation requires evidence of where miners either worked under or passed regularly under the trolley wires. The Secretary also contends that merely throwing the blade switch constitutes regularly passing under. In addition, the Secretary's representatives believe each switch would at some time or other be thrown. The Secretary seeks to stretch the regulation beyond its plain meaning. To support the Secretary's view would mean that "pass regularly" includes circumstances where miners merely occasionally cross under a trolley wire. If this were so the regulation would require that every trolley wire be insulated its entire length. There is no such requirement.

There is no allegation here that Emery left its trolley wires unguarded at critical locations and there is no evidence that Emery's miners worked around or regularly passed under the switches cited in these cases. To like effect see Southern Ohio Coal Co., 1 FMSHRC 1642 (1979) (Koutras, J.).

I agree with the case law cited in the Secretary's brief that the Act and its regulations should be liberally construed to achieve its purposes. But I cannot rewrite this regulation to read that "all trolley wires must be guarded adequately at all cut-out switches".

Briefs

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

Conclusions of Law

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

1. The Commission has jurisdiction to decide this case.

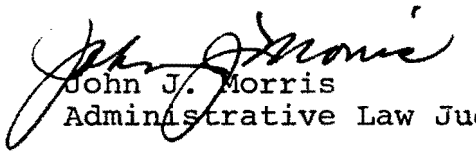
2. Respondent did not violate 30 C.F.R. § 75.1003(a).

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

ORDER

1. In WEST 86-101-R: Order number 2835373 is vacated.

2. In WEST 86-102-R: Order number 2835374 is vacated.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 17, 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 86-125-R Order No. 2811604; 7/21/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 87-5 A. C. No. 01-01247-03726
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-136 A. C. No. 01-01247-03719
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 87-1-R Citation No. 2810255; 9/26/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 87-2-R Citation No. 2810256; 9/26/86 No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 87-21 A. C. No. 01-01247-03735
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 87-3-R
v.	:	Citation No. 2810510; 9/22/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-55
	:	A. C. No. 01-01401-03661
v.	:	
	:	No. 7 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-14
	:	A. C. No. 01-01247-03734
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-18
	:	A. C. No. 01-01247-03731
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 87-26-R
v.	:	Citation No. 2811239; 11/25/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 4 Mine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-48
	:	A. C. No. 01-01247-03747
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

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

Before: Judge Merlin

The above-captioned cases were set for hearing pursuant to duly issued notices of hearing of various dates. When they came on for hearing as scheduled, counsel for both parties advised that the penalty cases had been settled and that the notices of contest would be withdrawn subject to approval by the Administrative Law Judge. Other matters which also were set for hearing on the same date and which preceded to hearing on the merits, are contained in a separate transcript and are the subject of a separate decision.

In these cases the parties agreed to the following stipulations: (1) the operator is the owner and operator of the subject mine; (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) the Administrative Law Judge has jurisdiction of this case; (4) the inspectors who issued the subject citations and orders were duly authorized representatives of the Secretary; (5) true and correct copies of the subject citations and orders were properly served upon the operator; (6) the operator's size is medium; (7) imposition of penalties herein will not affect the operator's ability to continue in business; (8) the violations were abated in good faith; and (9) the operator's history of prior violations is average for its size.

SE 87-5 involves two citations. Citation No. 2811709 was issued for a violation of 30 C.F.R. § 75.500(a). The Solicitor advised that a non-permissible switch box and starter box were used in the last open cross-cut of the No. 5 section. According to the Solicitor, the gravity of the violation was serious and negligence was high. The original assessment was $800 and the proposed settlement was for that amount. Operator's counsel expressed agreement to pay the proposed settlement. Order No.

2811604 was originally a section 104(d)(2) order issued for a violation of 30 C.F.R. § 75.200. The original assessment was $800 and the proposed settlement was $400. The violation was for missing ribs bolts. The Solicitor advised at the hearing that the (d) order had been modified to an (a) citation because the operator had already begun replacing the bolts when the violation was cited. Accordingly, neglience was much less than originally thought. I approved the proposed settlements from the bench.

Operator's counsel then moved to withdraw the related notice of contest, SE 86-125-R. This motion was granted and the case dismissed from the bench.

SE 86-136 involves five citations. All were based upon a 1981 notice of safeguard. In accordance with a prehearing order, the parties submitted extensive prehearing statements. Upon further review of the matter, the operator agreed to pay $259 for each citation, which was the original assessment. The Solicitor accepted this proposal and recommended settlements based thereon. At the hearing, the Solicitor advised that although sanding devices are not always used, they are necessary on occasion and that, therefore, the violations were serious. He further stated that the operator was negligent. Based upon the representations of the Solicitor and operator's counsel, I accepted the proposed settlements.

SE 87-21 involves two citations. Citation No. 2810255 was issued for a violation 30 C.F.R. § 75.1722(b). According to the Solicitor, an inadequate guard was being used around the No. 4 belt conveyor drive. The violation was serious. The negligence of the operator was mitigated because it was using a fence enclosure as a guard. The inspector found that the fence was inadequate, even aside from the fact that its gate was missing. The operator promptly abated the violation by constructing localized guards immediately around the conveyor drive's moving parts. I accepted the Solicitor's representations that the operator's negligence was less than originally thought because it did, in fact, have some guarding around the belt conveyor. The original assessment was $249 and the proposed assessment was $150. I approved the proposed settlement from the bench. Citation No. 2810256 was issued for a violation 30 C.F.R.§ 75.1403(5)(j) for a failure to guard an area outby the No. 4 section belt conveyor drive. In this instance, the operator had the required crossover which employees could have used to get from one side of the belt to the other. However, the crossover was 70 feet away from the conveyor drive and therefore, too inconvenient for its purpose. The operator abated the condition by constructing a crossover guard in the immediate area of the conveyor drive. The violation was serious, but here again, the Solicitor represented that the operator's negligence was less than originally thought since it did have a crossover, although not in the most suitable location. The original assessment was $192 and the proposed settlement was $150. I approved the proposed settlement from the bench.

Operator's counsel then moved to withdraw the related notice of contest proceedings, SE 87-1-R and SE 87-2-R. This motion was granted and the contest cases were dismissed from the bench.

SE 87-55 involves Citation No. 2810510 which was issued for a violation of 30 C.F.R. § 75.400 because of accumulations of coal dust including float coal dust deposited on rock dust surfaces and loose coal accumulated in various locations. The Solicitor advised that for the most part these were not typical accumulations, but rather resulted from horizontal drilling into the coal seam by the operator in an attempt to liberate methane. The operator's activities were permitted under applicable ventilation and dust plans which at that time allowed it to inert coal shavings left from its drilling with rock dust. Subsequently, applicable plans were changed so that such activities were not allowed. The original assessment was $136, but in light of the unusual circumstances, the parties recommended a settlement in the amount of $50, which I approved from the bench.

Operator's counsel then moved to withdraw the related notice of contest, SE 87-3-R. This motion was granted and the case dismissed from the bench.

SE 87-14 involved one citation which the Solicitor advised had been vacated since it was improperly predicated upon a prior safeguard. The Solicitor moved to dismiss and the motion was granted from the bench.

SE 87-18 involved Citation No. 2353478 issued for a violation of 30 C.F.R. § 75.200 because employees went under unsupported roof. The Solicitor advised that the presence of men under unsupported roof was an instantaneous reaction to the sudden occurrence of a methane ignition. The original assessment was $500 and the proposed settlement was $200. In view of the emergency nature of the situation, I approved the recommended settlement from the bench.

SE 87-48 involved Citation No. 2811239 which was issued for a violation of 30 C.F.R. § 75.1403 when an individual operating a personnel carrier on the track haulage, proceeded without obtaining the right-of-way from the dispatcher. The Solicitor advised that the operator had in effect a well-established dispatcher method of controlling underground rail traffic and that all employees were familiar with this system and were aware that they should obtain right-of-way clearance prior to traveling on the rail system. In addition, the company's safety program required that all vehicles obtain clearance from the dispatcher. Here the employee's actions were contrary to safety rules enforced by the operator. In an effort to deter such behavior in the future, the operator issued a formal reprimand to the employee for his misconduct. Accordingly, the Solicitor

represented that although the violation was serious, the negligence of the operator was low. Operator's counsel advised that under the contract with the union, reprimand was the strongest action the company could take against the individual in this instance. The original assessment was $371 and the proposed settlement was $150. Based upon the information furnished by counsel, the proposed settlement was approved from the bench.

Operator's counsel then moved to withdraw SE 87-48, the related notice of contest. This motion was granted and the case dismissed from the bench.

In light of the foregoing, the operator is Ordered to Pay the amounts as set forth above.

It is further Ordered that the penalty petition and notices of contest be Dismissed as set forth above.

Paul Merlin
Chief Administrative Law Judge

Distribution:

R. Stanley Morrow, Esq., Harold D. Rice, Esq., Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

H. Gerald Reynolds, Esq., Jim Walter Corporation, 1500 North Dale Mabry Highway, Tampa , Fl 33607 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 18 1987

RICKY VERNON HEIN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 87-22-DM
v.	:	
	:	MD 86-10
PUSKARICH LIMESTONE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of a settlement agreement and an order dismissing this proceeding.

FOR GOOD CAUSE SHOWN, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties will fully comply with the terms of the Settlement Agreement filed herein on March 9, 1987, and confirmed by letter of March 5, 1987, from counsel for Complainant.

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

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Mr. Ricky Vernon Hein, 4030 Avon Road, Carrollton, OH 44615, (Certified Mail)

Daniel M. Jonas, Esq., Black, McCuskey, Souers & Arbaugh, 1000 United Bank Plaza, 220 Market Avenue South, Canton, OH 44702 (Certified Mail)

John R. DeBonis, Corporate Director of Human Resources, Black, McGuskey, Souers & Arbaugh, 1000 United Bank Plaza, 220 Market Avenue South, Canton, OH 44702 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 19 1987

RUSHTON MINNING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 86-44-R
v.	:	Order No. 2404261; 11/5/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-92
	:	A.C. No. 36-00856-03554
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for Rushton Mining Company.

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton Mining Company (Rushton) filed a Notice of Contest challenging the propriety of Order 2404261 issued under § 104(d)(1) of the Federal Mine Safety and Health Act (Act) at its Rushton Mine. The Secretary of Labor (Secretary) has filed a petition for the assessment of a civil penalty for the violation alleged in the order. The penalty proceeding also involves five other alleged violations concerning which the parties have submitted a settlement motion which I am approving. Because the two cases involve the same withdrawal order, they were consolidated for the purposes of hearing and decision by order issued May 6, 1986. Pursuant to notice, the cases were heard in

State College, Pennsylvania, on November 18 and 19, 1986. Joseph E. Colton, Ralph Hamilton and Ronald J. Gossard testified on behalf of the Secretary. Daniel J. Kerfoot, Frank Petriskie, and Raymond G. Roeder testified on behalf of Rushton. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding, Rushton was the owner and operator of an underground coal mine in Centre County, Pennsylvania, known as the Rushton Mine. The mine has 260 employees, and produces approximately 660,000 tons of coal annually. It is a subsidiary of the Pennsylvania Mines Corporation. It is a large operator. During the 24 months prior to the violations being considered here, it had a history of 257 violations. This history is not such that penalties otherwise appropriate should be increased because of it. The alleged violative condition was promptly abated in good faith.

On November 5, 1985 at about 9:45 a.m., Federal Mine Inspector Joseph Colton issued a withdrawal order under § 104(d)(1) of the Act charging a violation of 30 C.F.R. § 75.1434(a)(2). The order alleged that the wire rope attached to a mantrip car had broken wires in one strand of one lay which exceeded 15 percent of the total number of wires in the strand. The rope was attached to a drum in the hoist house and was used to lower the mantrip, containing up to 34 miners, into the working section of the mine at the commencement of the shift, and to remove them at the conclusion of the shift. The hoist was operated by Frank Petriskie, an employee of Rushton for 21 years, and a hoist operator for more than 6 years. Mr. Petriskie is regarded as an extremely conscientious employee.

The rope runs from the drum in the hoist house to the bottom of the slope, a distance of approximately 700 feet. The grade is approximately 17 percent. The mantrip has electrical mechanical brakes with sensors which set the brakes automatically in the event of "an overspeed condition." The rope used in this operation is 1,100 feet long, 1 inch in diameter, and has a "breaking strength" of in excess of 50 tons. A fully loaded mantrip puts a load of about 5 tons on the rope. It is the policy at Rushton to change the rope every 6 months and more often if broken wires are discovered.

Prior to the issuance of the contested order on November 5, 1985, Petriskie examined the drum, the rope, the clamps attaching the rope to the brake car, and the other components of the hoisting system while the mantrip was being

lowered into the mine. He checked the rope by draping a rag over it to catch any breaks in the rope and by visually examining it. The examination was performed by Mr. Petriskie alone. He then recorded the results of his examination in the hoist examination record book at 8:35 a.m. The book was later countersigned by Andy Moriarity, a surface foreman.

The evidence is very clear and not contested by Rushton that at the time of Inspector Colton's examination the rope had more than the number of broken wires required to meet the "retirement criteria." Under Rushton's procedures, it was due to be changed November 9, 1985 (when it would have apparently been on the hoist for 6 months).

I find as a fact that the number of broken wires in one strand of the rope totalled seven. These were crown or surface wires and the breaks were visible. There were five broken wires in another area of the rope. In addition, a number of other areas had in excess of three broken wires. There are approximately nineteen wires to a strand and six strands in the rope. The seven broken wires represent 36.8 percent of the total number of wires in the strand.

Following the issuance of the order, the wire was promptly replaced, and the alleged violation abated. Some time after the order, Mr. Petriskie asked if he could have assistance in inspecting the rope. The request was granted and it is now inspected by two miners. Petriskie "checks it out" before 7:00 a.m. and with another person inspects it at about 7:45 a.m. when the mantrip is lowered into the mine.

REGULATION

30 C.F.R. § 75.1434 provides in part:

> Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs:
>
> (1) The number of broken wires within a rope lay length, excluding filler wires, exceeds either --
>
> * * * * * * *
>
> (2) Fifteen percent of the total number of wires within any strand;
>
> * * * * * * *

ISSUES

1. Does the evidence show a violation of a mandatory safety standard?

2. If a violation is established, did it result from Rushton's unwarrantable failure to comply within the regulation?

3. If a violation is established, was it significant and substantial?

4. If a violation occurred, what is the appropriate penalty?

CONCLUSIONS OF LAW

VIOLATION

Rushton contends that the standard is violated only if it is shown that it knew or should have known of the defective condition in the rope and failed to retire it. It thus would require a finding of negligence before a violation could be found. The situation is likened to cases involving methane liberation under 30 C.F.R. § 75.308 where it has been held that the presence of excessive methane does not constitute a violation, but rather the failure to take appropriate steps to reduce or eliminate it. See Mid-Continent Coal and Coke Co., 1 IBMA 250 (1972); Youghiogheny and Ohio Coal Co., 5 FMSHRC 1581 (1983), vacated 7 FMSHRC 200 (1985). The analogy is not apt. Methane is liberated in the cutting of coal, and excess methane can suddenly and unexpectedly appear, in spite of an operator's care in following appropriate ventilation requirements. For this reason constant examinations for methane are mandated by the Act. When excess methane is detected, remedial steps must be taken immediately. The violation charged here, however, involves defects in equipment which occur through usage over time. I conclude that the existence of defects in a wire rope sufficient to require its retirement in itself constitutes a violation of the standard if the operator continues to use the rope, regardless of whether he knew or should have known of the defects.

UNWARRANTABLE FAILURE

In the United States Steel Corporation case, 6 FMSHRC 1423, 1437 (1984), the Commission stated that "an unwarrantable failure . . . may be proved by a showing that the violative condition . . . was not corrected or remedied, prior to the issuance of a citation or order because of indifference, willful intent or a serious lack of reasonable care."

Because a mantrip car is involved, the hoisting equipment is required to be examined daily. 30 C.F.R. § 75.1400(d). This is in addition to the requirement that the wire rope be examined at least every 14 calendar days. 30 C.F.R. § 75.1433(a).

I have found that prior to the order issued here, Rushton examined the rope daily. It examined it only little more than an hour prior to the issuance of the order on November 5, 1985. On the basis of these findings, I conclude that the failure to correct the violative condition here did not result from indifference or willful intent. The question remains whether it resulted from a serious lack of reasonable care.

I have found that Petriskie examined the rope on November 5 and failed to see the defects. I have further found that the defects were substantial and clearly visible on careful examination. Petriskie was a conscientious employee. I can account for his failure to find the broken wires only by finding that the method of examination was seriously inadequate: he examined the wire alone while lowering the mantrip car, with up to 34 miners on board, to the working section. He was asked to perform alone too many tasks in a limited time, and was forced to neglect the inspection task. The inadequacy was recognized by Rushton after the order when it assigned a person to help Petriskie perform the rope examination. I conclude that the evidence shows a serious lack of reasonable care on Rushton's part. I am not concluding that Petriskie's examination was inadequate and that Rushton should have known this. Rather, I am concluding that the procedure for examinining the rope was seriously flawed and that Rushton was responsible for this. The violation was caused by Rushton's unwarantable failure to comply with the regulation.

SIGNIFICANT AND SUBSTANTIAL

The Commission stated in Mathies Coal Co., 6 FMSHRC 1 (1984), that to establish a significant and substantial violation the Secretary must show that the violation contributed to a hazard, and that the hazard contributed to would, with reasonable likelihood, result in an injury of a reasonably serious nature. The inspector was of the opinion that the hazard contributed to here was the failure of the rope which would subject the persons in the mantrip to injuries from derailment of the car or from attempts to evacuate the car. However, the evidence does not establish that the defects found in the rope would be likely to cause it to break. Respondent's general maintenance supervisor testified that the rope had a "reserve strength" of 31 percent of its original capacity, that is, if all the crown wires were worn out, the core would have 31 percent of its original capacity.

The original capacity was 50 tons, and a fully loaded mantrip car was 5 tons. Therefore, I could not conclude that the failure of the rope was reasonably likely in view of the limited number of broken wires cited. Furthermore, the Inspector did not address the effect the automatic braking system would have on the likelihood of injury should the rope fail. I conclude that the Secretary has not established that the violation was significant and substantial.

PENALTY

Although I concluded that the violation was not significant and substantial under the Mathies test, nevertheless, I believe it was moderately serious: the safety of 34 people was involved each time the mantrip was lowered. A defective rope to some degree put that safety at risk. The violation resulted from Rushton's negligence. Considering the criteria in § 110(i) of the Act, I conclude that an appropriate penalty for the violation is $400.

ORDER

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

1. Order 2404261 is AFFIRMED, including the special findings that it was caused by unwarrantable failure. The order is MODIFIED to delete the special finding of significant and substantial. The Notice of Contest is thus DENIED in part and GRANTED in part.

2. Citation 2404251 charging a violation of 30 C.F.R. § 75.516 is VACATED.

3. Citation 2404252 charging a violation of 30 C.F.R. § 75.1103-4(a) is VACATED.

4. Citation 2404253 charging a violation of 30 C.F.R. § 75.326 is VACATED.

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

CITATION/ORDER		PENALTY
2404227		$ 58.00
2547350		98.00
2404261		400.00
	Total	$556.00

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 20 1987

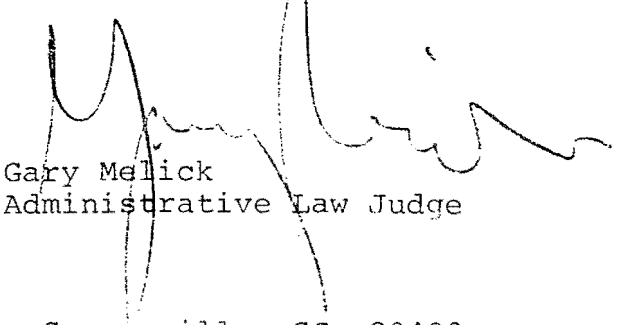
GARY K. RATCLIFF, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-159-D
v.	:	
	:	PIKE CD 86-18
CROCKETT COAL COMPANY, INC., Respondent	:	

DECISION

Before: Judge Melick

By order dated February 27, 1987, Respondent was held in default as to the issue of liability in this case. In accordance with that order the Complainant, Gary K. Ratcliff, thereafter filed a statement of costs and damages and served a copy of that statement upon Respondent by certified mail on March 9, 1987. Respondent has not contested the costs and damages asserted therein.

Accordingly, it is hereby ordered that Respondent, Crockett Coal Company, pay within 30 days of the date of this decision those amounts for which payment may be authorized under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, namely, $10,043.00 plus interest computed in accordance with the formula set forth in this Commission's decision in Secretary ex rel. Bailey v. Arkansas Carbona Company, 5 FMSHRC 2042 (1983) (copy attached). This order constitutes the final disposition of this proceeding before this Judge.



Gary Melick
Administrative Law Judge

Distribution:

Gary K. Ratcliff, 105 Bedford Court, Summerville, SC 29483 (Certified Mail)

William Miracle, Superintendent; Jerry Davis, President, Crockett Coal Co., Inc., P. O. Box 2880, Wise, VA 24293 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-231 A. C. No. 46-01329-03637
v.	:	
	:	Morton Mine
UNITED STATES STEEL MINING COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearance: Mark R. Malecki, Esq., Office of the Solictior, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania and Carl Peters, Senior Mine Inspector, Chesapeake, West Virginia, for Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) seeks a Civil Penalty for an alleged violation by Respondent of 30 C.F.R. § 75.1106. Pursuant to notice, the case was heard in Charleston, West Virginia on December 9, 1986. Charles Knotts and Carl E. Jenkins testified for Petitioner, and Theodore Cobb and Thomas Cummings testified for the Respondent. The Parties filed Proposed Findings of Fact and Briefs on February 17, 1986. No reply briefs were filed.

Findings of Fact

1. On October 29, 1985, at 10:00 a.m., at Respondent's Morton Mine, Charles Knotts (in his capacity as a Federal Coal Mine Inspector for the Mine Safety and Health Administration) arrived at the 047-0 section, and proceeded to a scoop to determine whether a citation written concerning that scoop had been abated. He then proceeded to an area marked "B" on Petitioner's Exhibit 3. He paused for approximately 5 minutes at this spot and noticed sparks from welding opertions, which were going on in

the second crosscut outby the face area, some 140 feet away from him. Knotts approached the area where the welder was working on a continuous mining machine. Knotts testified that he observed the welder, Theodore Cobb, from a distance of 5 or 6 feet welding on the continuous miner for a period of 5 to 6 minutes. During this time Cobb did not take a reading for methane with a methanometer. No other individual was observed making a methane test either. (Cobb testified that he had taken a methane test that morning before he started welding, and this was corroborated by the testimony of Thomas Cummings, Respondent's electrical foreman. Cobb also testified that he made frequent and regular tests during the welding operation. His testimony also differed from Knotts' version concerning what occurred after Knotts approached the area in which Cobb was working. I adopted Knotts' testimony that when he observed Cobb for 5 to 6 minutes, from a distance of 5 to 6 feet there was no testing of methane. My conclusion, in this regard, is based on observations of the witnesses' demeanor while testifying about this issue.)

2. The Morton Mine liberated 700,000 cubic feet of methane per day in the first quarter of the inspection year 1986, and 1,000,000 cubic feet per day in the last quarter of the inspection year 1985.

3. If the methane level accumulates to 5 percent of total air or more and no methane checks are being made, the gas could be ignited by welding and cause an explosion. Coal dust increases the likelihood of explosion and would cause the ensuing explosion to travel beyond the section in question.

4. The ventilation system at the Respondent's Morton Mine circulates over 1,000,000 cubic feet of air per minute. On the date of the citation there was sufficient air in the area to keep it clear of methane.

5. In the 047-0 section there are fans located on both sides to keep the air free of methane gas.

6. Methane could accumulate in the mine in the event of a failure in the ventilation control system if the lime stone blocks get "out of kilter" (Tr. 53.), or if a fan stops working. A failure of one fan would have only a "miniscule" effect on the ventilation in the section. (Tr. 146.)

7. The ventilation system could also fail if there is a roof fall on an overcast, or there is a curtain interruption which could occur if it is knocked down with a piece of mobile machinery. There was no testimony presented as to whether these occur in normal mining operations. A block stoppage, causing a failure of a ventilation system, could be crushed in a "moving action," from the mine roof or bottom. (Tr. 186.) There is no evidence that this is a common occurrence in the subject mine.

8. Knotts was asked whether it is possible that there can be interruptions in the Respondent's ventilation system and he stated "all things are possible, but it is not probable that there is going to be any major ventilation change." (Tr. 135.)

9. There was no evidence of any interruptions in the ventilation system on the date the citation was issued.

10. On October 29, 1985, when Cobb first began to weld, prior to the issuance of the citation, he made a gas test with a methanometer and no methane was detected. Immediately after Knotts determined that a violation had occurred in the welding area, no methane was detected in a check for methane.

11. Cobb was asked in direct examination whether he conducted a search for fire during the period in question and he answered in the affirmative "....but it was too wet to worry about fire." (Tr. 241.) In essence, he further testified that he always looks for fire and that whenever he puts a rod in and takes his hood up he will look at the immediate area and see if there is a fire. (In contrast, it was the testimony of Knotts that when he stood for 5 or 6 minutes near Cobb, who was welding, the floor of the mine was not felt by the latter to see if there were burning pieces of slag. I adopted Knotts' testimony due to my observations of the witnesses' demeanor, and also because this testimony is directed specifically to what occurred while Knotts observed Cobb welding.)

12. Sparks falling on coal and coal dust could present a fire hazard.

13. Knotts testified that on the day in question the mine floor was damp to dry, but not wet. On the other hand, Cobb testified that the area beneath where he had worked on the miner was wet. I adopted this testimony as it was corroborated by Cummings, and also in light of the fact that both Cobb and Cummings testified that before Cobb started to weld on the mining machine it was washed off with a water hose.

14. Cobb was asked whether he saw any float coal dust and he answered in the negative. Knotts on the other hand testified that he saw float coal dust on the machine and that there were "combustibles" on the floor. (Tr. 105.) I have adopted the testimony of Knotts with regard to "combustibles" on the floor, as it was not contradicted. Also, Cobb and Cummings testified that before the machine was washed off it was scraped. It is thus conceivable that some coal dust might have been formed in the scraping process.

15. The welding, performed by Cobb on October 29, was to the head (front) of the mining machine which was located at a crosscut between two entries. I accepted Knotts' version placing the head of the miner almost flush with the entry. Knotts testified that, in essence, after he stopped Cobb from welding, rock dust was brought from a distance of approximately 140 feet, and that the fire extinguisher was 4 or 5 breaks away. On the other hand, Cobb testified that the fire extinguisher was on a header adjacent to the power center in the next entry to the right of the tail end of the mining machine, and outby the break (crosscut) in which the miner was located. His testimony placed the rock dust in that same entry along the welding machine to the right of the power center. I accepted Cobb's testimony, in this regard, as it was corroborated by Cummings. Also, it is noted, that Knotts testified that he was not in that specific area, and did not recall where the power center was located, and even said that it was possible that there was a fire extinguisher and rock dust in the area as indicated by Cobb and Cummings.

16. The blocks or pillars between entries are approximately 60 to 70 feet in length, and the entries are approximately 20 feet in length.

17. The failure to have a fire extinguisher or rock dust immediately available during welding could reasonably have led to an increased fire or explosion hazard since a fire would not have been immediately put out.

18. An ignition, due to an accumulation of methane at the site of welding, without the presence of coal dust would cause severe burns to persons in the immediate area. If coal dust is present, and an explosion results, it would cause serious injury or fatalities.

19. There are generally 10 miners in a section crew, and approximately 200 miners were at the Morton Mine the day the citation was issued.

20. On the date the citation was issued, Cummings, the electrical foreman, was present in the area the entire time that Cobb was welding and was supervising him.

The Parties stuplated that:

1. The Morton Mine had an annual hours worked or tonnage of 11,130,942 in 1985 and the Respondent had an annual hours worked or tonnage of 814,854 in 1985.

2. The Respondent had 783 inspection days in the period November 1, 1983 through October 31, 1985, and was assessed 536 violations other than single penalty assessments timely paid.

3. The fine proposed by Petitioner will not adversely effect the Respondent's ability to continue in business.

4. The violation was timely abated.

Regulatory Provisions

30 C.F.R. § 75.1106 provided as follows:

> ... Welding, cutting or soldering with arc or flame in other than a fireproof enclosure shall be done under the supervision of a qualified person who shall make a diligent search for fire during and after such operation and shall, immediately before and during such operations, continuously test for methane with means approved by the Secretary for detecting methane. Welding, cutting, or soldering shall not be conducted in air that contains 1.0 volume per centum or more of methane. Rock dust or suitable fire extinguishers shall be immediately available during such welding, cutting or soldering.

Issues

1. Whether Respondent made a diligent search for fire during welding on October 29, 1985.

2. Whether Respondent continuously tested for methane during welding on October 29, 1985.

3. Whether rock dust was immediately available during welding on October 29, 1985.

4. Whether a fire extingusher was immediately available during welding on October 29, 1985.

5. If a violation of § 75.1106, supra, occurred, was it of such a nature as could have significantly and substantially contributed to the cause and effect of a safety hazard.

6. If a violation of § 75.1106, supra, occurred, whether such violation was caused by Respondent's unwarrantable failure to comply with § 75.1106, supra.

Conclusions of Law

Jurisdiction

Respondent, as owner and operator of the Morton Mine, is subject to the provisions of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction over the Parties and subject matter in this proceeding.

Violation of Section 75.1106

Based on my observations of the demeanor of Knotts and Cobb, I found Knotts' testimony credible that during the 5 or 6 minutes that he watched Cobb welding, the latter did not test for methane. Section 75.1106, supra, provides that during welding methane should be tested for "continuously." Webster's New Collegiate Dictionary (1979 edition), defines continuous as "marked by uninterrupted extension in space, time, or sequence." Inasmuch as neither Cobb or anyone else tested for methane during the 5 minutes of welding, observed by Knotts, I conclude that the testing was not done "continuously," and as such § 75.1106, supra, was violated.

I found Knotts' testimony credible that during the 5 or 6 minutes that he observed Cobb welding, the latter did not feel the floor of the mine to see if there were burning pieces of slag. Cobb testified that, in essence, whenever he changed the rod he had his hood up, and he would notice whether there was a fire in the area under him. He indicated that he always looks for fire "but it was too wet to worry about a fire." (Tr. 241.) Section 75.1106, supra, requires that during welding the search for fire be "diligent." Webster's New Collegiate Dictionary, (1979 edition), defines "search" as "...to look into or over carefully or thoroughly in an effort to find or discover something...." [Emphasis added.] This same source defines "diligent" as "characterized by steady, earnest, and energetic application and effort." Based on these definitions, I conclude that although Cobb would have noticed a fire when he removed his hood, he did not make a diligent search for fire during the time that he was observed by Knotts. As such, a violation of § 75.1106, supra, has occurred.

I found credible the testimony of Cobb and Cummings that a fire extinguisher and rock dust, on October 29, 1985, were located at the next entry and outby the areas by which Cobb was welding. Specifically, I adopted Knotts' testimony which placed the area in which Cobb was working, one entry removed from the areas Cummings and Cobb testified to be the location of the fire extinguisher and rock dust. Accordingly, one would have to traverse the length of a pillar, approximately 50 feet, and then travel some distance outby to reach the fire extinguisher and rock dust.

Webster's New Collegiate Dictionary (1979 edition), defines "immediately" as, "(1) in direct connection or relation....; (2) without interval of time...." Due to the distance involved between the welding site where Cobb was welding, and the fire extinguisher and rock dust on October 29, 1985, I find that the latter two items were not "immediately available," as required in § 75.1106, supra, and as such that section was violated.

Significant and Substantial

The Petitioner has, in essence, alleged that the nature of Respondent's violations of § 75.1106, supra, fall within the purview of § 104(d)(1) of the Act, as they "...could significantly and substantially contribute to the cause and effect of a coal ... mine safety or health hazard...." (§ 104(d), supra) In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3-4.)

As discussed above, infra, I have already found that a mandatory safety standard, i.e., 30 C.F.R. § 75.1106, has been violated. Accordingly, the first element of Mathies, supra, has been satisfied.

Knotts' testimony was not contradicted that, in essence, if as a result of not testing for methane, undetected methane increases to five percent of total air, a fire or explosion could occur in the event the ventilation system fails. Thus, it is concluded that not testing for methane contributed to some extent to the hazard of a fire or explosion. It has already been found, infra, that neither a fire extinguisher nor rock dust were "immediately available," at the site of Cobb's welding. Accordingly, in the event of a fire or explosion, caused by excess methane being ignited, the hazard would be increased because, due to the placement of the fire extinguisher and rock dust, the fire would not be immediately put out.

Cobb testified that while welding, upon lifting up his hood he would be able to check the exact area in which he was working. However, that there was no evidence that specifically there was any search for fire, or welding sparks, on or about the miner. Although Cobb and Cummings testified, in essence, that there was not coal dust on the miner, I adopted Knotts' testimony as to the presence of coal dust on the miner. Inasmuch as Cobb had testified that prior to the welding he and another miner had scraped the mining machine of coal, it is likely that coal dust, to some extent, had remained, even after it was washed down. I concluded that Cobb did not make a diligent search for fire. Thus, there is a likelihood that some sparks might have remained undetected on the floor or on the miner. I accepted Knotts' testimony that there were combustible items on the floor, and that there was coal dust on the miner. Thus, I conclude that the failure to make a diligent search for sparks did, in combination with the evidence of coal dust and combustible items, contribute to a fire hazard.

Accordingly, I conclude that the second element of Mathies, supra, has been established in that the violation did contribute to a discrete safety hazard.

As interpreted by the Commission in Secretary of Labor v. Consolidation Coal Company, 6 FMSHRC 189, at 193 (February 1984), the third element articulated by the Commission in the Mathies, supra, "embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not."

According to the testimony of Carl E. Jenkins, Federal Coal Mine Supervisor, the Morton Mine is considered to liberate more methane then many other mines in the area, and, indeed, in the last quarter of the inspection year 1985, it was found to liberate 1,000,000 cubic feet per day. Knotts has indicated that an accumulation of methane in concentrations of more than 5 percent of total air, could lead to an ignition or explosion. Jenkins testified that, in essence, although the area in which Cobb was welding is not considered to be a high liberator of methane, there was a "possibility," that methane could accumulate between 5 and 15 percent. However, Jenkins indicated that, at the location where Cobb was working, a couple of breaks outby the face, normally he would not expect to find methane. Furthermore, Knotts indicated that Respondent's ventilation system, which has the purpose of keeping the air free of methane gas, is very effective, and that on the day that he issued the citation there

was sufficient air in the area to keep it free of methane. It appears further, from Knotts' testimony, that the only way in which methane would increase to the point to where it would constitute a fire or explosion hazard, would be in the event of a failure of the ventilation system. In essence, it was the testimony of Knotts and Jenkins that a failure of the ventilation system could occur: if a fan would stop working, if the check curtains would become interruped, if the lime stone blocks would get "out of kilter," (Tr. 53.) if the block stoppings would get crushed, or if there would be a roof fall on an overcast. However, Knotts indicated that "it's not probable that there is going to be any major ventilation change." (Tr. 135.) He further stated that the failure of one fan would have only a "miniscule" effect on the ventilation in the section. (Tr. 135-136.) Jenkins said that usually interruptions of a block curtain could occur if it is knocked down with a piece of mobile machinery, but he did not offer any opinion on the likelihood of this event occurring. Also, there was no evidence presented as to the likelihood of the lime stone block getting "out of kilter," (Tr. 53.) the roof falling on an overcast, or the crushing of block stoppings. In this connection, Knotts testified that the latter condition occurs from a "moving action" from the mine roof or bottom, (Tr. 186.) but there was no evidence presented that this is a common occurrence in the Respondent's mine.

There was evidence presented that there have been at least 12 cited violations of the Respondent's ventilation plan in the last 2 years. However, Jenkins, in essence, testified that there was no way that he could ascertain whether any of these violations were specifically for any failure of the ventilation system.

Accordingly, it must be concluded that Petitioner has failed to establish that there was any reasonable likelihood of a failure of Respondent's ventilation system to the extent that it would cause methane to accumulate in a high enough concentration as to constitute a hazard. Therefore, it must be concluded that it has not been established that there was a reasonable likelihood that a fire or explosion will occur as a result of Cobb's failure to continuously test for methane.

I have adopted the testimony of Cobb and Cummings that on the morning of October 25, 1985, prior to welding, the miner was washed down. It is likely that the washing would have caused the miner and the area around it on the floor, to be somewhat wet. Taking this factor into account, I find that the Petitioner has not met its burden in establishing that there was any reasonable likelihood of combustible materials or coal dust on the floor or on the miner, being in a dry enough state to have been ignited by sparks caused by the welding operation. It thus is not established that as a result of the failure of Cobbs to make a diligent search for fire, there was a reasonable likelihood of a fire.

Therefore, based upon on all of the above, I conclude that it has not been established that the violations herein were "significant and substantial."

(I conclude, based upon the testimony of Jenkins, that in the unlikely event of a fire or explosion either could have reasonably been expected to result in fatalities or serious injuries to miners in the blast or fire area.)

Unwarrantable Failure

At the date the citation was issued, Cummings, the electrical foreman, was supervising Cobb directly and was in the area the entire time that Cobb was welding. As such, he was in the position to observe Cobb, and thus should have known of his failure to continuously test for methane during the welding. He also should have known that no one else was testing for methane. In the same fashion, he should have known that Cobb was not making a diligent search for fire during the welding. Further, inasmuch as he knew the location of the fire extingusher and rock dust, he thus should have known that it was not "immediately available," during the welding. As such, I conclude that the violation of § 75.1106, supra, was due to Respondent's "unwarrantable failure."

Civil Penalty

I have considered all of the criteria in § 110(i) of the Act. All criteria have been stipulated to except the Respondent's negligence and the gravity of the violation. I conclude that Respondent, in violating § 75.1107, supra, acted with a high degree of negligence. Further, since I found that the violation was not "significant and substantial," I conclude that its gravity was only moderately serious. I conclude that a fine of $400 is appropriate.

ORDER

It is ORDERED that Order Number 2717216, is modified to a § 104(a) Citation. It is further ORDERED that Respondent pay the sum of $400 within 30 days of the date of this decision as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 25 1987

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 85-279-R
v.	:	Citation No. 2403981; 7/17/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-113
	:	A.C. No. 36-00856-03557
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for Rushton Mining Company (Rushton).

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton filed a notice of contest challenging a citation issued July 17, 1985, alleging a violation of 30 C.F.R. § 75.301-5. On July 22, 1985, the citation was modified to charge a violation of 30 C.F.R. § 75.316 rather than § 75.301-5. After a number of extensions, an order was issued on November 13, 1985 under § 104(b) of the Act because of Rushton's failure to abate the alleged violative condition. The Secretary filed a petition for the assessment of a civil penalty for the violation charged in the contested citation. Because the two cases involve the same citation and order, they were consolidated for the purposes of hearing and decision.

Pursuant to notice, the case was called for hearing in State College, Pennsylvania on November 18, 1986. Donald J. Klemick and Alex O'Rourke testified on behalf of the Secretary. Raymond G. Roeder and Lemuel Hollen testified on behalf of Rushton. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Rushton is the owner and operator of an underground mine in Centre County, Pennsylvania, known as the Rushton Mine. The mine has 260 employees and an annual production of 660,000 tons of coal. The annual dollar volume of sales in 1984 exceeded 22 and one-half million. Rushton is a subsidiary of Pennsylvania Mines Corporation. On the basis of the foregoing, I find that Rushton is a large operator. Rushton had a history of 257 violations in the two years prior to the violation involved here, 12 of which were violations of 30 C.F.R. § 75.316. This history is not such that a penalty otherwise appropriate should be increased because of it.

Rushton had an approved ventilation system and methane and dust control plan in effect for the subject mine. The basic plan was not introduced into evidence, nor were any revisions or Secretary-imposed additional requirements except those directly involved in this proceeding. Rushton is required to submit ventilation plans for MSHA's review every 6 months. Such plans were submitted in June 1985, December 1985, and June 1986. None of these plans contained provisions related to the installation of a CO monitor in the intake shaft. However, it is common to submit proposed additions or modifications to the plan between the regular 6 month submissions. When approved they are generally incorporated in the mine map accompanying the next 6 month submission. The CO detector, however, does not appear in the mine map as part of the ventilation plan.

Rushton had problems during the winter months with its intake air shaft in that the concrete lining of the shaft was deteriorating because of acidic water dripping into the shaft and freezing. Rushton decided in early 1985, to reline the shaft with an insulating material to prevent the freezing and ice buildup. Its intention was to have the work performed in July during the miners' vacation.

On April 6, 1985, Rushton wrote to MSHA District Manager Donald Huntley seeking approval of a proposal to reline the shaft using a sandwich-type panel composed of a corrugated FRP sheet against the wall, a sheet of heavy gauge polyethylene film, a

4 inch thick polyisocyuranate foam sheet, and a 28 gauge corrugated steel sheet to complete the panel. The request indicated that the work could be done only during the miners' vacation period in July. On April 10, 1985, MSHA declined to approve the plan on the ground that combustible material is not permitted in an intake air shaft. This referred to the polyisocyuranate foam sheet. The MSHA letter of disapproval was signed by Alex O'Rourke for District Manager Huntley. On April 24, 1985, MSHA and Rushton officials met in Pittsburgh to discuss the problem. An MSHA Tech Support chemical engineer recommended using a polystyrene foam insulating material. On May 22, 1985, Rushton submitted a revised plan, proposing the use of a foam panel fabricated from modified polystyrene beads instead of the polyisocyuranate. On June 4, 1985, MSHA approved the revised plan with the additional requirements that a continuously monitoring carbon monoxide detector be installed in the shaft bottom area, and a plan detailing what action Rushton will take if carbon monoxide is detected. This plan was required prior to completion of the shaft work. On July 8, 1985, Rushton submitted a letter enclosing a copy of its plan for installation of the carbon monoxide monitor and a copy of the purchase order for the monitor. The letter stated that the monitor would be installed as soon as it is received.

On July 17, 1985, Inspector Donald Klemick issued a citation charging a violation of 30 C.F.R. § 75.301-5 because "the approved plan for repairing the intake shaft was not being followed . . .. A continuously monitoring carbon monoxide detector was not installed nor were precautions being taken to test for carbon monoxide while work was being conducted in the shaft and men were underground." The citation fixed the time for abatement as August 9, 1985. It also required that Rushton test for CO on each shift and record the results. The record is not clear as to the dates the construction began and was completed. The work was in progress when the citation was issued (Wednesday, July 17), and the Inspector was under the impression that it was to be completed by the end of the week (July 20). Rushton's Mine Superintendent Raymond Roeder stated that he believed the work was performed during the last two full weeks in July. At any rate, it is clear that the relining was being performed on July 17, and was completed on or before July 27, 1985. There were miners working underground on July 17, changing a belt drive unit near the bottom of the slope.

On July 22, 1985, after discussion with his supervisor, Inspector Klemick modified the citation to charge a violation of 30 C.F.R. § 75.316. On the same day, MSHA wrote to Rushton "to clarify the portions of the Law that were reviewed in approving [the] plan submitted on May 22, 1985, and approved on June 4, 1985." The letter stated that the work and materials in the

shaft were covered under 30 C.F.R. § 77.1900 and the requirements for a CO detector were covered under the mine ventilation system and methane and dust control plans, 30 C.F.R. § 75.316. This was the first notice to Rushton that the CO plan was required under § 75.316.

On July 30, 1985, MSHA approved the plan for the installation of a CO detector with certain stipulations. On August 16, 1985, the time for abatement was extended to October 23, 1985, because a revised plan for the installation of a CO monitor was submitted for approval, and the detector had been ordered but had not arrived at the mine. On September 16, 1985, Rushton submitted a revised plan for installing the CO monitor after discussing the prior plan with Inspector Klemick. On October 28, 1985, MSHA wrote that the revised plan "is not acceptable in the present form." Further information concerning the protection of the miner who will test for CO if the CO detector becomes inoperable was required. On October 29, 1985, the abatement time was further extended to November 8, 1985, because the CO detector had arrived and "installation procedures are in effect."

On November 13, 1985, Inspector Klemick issued an order of withdrawal under § 104(b) of the Act because the condition cited had not been abated. The order stated that "the revised plan submitted September 16, 1985, was not acceptable per the District Manager's letter of October 28, 1985, which requested a response from the operator to complete the evaluation of the plan. Since a response had not been submitted another extension of time cannot be justified." The order directed that testing with an approved CO detector be continued and the results recorded.

On November 15, 1985, a revised plan for the installation of the CO monitor was submitted to MSHA by Rushton. On December 2, 1985, MSHA notified Rushton that the revised plan was acceptable. On December 13, 1985, Inspector Klemick terminated the order because the CO detector was installed and a plan was approved by MSHA on December 2.

REGULATION

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

[STATUTORY PROVISIONS]

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The

plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

ISSUES

1. Does the evidence establish a violation of 30 C.F.R. § 75.316?

2. If a violation is established, was it abated timely?

3. If a violation is established, was it significant and substantial?

4. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Rushton was subject to the provisions of the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

VIOLATION

A mine operator is required to adopt and have approved by the Secretary a ventilation system and methane and dust control plan suitable to the conditions and the mining system of the mine in question. The Secretary may require "additional or improved equipment" and "other information" before approving a submitted plan. When a plan has been approved, the mine operator is required to follow it, and failure to do so may be cited as a violation of a mandatory standard. Ziegler Coal Company, 4 IBMA 30 (1975), aff'd sub. nom. Ziegler Coal Company v. Kleppe, 536 F.2d 398 (D.C. 1976); Mid-Continent Coal and Coke Company, 3 FMSHRC 2502 (1981). Because a ventilation plan creates, in effect, mandatory health and safety standards, and possible penalties, it is imperative that the scope and meaning of the plan be clear and unambiguous. In this case, on the day the citation was issued, neither Rushton nor the Inspector considered the shaft repair work to be covered under the approved ventilation plan. Although MSHA officials apparently treated it as a ventilation matter, none of the correspondence or

discussions between MSHA and Rushton prior to the date of the citation referred to the ventilation plan. Because of these facts, I conclude that as of July 17, 1985, the Secretary's requirements concerning the relining of the intake air shaft and the installation of a CO detector were not made part of the approved ventilation plan: adequate notice was not given to the mine operator that the requirements were imposed as part of the ventilation plan. Therefore, the citation did not properly charge a violation of 30 C.F.R. § 75.316 and must be vacated. I am not holding that the relining of the shaft and the installation of the CO detector could not properly be brought within the ventilation plan requirements, but only that notice to the mine operator of MSHA's intention to do so is a prerequisite to enforcement of the requirement by citation and imposition of a penalty. Because such notice was not given in this case, the citation was issued in error, and no penalty may be imposed. Because I am vacating the citation, the issues with respect to the § 104(b) order are moot.

ORDER

Based on the above findings of fact and conclusions of law, citation 2403981 issued July 17, 1985, charging a violation of 30 C.F.R. § 75.316 is VACATED. No penalty is assessed. The proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge

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MAR 25 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-23-M
	:	A.C. No. 09-00265-05506
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND COMPANY, Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Carl Brown and Steve Brown, Brown Brothers Sand Company, Howard, Georgia, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $1,940, for four alleged violations of certain mandatory safety and reporting standards found in Parts 50 and 56, Title 30, Code of Federal Regulations. Hearings were held in Macon, Georgia, on September 15, 1986, and February 19, 1987. The petitioner filed posthearing briefs, but the respondent did not. However, I have considered the oral arguments made by the respondent during the course of the hearings in the adjudication of this matter.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety and reporting standards,

and if so, the appropriate civil penalty to be assessed for those violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) findings concerning the violations are supportable.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated that the respondent is subject to the Act, as well as to the jurisdiction of MSHA and the Commission. They also agreed that the respondent is a small sand mine operator employing 9 to 10 employees, and that the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business. They agreed that the respondent's history of prior violations for the period October 3, 1983 through October 2, 1985, is reflected in exhibit P-1, an MSHA computer print-out listing 18 violations. They also agreed that three of the violations issued in this proceeding were timely abated, but MSHA asserted that Citation No. 2521411, concerning the lack of service brakes on a welding truck was not (Tr. 16-18).

Bench Rulings

I ruled that the question concerning the alleged "unwarrantable failure" on the part of the respondent as stated in the section 104(d)(1) and (2) orders and citations issued by the inspector was not an issue in this civil penalty proceeding. See: MSHA v. Black Diamond Coal Mining Company, Docket No. SE 82-48, 7 FMSHRC 1117 (August 1985) (Tr. 12-13).

MSHA's oral motion to modify section 104(d)(1) Order No. 2007656, July 19, 1985, 30 C.F.R. § 50.30(a), to a section 104(a) non-"S&S" citation was granted (Tr. 12, 14).

MSHA's motion to amend its proposed civil assessment for section 104(d)(2) Order No. 2521411, 30 C.F.R. § 56.9087, from $400 to $150 was granted (Tr. 4, February 19, 1987).

Findings and Conclusions

History of Prior Violations

Exhibit P-1 is an MSHA computer print-out summarizing the respondent's compliance record for the period October 3, 1983 through October 2, 1985. That record reflects that the respondent was issued 18 citations and orders, for which civil penalties in the amount of $3,031 were assessed. The information submitted reflects that the respondent has paid no civil penalty assessments for the 2-year period in question, and has either contested the violations or has been issued deliquency letters by MSHA for non-payment of some of the violations. For an operation of its size, I cannot conclude that respondent's compliance record is such as to generally warrant any increases in the civil penalties which I have assessed for the violations which have been affirmed in this case.

With respect to the respondent's past non-compliance with the reporting requirements of 30 C.F.R. § 50.30(a), I have taken this into consideration in the civil penalty assessment for the violation of that standard which has been affirmed in this case.

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

The parties have stipulated that the respondent is a small operator and that the civil penalty assessments proposed by the petitioner in this case will not adversely affect the respondent's ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

Section 104(a) non-"S&S" Citation No. 2007656, issued on July 19, 1985, cites a violation of 30 C.F.R. § 50.30(a), and the condition or practice is described as follows: "The operator failed to file a quarterly employment MSHA Form 7000-2 on time for the 1st and second quarter of 1985 as implemented by Part 50.30A of title 30 C.F.R. The operator constantly fails to submit the man hours report to MSHA. This is an unwarrantable failure."

MSHA's Testimony and Evidence

MSHA Supervisory Inspector Reino Mattson confirmed that he issued the citation in question. Mr. Mattson produced a blank MSHA Form 7000-2, and explained the information required (exhibit P-4). He confirmed that the respondent filed two signed report forms for the first two quarters of 1985, but failed to fill in the required information, including the employee man-hours worked during these time periods. The forms contain the signature of Carl Brown, and the following typewritten statements:

> This report is average for and any report filed by Reino Mattson's forced upon me and my company (exhibit P-4).
>
> This is an average of any and all previous reports forced upon me and my company by Reino Mattson Supervisor for MSHA (exhibit P-5).

Mr. Mattson explained the reasons for requiring information concerning a mine operator's working personnel, hours worked, and production, and stated that it is required to compile statistical reports reflecting the accident incident rate nationwide and for the State of Georgia. The information which is compiled is used to increase enforcement efforts and to assist mine operator's in reducing the accident incident rate. Mr. Mattson produced copies of the type of reports compiled by MSHA, utilizing the information submitted by mine operator's on MSHA Form 7000-2, (exhibits P-6 and P-7).

Mr. Mattson stated that the reporting citation which he issued is the fifth citation issued to the respondent for non-compliance with section 50.30(a). He cited two prior decisions by Commission Judges who affirmed two prior citations and imposed civil penalties for these violations (Tr. 21-34).

On cross-examination, Mr. Mattson confirmed that the respondent submitted the forms, but failed to provide the information on the form as required by section 50.30(a). He reiterated the necessity for providing the required information so as to enable MSHA to assist mine operators in their safety efforts to reduce mine reportable accidents.

Mr. Mattson confirmed that to his knowledge the respondent has had only one reportable accident incident during all of the years it has been in operation, but he was unable to

provide any specific information with respect to this incident.

Mr. Mattson confirmed that he personally had nothing to do with the "special civil penalty assessment" made by MSHA's Office of Assessments with respect to the citation in question. He expressed his view that the proposed penalty reflected the fact that the respondent has in the past refused to file the form with the required information, or simply ignored the filing requirements of section 50.30(a).

Mr. Mattson denied that he has ever threatened the respondent with any criminal sanctions for its refusal to comply with section 50.30(a). He explained that several years ago he simply brought to the respondent's attention the printed information which appears in the first paragraph on the face of MSHA Form 7000-2, concerning possible criminal sanctions for non-compliance.

Mr. Mattson confirmed that he issued the citation on the basis of information received from MSHA's Health and Safety Analysis Center in Denver, Colorado. He explained that MSHA's computerized compliance records confirmed that the respondent had failed to submit the required man-hour and mine personnel information as required for the first and second quarters of calendar year of 1985, and that he issued the citation on the basis of this information which reflected non-compliance. He also indicated that the forms were not timely filed as reflected on the face of the submitted forms.

Mr. Mattson confirmed that due to certain personnel and funding reductions, including a suspension of funding for the enforcement of the Act against sand and gravel mine operators, the respondent's mine was not inspected by his office for a period of 4 years. He also confirmed that the first regular inspection of the respondent's mine during this period was initiated in July, 1985 (Tr. 34-52).

With the court's permission, respondent operator Carl Brown produced a 45 minutes taped conversation concerning a conference held in Inspector Mattson's office on January 22, 1985, concerning a citation for another alleged violation of the reporting requirements of 30 C.F.R. § 50.30(a). Excerpts from the tape, which was played off the record, reflect that the respondent failed to file the required reports for the first three quarters of 1984, and that the single contested citation was issued for this reason.

Fact of Violation

The respondent here is charged with a violation of mandatory reporting requirement 30 C.F.R. § 50.30(a), which states as follows:

> (a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

Aside from his displeasure with the requirements of section 50.30(a), and unsupported allegations of reprisals on the part of the inspector, the respondent offered no testimony in defense of the citation, nor has it rebutted MSHA's prima facie case (Tr. 68).

The respondent has not rebutted the fact that it failed to file the completed forms as required by section 50.30(a). During the course of cross-examining Inspector Mattson, respondent's representative Steve Brown, part owner of the company, implied that since the quarterly reports were filed, it has complied with section 50.30(a). This defense is rejected. It seems clear from the evidence in this case that the information required to be included on the form by section 50.30(a), and the instructions for completing the form found in section 50.30-1, was not submitted by the respondent.

I conclude and find that MSHA has established a legitimate enforcement need for requiring the submission of the information required by mandatory standard section 50.30(a), and that the submission of such information will enable the Secretary of Labor to prepare and disseminate statistical analyses of mine injury frequency rates as mandated by the Act.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has established a violation of

section 50.30(a) by a preponderance of the credible evidence adduced in this case. Accordingly, the citation IS AFFIRMED.

Gravity

Inspector Mattson was of the view that the failure by the respondent to file the necessary reporting information would not result in the likelihood of an injury. He confirmed that he did not consider the violation to be significant and substantial. I agree with these findings by the inspector, and I conclude and find that the violation is non-serious.

Negligence

This is not the first time this respondent has been charged with a failure to comply with the mandatory reporting requirements of section 50.30(a). In a prior decision issued by me on May 1, 1981, Docket No. SE 80-124-M, 3 FMSHRC 1203 (May 1981), a violation was affirmed and a civil penalty of $10 was assessed. In a decision rendered on December 7, 1983, Docket No. SE 83-42-M, 5 FMSHRC 2065 (December 1983), Judge Broderick affirmed a violation and assessed a civil penalty of $100.

MSHA's computer print-out, exhibit P-1, includes two section 104(a) citations issued on February 29, 1984, and January 3, 1985, for failure by the respondent to comply with the requirements of section 50.30(a). The first citation was assessed at $20, and the second at $150, and the print-out reflects that the respondent failed to pay these assessments and was issued deliquency letters by MSHA for its failure to pay. I assume that the January 3, 1985, citation was the subject of the MSHA conference alluded to by the respondent in the tape referred to earlier.

The tape in question also reflects Mr. Brown's displeasure with the reporting requirements of section 50.30(a), the fact that other mine operators purportedly have not responded to MSHA's reporting requirements, and his assertion that Inspector Mattson "threatened" him with possible criminal sanctions some 8 years ago when he discussed with him the reporting requirements of section 50.30(a).

It seems clear to me that MSHA has been more than patient with the respondent with respect to its continued refusal to comply with the reporting requirements of section 50.30(a). As a matter of fact, in at least two instances, including the instant case, where the respondent has failed to file more than one quarterly report, MSHA has issued single citations,

when it could have issued separate citations for each required quarterly report which was not filed.

The respondent has not presented any mitigating excuses for its continued failure to comply with section 50.30(a). As pointed out in my prior decision of May 1, 1981, Mr. Carl Brown considers MSHA Form 7000-2 to be so much "junk mail," and he does not take kindly to being "coerced or forced" to file these forms. I find no such coercion in this case, and Mr. Brown's claims of threats by Mr. Mattson were rejected in my prior decision, and they are rejected here.

I believe the time has come for the respondent to realize the serious consequences which may flow from his continued refusal to comply. As previously stated by Judge Broderick, the fact that the respondent believes the required reports are onerous or unnecessary is no defense to the citations which have been issued by MSHA for its continued non-compliance.

I conclude and find that the evidence adduced in this case, including the respondent's history of non-compliance, reflects a conscience and deliberate disregard and flaunting of the requirements of section 50.30(a). Under the circumstances, I conclude and find that the respondent has exhibited a reckless disregard for the mandatory requirements stated in section 50.30(a), and that its failure to comply is the result of gross negligence on its part.

Good Faith Abatement

MSHA has stipulated that the respondent exhibited good faith in timely abating the violation after the issuance of the order, and I adopt this as my finding.

Civil Penalty Assessment

Although MSHA has modified the original order to a section 104(a) non-"S&S" citation, I am not bound by the $20 civil penalty assessment which is normally assessed by MSHA for such citations. MSHA's proposed civil penalty for the violation is $250. Based on the respondent's history of non-compliance with this standard, and my finding of gross negligence, I conclude and find that a civil penalty of $250 is reasonable and appropriate. Accordingly, I accept and adopt MSHA's civil penalty proposal for the violation in question, and I assess a civil penalty of $250 for the violation which has been affirmed.

Section 104(d)(2) "S&S" Order No. 2521412, issued on September 4, 1985, cites a violation of 30 C.F.R. § 56.14006, and the condition or practice is described as follows:

> The guard for the tail pulley on the railroad car loadout belt conveyor was left off. The guard was laying across the walkway and the belt conveyor was operating. This violation is an unwarrantable failure and this equipment shall not be operated for any purpose until inspected and released by an MSHA inspector.

MSHA's Testimony and Evidence

MSHA Inspector Steve Manis confirmed that he issued the order, and he described the location of the belt conveyor in question. He stated that the conveyor runs horizontally out of a tunnel onto an elevated conveyor belt used to load material onto railroad cars. He identified two photographs of the cited conveyor belt, and identified the location of the tail pulley and unguarded pinch-point, as well as a nearby walkway. He also identified the guard which was left off the tail pulley, and stated that it was lying to the right of the tail section approximately 15 feet across the walkway on the ground (exhibit P-9; Tr. 96-99). He stated that Mr. Greg Brown confirmed that the guard was in fact the guard for the tail pulley, but that he did not know how long it had been off (Tr. 100).

Mr. Manis stated that the conveyor belt was running when he observed the cited condition, and he believed that the failure to replace the guard presented a hazard of someone getting caught in the pinch points between the tail pulley and the conveyor belt. He stated that employees would have a reason to be in the area adjusting idlers, performing welding work, cleaning up, or greasing or servicing the moving parts of the belt. Although there was no one exposed to the hazard when he discovered the condition, Mr. Manis confirmed that he observed footprints in the area, and that there was evidence that someone had been there to clean around the conveyor that morning or late in the afternoon (Tr. 102). He stated that no one knew how long the guard had been off, but since it was partially covered with sand, "it appeared to be off some time." The guard was replaced, and while it may have been put back that same day, he terminated the violation the next day (Tr. 102).

On cross-examination, Mr. Manis stated that the walkway was about 3 feet from the tail pulley, and that it was guarded by a handrail. He stated that someone could get into the unguarded pulley pinch point while cleaning up on the side of the pulley, and that cleanup could not be done in that area from the walkway. Upon examination of three photographs taken by the respondent purporting to be the cited conveyor belt area, Mr. Manis could not state whether they were in fact of the area he cited (exhibits R-1 through R-3; Tr. 102-105).

In response to further questions, Mr. Manis identified the steel structure across that portion of the belt tail where the guard had been removed, and while he agreed that it provided some protection on the sides, the required guard should cover the entire tail section. He agreed that the "square box-type" guard which had been removed would be adequate for this purpose. Although he did not know the specific procedures followed by the respondent in cleaning the area, he stated that the correct procedure is to lock out the belt and shutdown the power before servicing it, and then replacing the guard after the work is completed (Tr. 113). He confirmed that he cited a violation of section 56.14006, because the tail pulley was guarded at one time, but was removed and not replaced (Tr. 114). He did not consider the cited tail pulley area to be "guarded by location" because someone could simply walk up to it, as he did, and it was not up in the air where no one could get to it or reach it (Tr. 116).

Mr. Manis stated that anyone could walk up to the unguarded tail pulley and stick their hand or foot into it "if they wanted to" while cleaning or servicing it, or doing welding work (Tr. 117). He believed someone could do this by bending over while cleaning the belt with a shovel, and he did not believe that one had to get on their hands and knees to reach the pinch point. He stated that while the tail pulley was 3 feet off the ground, the pinch point was at the bottom "right on the ground" (Tr. 119). He stated that clean-up would be done by a long-handled shovel, and the removal of the guard while cleaning would depend on whether there was any sand "runover" (Tr. 121). He confirmed that in order for someone to reach the pinch point, he would have to reach in over or under the steel structure of the conveyor belt as shown in photographic exhibits P-9 (Tr. 121).

Respondent's Testimony and Evidence

Greg Brown testified that the cited area is normally cleaned up by a water hose which sprays water up through the tail pulley and anywhere on the walkway. A shovel is not

usually used unless the belt is "overloaded so much that it's got spillover." In that case the clean-up man "gets as much as he can out with a shovel . . . and we use water as much as possible" (Tr. 123). Mr. Brown identified the three photographs (exhibits R-1 through R-3) as the identical cited area in question. He identified the location of the unguarded pinch-point as the area at the bottom and behind the steel belt tail structure at the approximate same location identified by Inspector Manis (Tr. 124).

Mr. Brown stated that since water is used to wash off the tail pulley area, the only reason for removing the guard would be to loosen or tighten the belt, and that this would be done with the belt turned off. He stated that the pinch point in question was an inch or two off the ground, and that someone would have to be on their hands and knees below ground level in order to stick his hand into the tail pulley (Tr. 126).

On cross-examination, Mr. Brown stated that when the belt is cleaned with water, it may or may not be running, but that when shovels are used, it is turned off. When asked whether it makes a difference to the clean-up man whether it is turned off while cleaning it with water, he replied "I don't reckon it does to them" (Tr. 127). He confirmed that any accumulated material which is cleaned from the belt tail by water goes out of a drain pipe located some 5 or 6 feet away and out of the view of the photographs (Tr. 127). He confirmed that the cited tail pulley area has always been guarded during the 2 years he has been at the mine, and he agreed that the photograph of the guard which was removed as depicted in exhibit P-9, looks like the same guard (Tr. 128). The only reason for the removal of the guard would be to tighten the belt, and he confirmed that the walkway is approximately a foot or a foot and a half from the the pinch point area. He stated that the belt is on roller wheels and is swung away from the walkway when it is not in use. He confirmed that the belt was operating when the inspector issued the citation (Tr. 130).

Mr. Brown stated that to reach the pinch point area from the walkway, one would have to be kneeling on the walkway and reaching down for a distance of 1 to 2 feet. He stated further that any washing down of the tail section is done from the walkway because the clean-up man can reach just about every spot from that location, and he knows of none which cannot be reached from the walkway. The walkway has a standard 4-foot high guardrail that extends the full length, and it also has a mid-rail (Tr. 133).

Mr. Steven Brown confirmed that the tail section guard was initially installed because MSHA required it, and he agreed that unless it is taken off to make some adjustments to the belt, it is required to stay on. He also agreed that if the guard is taken off after the belt is adjusted, it should be put back on (Tr. 135). He stated "that may have been what he was doing that morning. I don't know" (Tr. 136).

With the Court's permission, the respondent produced a video tape showing the cited tail pulley area in question, and pointed out the pinch point area below the adjacent walkway. Mr. Carl Brown confirmed that he made the video the night before the hearing, and MSHA counsel Welsch pointed out that the video reflects that the cited tail pulley was a "wing pulley" rather than a "smooth cylinder pulley" (Tr. 141).

MSHA's Arguments

In its posthearing brief, MSHA asserts that there is no question that at the time of the inspection, the guard for the tail pulley section of the railroad car loader was off and no testing was being conducted. In fact, the conveyor was operating and loading sand. Although the pinch point of the tail pulley was close to floor level, MSHA states that it is important to note that it was close to the walkway and capable of catching loose clothing. Also, it may have been hazardous to employees doing cleanup around the conveyor, and without the guard, there was nothing to prevent an employee from being caught in the pinch point.

MSHA asserts that it is relevant to note that the cited standard only requires the guard to be securely in place, and does not require a showing of any hazard to employees. Since the guard had been removed and not replaced, MSHA concludes that a violation has been established.

MSHA concludes further that in accordance with the criteria of National Gypsum Co., Cement Division, 3 FMSHRC 822 (April 1981), it is clear that the lack of a guard would likely have caused serious injury to employees who worked in maintaining the tail pulley and to employees who regularly used the walkway in the area. Therefore, MSHA further concludes that the violation should be considered "significant and substantial."

Fact of Violation

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 56.14006, which provides that "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

After careful consideration of all of the testimony and evidence adduced with respect to this violation, I conclude and find that MSHA has established a violation by a preponderance of the credible evidence in support of its case. The respondent has not rebutted the fact that the guard which is normally in place at the tail pulley location was not in place at the time the inspector observed it, and that the conveyor belt was indeed operating loading sand. As correctly stated by MSHA, no testing was taking place and the guard was not in place. Accordingly, the violation IS AFFIRMED.

With regard to the "significant and substantial" finding by the inspector, MSHA's assertion that it was likely that someone could catch their clothing in the exposed pinch point from the walkway, is rejected. The walkway was guarded by a handrail, and I find it highly unlikely that anyone standing on the walkway while hosing down the tail pulley, or simply walking by, could inadvertently catch their clothing in the pinch point. Such a person would have to fall through or over the protective railing, and contort their body under the steel framework of the conveyor to reach the pinch point.

With regard to the likelihood of anyone reaching the pinch point while servicing or cleaning the tail pulley area while inside the protective walkway immediately adjacent to the unprotected tail pulley assembly, I conclude and find that the facts here support the inspector's "significant and substantial" finding in that respect. Although Greg Brown testified that normal cleaning is conducted by means of a water hose, he confirmed that the cleaning of belt spillage or overloading is also done by means of a shovel, and that the clean-up person "gets as much as he can with a shovel." Any cleanup would require the person handling the shovel to get in and behind the tail pulley apparatus beyond the steel conveyor framework.

I am not convinced that any cleanup with a shovel would always be done from the walkway, but would require the cleanup person to be in close proximity of the pulley assembly itself. Further, any belt adjustments would necessarily be made by someone in close proximity to the tail pulley assembly rather than from the walkway. More importantly, although Mr. Brown

stated that any cleanup work accomplished by means of a shovel would normally be done with the belt turned off, he conceded that it made no difference to the cleanup person whether the belt was turned on or off while it was being cleaned with water. Under these circumstances, any cleanup person who would be indifferent as to whether the belt was shutdown or not, would likely place himself in a hazardous situation should he venture close to the unguarded tail pulley assembly while attempting to hose it down or clean it up by means of a shovel, and would reasonably likely suffer injuries if he were to contact the unguarded tail pulley assembly. The fact that it may require him to be on his hands and knees to reach the particular pinch point in question, does not detract from the fact that he could become entangled in the tail pulley assembly which is normally guarded by a large "box-type" steel mesh guard which is required to be in place. Under these circumstances, the inspector's "significant and substantial" finding IS AFFIRMED.

Gravity - The violation was serious in that the lack of guarding could have contributed to an accident. The pinch point, and more so the unguarded conveyor tail pulley assembly, were readily accessible to any cleanup or maintenance man in the area.

Negligence - The violative condition was readily observable and should have been detected by the respondent exercising reasonable care. I conclude and find that the violation was the result of ordinary negligence on the respondent's part.

Good Faith Compliance

MSHA agrees that the respondent abated the violation in good faith, and I adopt this as my finding on this issue.

Civil Penalty Assessment

Taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $175 is reasonable for the violation which has been affirmed.

Section 104(d)(1) "S&S", Citation No. 2521744, issued on July 19, 1985, cites a violation of 30 C.F.R. § 56.9003, and the condition or practice is described as follows: "The Dodge welding truck was not provided with service brakes and the brake pedal was missing. This welding truck was cited for

service brakes in the past and was taken out of service for termination. This is an unwarrantable failure."

On September 4, 1985, Inspector Steve Manis issued section 104(b) Order No. 25221410, removing the truck from service. The order reads: "No apparent effort was made by the mine operator to repair the service brakes on the Dodge welding truck. This equipment shall not be operated for any purpose until inspected and released by an MSHA inspector."

MSHA's Testimony and Evidence

MSHA Inspector Ron Grabner confirmed that he inspected the respondent's mine on July 19, 1985, and issued the citation on the welding truck. He also confirmed that during a subsequent inspection of the truck conducted with Inspector Manis on September 4, 1985, three photographs of the truck were taken, and he identified them as exhibit P-11. Other than the repair of certain axle bolts that were loose and missing on July 19, he was aware of no other changes made to the truck from July 19 to September 4, and the truck looked the same on both days (Tr. 147-151).

Mr. Grabner stated that the truck was converted so that it could be used as a "welding truck," and that it was moved about the plant to service and repair equipment. When he first observed it in July, it was located at the new shaker screen which was under construction, and when he observed it in September, it was located at the old shaker screen. He confirmed that the service brake which normally activates the rear wheels to stop the truck was completely removed from the truck, and the brake pedal itself was missing (Tr. 151-154).

Mr. Grabner stated that during his inspection on July 19, leadman Jim Miller informed him that the truck had been driven to the new shaker screen location (Tr. 154-166). Mr. Grabner believed that the missing brake condition constituted a significant and substantial violation because it was reasonably likely that an accident resulting in serious injuries could occur before the condition was corrected (Tr. 155). When he returned to the mine in September, the brakes had not been repaired, and Mr. Manis issued an order. At that time, Greg Brown confirmed that no effort had been made to repair the truck (Tr. 157).

On cross-examination, Mr. Grabner confirmed that he has never observed the cited truck moving, but that Mr. Miller advised him that it would run. However, when he was there in September the battery was dead, and the truck could not be

started. He confirmed that section 56.9003, does not specifically require a brake pedal, but does require the truck to have "adequate brakes" that will stop the truck within a reasonably safe distance. He agreed that a truck travelling 10 miles an hour would stop quicker than one going at 40 miles an hour (Tr. 159).

In response to further questions, Mr. Grabner stated that the truck had a hand brake which is used to hold the truck after it is stopped, but he did not consider this to be the service brake (Tr. 160). He believed that the loose axle bolts which he detected on July 19, would affect the hand brake if they came loose from the axle and the truck would not stop (Tr. 161-163). He confirmed that no citation was issued for the axle condition (Tr. 164).

Mr. Grabner agreed that the truck is moved from one location to another at the plant as needed for the purpose of performing construction work that requires welding, and that it may remain in one location for days before being moved to another location. He confirmed that he was told the truck was driven to the first location on July 19, and towed by means of a front-end loader to the second location on September 4 (Tr. 168-169). The truck did not have any doors, windshield, and one of the headlights was broken. However, no citations were issued for these conditions (Tr. 171). He cited it because it had no service brakes or a brake pedal to indicate that service brakes were indeed on the truck (Tr. 173).

Mr. Grabner stated that the truck at one time was a four-wheel drive truck, and he identified respondent's photographs, exhibits R-4 through R-6 as the sited truck (Tr. 174). Mr. Grabner confirmed that the axle condition was repaired when he returned to the plant in September, but he could recall no explanation by the respondent as to why the brakes were not repaired. He also confirmed that during a conference with Carl Brown, Mr. Brown took the position that the hand brake was sufficient to stop the truck, and that it is driven in first or second gear at low speed (Tr. 177, 181). Although the truck was never tested, and Mr. Grabner did not ride in it, Mr. Miller did show him in July how the hand brake was used, and Mr. Grabner had no reason to believe that the hand brake would not hold the truck once it was stopped (Tr. 178). However, he would not accept the hand brake as compliance because it was not intended to be used for stopping the truck when it's moving (Tr. 180-181).

Mr. Grabner was not aware of any thorough MSHA inspection of the truck to determine whether or not it was otherwise equipped with a braking system or parts (Tr. 182). However, he was not aware of anything inside the cab of the truck which could be used to activate any service brake system, and the respondent never informed him of any mechanism inside the truck which could be used to activate any such brake system (Tr. 183).

Inspector Reino Mattson testified that he first became familiar with the cited truck in June, 1977, when MSHA Inspector Michael Denny cited it as an imminent danger because it was operating without service brakes, and the brake pedal was cut off (exhibit P-13). Since the truck was drivable, Mr. Mattson would not permit the installation of a tow bar to serve as abatement, and the order remained in effect. Eighteen months later, the respondent was advised by MSHA that the installation of the tow bar for the purpose of towing the truck would serve as compliance, but that the order would remain in effect in case the truck were driven under its own power. Subsequently, in November, 1978, the welding apparatus was removed from the truck, and it was parked with the engine frozen. Under the circumstances, since the truck was out of service, the order was terminated (Tr. 184-187).

Mr. Mattson stated that after the order was lifted, he met Mr. Carl Brown at a subsequent hearing sometime in 1980, and Mr. Brown asked him about putting the truck back in service. Mr. Mattson stated that he informed Mr. Brown that if he repaired the brakes there would be no problem. Mr. Brown replied "I'm not touching the brakes," and Mr. Mattson informed him that "we're probably going to have some more problems." Subsequently, when Mr. Mattson was at the plant with Mr. Grabner on July 19, 1985, he discovered that the welder and cutting torches were put back on the same truck, and Mr. Miller and Greg Brown informed him that the truck had been driven to the location where it was discovered and that it had also been used around the plant. Under the circumstances, Mr. Grabner issued the citation (Tr. 187-188). Mr. Mattson could not state when the truck was actually put back into service (Tr. 191).

On cross-examination, Mr. Mattson confirmed that from the time the truck was taken out of service in 1978, until the inspection of July 19, 1985, he never observed the truck being driven and it was parked "in the bone yard. And the weeds were as high as the truck and it was not in operation" (Tr. 192).

Respondent's Testimony and Evidence

Carl Brown testified that he acquired the truck in question 18 to 20 years ago as government surplus. He described the truck as a four-wheel drive 1935 Army weapons carrier. He exchanged scrap iron worth $50 for the truck, and when he got it, it did not have a brake pedal or a windshield, and it was used to transport the welder. He stated that the hand brake was used and "it would drag the wheels in that sand." Even without a hand brake, with four-wheel drive travelling at 3 or 4 miles an hour, the truck would stop itself (Tr. 192-193).

Mr. Brown stated that after the truck was cited as an imminent danger it "was parked in the weeds," and the order was lifted when a tow bar was installed to the truck, but the truck still "sat in the weeds." Subsequently, his grandson Daryl, who was then 15 years old, performed some work on the motor and got the truck running again and drove it to the plant office area (Tr. 194). Mr. Brown did not know whether the truck was driven to the location where it was found by the inspectors on July 19, 1985 (Tr. 196).

MSHA's counsel Welsch stated that the truck was cited on July 19, 1985, because it had no service brakes, and the inspectors were led to believe that it was driven from the weeded area to the location where they observed it, and the tow bar had been removed (Tr. 199). MSHA was previously under the impression that the truck was to be towed or moved around by a front-end loader using the tow bar (Tr. 200-201). Mr. Brown confirmed that the cited truck has never been involved in an accident and has never run into anything (Tr. 208).

Greg Brown confirmed that when the inspectors came to the plant in September 1985, he informed them that the truck "would not run or crank." He confirmed that the truck was towed to the old screen location a week prior to the inspection, and it remained there until it was again towed to the shop sometime in December and the back axle would not roll free because the "rear end gummed up on us." He confirmed that the truck was used to haul a welder, and when it was moved from the shop to the plant it travelled less than a quarter of a mile. If it were driven, the top speed was 10 to 15 miles an hour, and he never had any trouble stopping it with the hand brake, and it never ran into anything or anybody (Tr. 211-212). If the clutch were engaged, the truck would "roll free" depending on its speed (Tr. 213).

On cross-examination, Mr. Brown admitted that either he or Mr. Miller drove the truck from the shop to the location where it was observed by the inspectors on July 19, 1985. He confirmed that he started working at the plant 2 years ago, and that the truck was in operation when he got there. He did not know how long it had been operational prior to that time. The truck would be "towed some" and depending on the distance, it would also be driven, "if it cranked" (Tr. 217). The truck had a hand brake, and it was driven in four-wheel low gear drive at speeds less than 10 to 15 miles an hour because of the muddy and sandy conditions and for traction.

Mr. Brown stated that the mine grounds do have hills, inclines, and declines, and the main road areas consist of hard compacted dirt. When the truck is driven, it is kept in four-wheel drive and it is slowed down by use of the hand brake and normal deceleration, and he does "what's necessary to stop the vehicle" (Tr. 220). One of the "hired hands" who did the welding usually drove the truck, but if he were not available, he and his brother, or Mr. Miller would drive it. He confirmed that the truck had no brake pedal or service brake, and while he has never examined the truck to determine whether it had a master cylinder or brake pads, there was no way to engage such a system from the cab while driving it. He confirmed that the hand brake is a system separate from any service brake system, but that the truck can be driven with the hand brake on, and it will stop the truck. He never experienced any trouble travelling down an incline using the hand brake (Tr. 221-223).

Mr. Brown confirmed that since the 104(b) order was issued, the truck has been parked at the shop and has not been used. The welder was removed and another portable welder has been purchased (Tr. 224). Counsel Welsch confirmed that the order has never been terminated, and as long as the truck is out of service, the respondent is in compliance with that order. Mr. Welsch confirmed that he is satisfied that the truck has been taken out of service (Tr. 225).

Jim Miller testified that he has worked for the respondent for 10 years, and confirmed that he has driven the truck in question during this period but never had any trouble stopping it with the hand brake. The truck has never run into anything, and it can possibly travel at a speed of 15 miles an hour. The distance from the shop to the pit area is a quarter of a mile. The truck was towed from the new screen area to the old screen area and remained there for a couple of months. Since the rear end was locked up, it would not be used for welding, and it was taken to the shop where it has

been parked ever since (Tr. 227). Mr. Miller stated that he has never "demonstrated" the truck to any inspector, and has never been asked to (Tr. 227).

Daryl Brown, testified that he is 20 years of age, and that he was 14 or 15 when he discovered the cited truck "in the weeds" in the pit during the summer. He confirmed that he cleaned the plugs, filed the points, cleaned out the gas tank, and installed a new battery and drove the truck to the plant office to show his grandfather, Carl Brown. His grandfather had him drive the truck "to the edge of the hole" where he took a picture of him in the truck. He had no trouble stopping the truck with the hand brake. Since that time, he has driven the truck while working at the site 2 months a year and has had no trouble stopping it (Tr. 230).

Mr. Carl Brown stated that the truck has not been used since the order was issued in September, 1985, that it has been taken out of service and he does not intend to use it again. He conceded that on the basis of the testimony adduced in this case, the truck was operated and driven prior to the time it was inspected and cited, but he insisted that it had an adequate hand brake (Tr. 238-239).

At the conclusion of the testimony, Mr. Carl Brown informed the Court that the truck in question was on a flat-bed truck parked across the street from the courtroom, and he requested that I view it. In the presence of the parties and all of the witnesses, I climbed onto the flat-bed truck and looked into the cab and the truck and observed that it was equipped with a handbrake, but that the foot pedal for the service brakes was missing. I also observed that the doors, windshield, and one headlight were missing. Mr. Steve Brown demonstrated the hand brake, and I observed the hand brake mechanism in place on the undercarriage of the truck (exhibit R-6; Tr. 249).

MSHA's Arguments

During oral argument at the conclusion of his case, MSHA counsel Welsch took the position that as long as the truck in question is towed and not driven, and complies with mandatory standard 30 C.F.R. § 56.9-70 (now 56.9070), with respect to the installation of a substantially constructed tow bar, the truck would not have to be equipped with service brakes. It was counsel's understanding that this was precisely the compromise agreed upon by MSHA when the previously issued imminent danger order was terminated in 1978, after the truck was taken out of service, and MSHA was under the assumption that

the truck would thereafter be towed and never driven (Tr. 233-237).

Mr. Welsch took the further position that even though the truck may have been driven a short distance at low speed and could be stopped by means of the hand brake, in order to comply with the cited standard, the truck must be equipped with separate service brakes, notwithstanding the fact that the broad language of section 56.9003 requiring "adequate brakes" does not specifically differentiate between hand brakes or service brakes. Mr. Welsch stated further that the hand brake was not designed to stop the truck while it is moving (Tr. 239-241).

In its written posthearing arguments, MSHA argues that it is uncontroverted that the cited welding truck was being operated without any service brakes, and that the brake pedal had been removed and had not been replaced during the 20 years the truck had been owned by the respondent. In order to stop the truck, the driver operated the truck in the low gear and used the clutch and hand brake. However, this should not replace the need for service brakes as required by the standard, and as conceded by the respondent, the hand brake was designed as an emergency brake to hold the truck once stopped. It was not designed to be used as a service brake to stop the truck.

MSHA maintains that the phrase "adequate brakes" as used in the standard clearly implies that service brakes exist and are used as designed by the manufacturer, and that the respondent's use of hand brakes or any other means to stop the truck is beyond the manufacturer's design and should not be considered compliance with the standard. The fact that respondent's employees testified that they had no problem in stopping the truck, using a variety of methods, should be considered irrelevant to finding a violation.

MSHA further maintains that the purpose of the standard is to prevent accidents. "Adequate brakes" as required by the standard should be given its commonly used meaning which would include service brakes on the vehicle designed for stopping, as well as hand brakes to hold the vehicle in emergencies. Section 56.9-3 prohibits operator conduct unacceptable in light of common understanding and experience in the industry or when the operator has actual knowledge that a condition or practice is hazardous. Concrete Materials, Inc., 2 FMSHRC 3105 (October 22, 1980). "Adequate brakes" clearly requires at least service brakes and not the use of other methods or the ingenuity of the employee to stop a vehicle.

To hold otherwise would negate the intent of the standard and place compliance within the whimsical imagination of the operator. Medusa Cement Company, 2 FMSHRC 819 (April 8, 1980).

MSHA concludes that the respondent's violation of section 56.9-3, was cited as "significant and substantial" within the meaning of section 104 of the Act and the Commission's decision in National Gypsum Co., Cement Division, 3 FMSHRC 822 (April 1981). In support of this conclusion, MSHA asserts that clearly, the lack of any service brakes presented a "significant and substantial" hazard to the driver and employees working in the vicinity, and, as noted by the respondent, the plant had hard compact roads and steep inclines which would require a good braking system. Respondent's need for service brakes was substantial.

Fact of Violation

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 56.9003, which provides that "Powered mobile equipment shall be provided with adequate brakes."

I conclude and find that MSHA has clearly established that the cited truck in question was not equipped with any service brakes, and that the only means of stopping it while it was being driven was by the use of the hand brake and low gears and clutch. The respondent's suggestion that the hand brake constituted an "adequate" braking system within the meaning of section 56.9003, is rejected. As correctly argued by MSHA, the hand brake was designed to hold the truck once it was stopped, and it was not designed to be used as a regular service brake to stop the truck while it was being driven about the plant site. The fact that the respondent used a variety of methods to stop the truck is irrelevant, and MSHA's interpretation and application of the facts here presented to the requirements stated in the cited standard are correct and I adopt them as my findings and conclusions on this issue. The violation IS AFFIRMED.

Significant and Substantial Violation

I agree with MSHA's assertion that the lack of service brakes on the truck was a significant and substantial violation. In view of the condition of the truck, including the total lack of a brake pedal or service brakes, and the fact that it was driven periodically over a long period of time with no service brakes, I believe it is reasonably likely that the lack of brakes could contribute to a potential

hazard to anyone driving it, particularly on inclines. In the circumstances, I conclude that the cited condition would likely contribute to the hazard. Accordingly, the inspector's "significant and substantial" finding IS AFFIRMED.

Gravity

While it is true that the truck in question was sometimes towed and left for several days at several construction sites where it was used for welding and repairs, the tow bar had been removed, and it seems clear to me from the testimony in this case that it was also driven without a service brake by Greg and Daryl Brown, leadman Miller, and the person who was doing the welding work.

Although the distance from the shop to the pit area was approximately a quarter of a mile, I am not convinced that the use of the truck was restricted to that particular route as a matter of routine. Daryl Brown testified that for the 2 years he has worked at the site, he has driven the truck while working there during time off from school. As a matter of fact, he admitted that his grandfather had him drive the truck to the edge of the pit, using only the hand brake to stop it, so that he could take his picture. Mr. Miller testified that he has driven the truck during the 10-years he has worked at the site. Greg Brown testified that "depending on the distance," the truck would be driven rather than towed, and that he had no problem stopping it while driving down inclines.

Although the respondent has established that the truck may not have been driven faster than 10 to 15 miles an hour, the total lack of any service brakes exposed the driver to a potential hazard likely to cause serious injury in the event of an accident. Having personally viewed the truck, I am of the view that the lack of doors, no windshield, and a makeshift driver's seat were conditions that posed additional hazards to the driver. Further, the position of the hand brake is such that the driver would have to bend down to reach it, rather than simply engaging a foot pedal, and in an emergency situation, this would impact on his reaction time. Under all of these circumstances, I conclude and find that the violation is serious.

Negligence

I agree with MSHA's argument that the respondent exhibited a high degree of negligence with respect to this

violation. The evidence clearly establishes that the respondent has for many years known that the truck should not be operated without service brakes.

Good Faith Compliance

The evidence establishes that the respondent failed to repair the service brakes or to otherwise abate the conditions cited on July 19, 1985, and that an order had to be issued on September 4, 1985. Further, I believe it is clear from the facts in this case that the respondent has exhibited total indifference with respect to the conditions cited. Under the circumstances, I conclude and find that the respondent has demonstrated a lack of good faith with respect to the violation in question.

Civil Penalty Assessment

Taking into account the requirements of section 110(i) of the Act, particularly the respondent's high degree of negligence and lack of good faith compliance with respect to the violation, I believe a civil penalty assessment in the amount of $600 is reasonable and appropriate.

Section 104(d)(2) Order No. 2521411, issued on September 4, 1985, cites a violation of 30 C.F.R. § 56.9087, and the condition or practice is described as follows:

> The automatic warning device which would give an audible alarm when the 644 C John Deere Front-end loader was put into reverse was not operating. Greg Brown stated that an electrical short was causing the back-up alarm not to work. This violation is an unwarrantable failure and this equipment shall not be operated for any purpose until inspected and released by an MSHA inspector. 644C John Deere Front-end loader, Serial No. 644 CB 4033930.

MSHA's Testimony and Evidence

MSHA Inspector Ronald Grabner stated that while conducting an inspection at the mine on July 19, 1985, he observed the front-end loader in operation that morning at the load out bins and the back-up alarm was working. Later in the day when the loader was inspected, the alarm was not working. Mr. Greg Brown determined that a fuse had burned out, and he replaced it. However, the new fuse burned out, and Mr. Brown surmized that there was a short circuit in the system. Since

the loader was parked, and since it appeared that something had malfunctioned between the time the loader was first observed in operation and the time it was inspected, no citation was issued. Mr. Brown stated that he would correct the condition (Tr. 9-15).

On cross-examination, Mr. Grabner stated that the loader was originally equipped with a backup alarm, and since there is an obstructed view to the rear, a backup alarm is required. When asked why he did not cite a second 644-B loader, Mr. Grabner stated that when he observed it operating in the stock pile area near the service tunnel, he did not believe that the view to the rear from the driver's seat was obstructed (Tr. 15, 17).

MSHA Inspector Steve C. Manis confirmed that during an inspection on September 4, 1985, he observed the front-end loader in question in operation, and he identified a photograph of the loader which he took that day (Tr. 23, exhibit P-1). Mr. Manis stated that the loader was operating at the surge tunnel area pushing sand into the surge pile where it falls through the tunnel top and is carried away on conveyor belts. Although the tunnel is not a normal travelway to get from the front of the plant to the back, it could be used as a travelway since it is closer than walking around the surge pile and bins. The loader was equipped with a back-alarm, but it was not working. Mr. Greg Brown confirmed that the alarm had a short, and when asked why it had not been repaired, Mr. Brown replied that "he just hadn't had time." Mr. Manis issued the citation, and subsequently terminated it on September 6, 1985, when repairs were made (Tr. 28).

Mr. Manis confirmed that he got into the loader next to the operator and looked out the rear view window and found that the engine hood, air cleaner container, and the muffler and tailpipe constituted an obstructed view to the rear of the machine (Tr. 29). Mr. Manis observed no one serving as an observer, and the machine was not equipped with rear view mirrors. He believed the violation was "significant and substantial" because the loader was operating in an area where there was a potential for people walking through the area, and there is a blind spot to the rear of the machine (Tr. 31).

On cross-examination, Mr. Manis confirmed that he saw no one around the loader while it was in operation. He also confirmed that the photograph he took was in connection with a broken windshield violation, and that it was not taken to support the backup alarm violation (Tr. 32-34). Mr. Manis

also confirmed that he did not observe the loader at the end of the surge tunnel, but saw it operating in the surge pile area (Tr. 37). He also confirmed that he made a notation of the serial number of the cited loader (Tr. 39).

Mr. Manis confirmed that he was aware of the fact that the,loader in question had previously been inspected by Inspector Grabner, and that Mr. Greg Brown assured Mr. Grabner that he would repair the defective backup alarm (Tr. 51).

Respondent's Testimony and Evidence

Greg Brown confirmed that he accompanied Inspectors Grabner and Manis during their inspections on July 19 and September 4, 1985. He confirmed that he advised Mr. Grabner that the 644C loader may have had a short, but that he also advised him that he was not sure and that "it could be anything" (Tr. 55). Mr. Brown stated that none of the equipment operators have ever advised him that their view to the rear is obstructed, and he confirmed that he has operated both loaders and has had no problem with any obstructed view to the rear (Tr. 57). Mr. Brown conceded that if someone 5 feet 8 inches tall were to stand behind the machine "jam up to the radiator," he would probably not be seen by the equipment operator (Tr. 58-59). Mr. Brown could not state how far back from the machine the person would have to stand before he could be seen by the operator (Tr. 59). He confirmed that when he backs up the loader, he looks to the rear because "I don't want to hit nobody, or hit anything else. I run over a chainsaw before, like that" (Tr. 62).

Mr. Brown confirmed that the respondent traded the 664-B end-loader, and purchased another 644-C model which was not equipped with a backup alarm, and no citation has been issued for a lack of a backup alarm (Tr. 63). MSHA counsel Welsch explained that this new 664-C end-loader has factory equipped convex backup mirrors, and supervisory Inspector Reino Mattson confirmed that MSHA's district office has given verbal approval for the use of the mirrors in lieu of a backup alarm, as long as the visibility to the rear is good and there are no obstructions to the rear (Tr. 65-69).

Carl Brown stated that 40 to 50 trucks are on his property every day, and they are regulated by OSHA and have no backup alarms. Mr. Brown claimed that loaders and tractors received by other operators regulated by OSHA have told him that when they receive this equipment they take the backup alarms off "because it's a nuissance around the working place" (Tr. 20). For demonstration purposes, Mr. Brown played a

video tape of several front-end loaders, included the one cited in this case, operating in the same area of the mine as the one which was cited (Tr. 75-76).

Inspector Grabner was called in rebuttal, and he confirmed that the day prior to the hearing, he and Inspector Manis observed a John Deere front-end loader model 644-C, similar to the one cited in this case, at another sand mining operation. They took measurements to determine the distance of any obstructed view to the rear in relation to any foot traffic to the rear of the machine. Mr. Grabner stated that he sat in the driver's seat and Mr. Manis, who is 5-feet 10-inches tall, stood at the rear of the machine, and after taking measurements, they determined that looking over Mr. Grabner's left shoulder, Mr. Manis first came into view at a distance of 8 feet 5 inches from the rear of the machine to where he was standing when the measurement was taken. Although the distance to the rear looking over his right shoulder was not measured, Mr. Grabner believed that it would have been considerally further back from where Mr. Manis was standing because of the obstruction of the muffler and air cleaner (Tr. 77-78).

On cross-examination, Mr. Grabner stated that the front-end loader in question is used for a multitude of purposes and at different locations at the mine site and is not used solely for one job at one particular location. He could not state whether he observed anyone around the loader in question when he first observed it. While it may operate in an area with no people around it, the next day it may be operating in an area where there may be people or other equipment working around it. Under these circumstances, he believed that the lack of an operable backup alarm on the cited loader constituted a "significant and substantial" violation, and he agreed with Inspector Manis' finding in this regard (Tr. 81-87).

Fact of Violation

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 56.9087, which provides as follows:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level

or an observer to signal when it is safe to back up.

I conclude and find that MSHA has established by a clear preponderance of the evidence that the cited end-loader in question had an inoperable backup alarm at the time the inspector cited it. I also conclude and find that MSHA has established that the view to the rear of the cited end-loader is obstructed, and that an operable backup alarm was required. This conclusion is supported by the testimony of the inspectors who made measurements of a similar end-loader, and it is corroborated as well by the photograph produced by the respondent, exhibit R-2, which shows that the air cleaner, muffler, and tailpipe behind the operator's compartment constitute obstructions to the operator's view to the rear of the machine. The respondent has not rebutted this fact, and the inspector's findings are further corroborated by the testimony of Greg Brown who testified that he ran over a chainsaw while operating the machine in reverse because he obviously did not see it, and that he always looks to the rear because he does not want to run over anyone or hit any equipment which may be operating to the rear of the machine. The violation IS AFFIRMED.

Significant and Substantial Violation

I agree with the inspector's finding that the lack of an operable backup alarm constituted a significant and substantial violation. While it may be true that the inspector could not recall observing anyone working the proximity of the machine while it was operating, the respondent had not rebutted the fact that the machine is used for a multitude of purposes at different locations at any given time. Under these circumstances, it is reasonably likely that the lack of an operable backup alarm could contribute to a potential hazard to equipment operating in the same area on any given day, or to mine personnel working in the area. Accordingly, the "S&S" finding by the inspector IS AFFIRMED.

Gravity

I conclude and find that the lack of an operable backup alarm constituted a serious violation. Although the respondent had two serviceable end-loaders, there is no evidence that it only used one of them, and I believe that given the volume of truck traffic on the site on any given day, one may reasonably conclude that both end-loaders were regularly used by the respondent in the course of its mining operation. Further, since it would appear that the defective backup

alarm was not repaired for over a month after it was first noted by the inspectors, one may reasonably conclude that the hazard exposure continued during this same time frame.

Negligence

I conclude and find that the respondent exhibited a high degree of negligence with respect to this violation. Respondent was put on notice on July 19, 1985, that the defective backup alarm needed attention, and Mr. Greg Brown knew that this was the case and assured the inspectors that it would be taken care of. However, more than a month past before any repairs were made, and they were made only after the inspector issued an unwarrantable failure order during his next visit to the mine.

Good Faith Compliance

Petitioner has stipulated that the violation was abated in good faith after the order was issued, and I accept this as my finding on this issue.

Taking into account the requirements of section 110(i) of the Act, particularly the respondent's high degree of negligence, I believe a civil penalty assessment in the amount of $100 is reasonable and appropriate.

ORDER

On the basis of the forgoing findings and conclusions, the respondent IS ORDERED to pay to the petitioner the following civil penalty assessments within thirty (30) days of the date of this decision:

Citation Order No.	Date	30 C.F.R. Section	Assessment
2007656	07/19/85	50.30(a)	$ 250
2521412	09/04/85	56.14006	$ 175
2521744	07/19/85	56.9003	$ 600
2521411	09/04/85	56.9087	$ 100

George A. Koutras
Administrative Law Judge

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