

MARCH 1988

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MARCH 1988

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

Utah Power & Light Company v. Secretary of Labor, MSHA, Docket No.
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No cases were filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 22, 1988

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. PENN 86-44-R
 : PENN 86-92
RUSHTON MINING COMPANY :

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

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), the issues are whether Commission Administrative Law Judge James Broderick erred in finding that Rushton Mining Company ("Rushton") violated mandatory underground coal mine safety standard 30 C.F.R. § 75.1434(a)(2) and whether the violation was caused by Rushton's "unwarrantable failure" to comply with that standard. For the reasons that follow, we affirm the judge's finding of a violation of section 75.1434(a)(2), but reverse his finding of unwarrantable failure.

The Rushton Mine is an underground coal mine located in Centre County, Pennsylvania. On the morning of November 5, 1985, Joe Colton, an inspector of the Department of Labor's Mine Safety and Health Administration, conducted an inspection of the mine's wire hoist rope. The hoist rope is used to lower and raise miners and materials into and out of the mine. The machinery that powers the hoist rope is located on the surface in the hoist house. The hoist rope is attached to a 4-foot diameter drum which lowers the rope into the mine when the drum is rotated clockwise and raises the rope when the drum is rotated counterclockwise. From the hoist house, the rope travels approximately 150 feet, where it turns around a sheave wheel before running another 150 feet to the entrance of the mine. At the mine portal, the rope is attached to mine cars that transport men and materials into the mine. As the drum rotates, the mine cars are lowered approximately 650 feet on a slope that is estimated at 17 degrees. Each fully loaded trip of cars transporting miners into the mine ("man trip") puts a load of approximately 5 tons on the rope.

The hoist rope is one inch in diameter, 1100 feet long, and has a breaking strength of more than 50 tons. It is composed of a fiber core surrounded by six wire strands, with each wire strand consisting of 19 individual wires. The hoist rope in service on November 5, 1985, had been in use since May 11, 1985. Under Rushton's policy of changing the hoist rope every six months, unless its condition requires earlier retirement, the rope was due to be replaced later that week.

Before lowering the man trip on November 5, Frank Petriskie, a hoist operator with more than six years of hoisting experience, visually examined the portion of the rope extending from the hoist house to the man trip. While a man trip with 34 miners aboard was lowered into the mine, he examined the remainder of the rope by inspecting it visually and by draping a rag over the rope as it was reeled so that broken wires could snag on the rag. Tr. 12 (November 18, 1986), Tr. 55 (November 19, 1986). Petriskie found no deficiencies in the rope and recorded the results of his examination in the hoist examination record book. Petriskie's notation was countersigned by his supervisor.

Shortly thereafter, Inspector Colton arrived at the mine to inspect the hoist rope. By then the man trip had reached the bottom of the slope and the miners had left the mine cars. Colton went to the hoist house, took a piece of rag, wrapped it around the hoist rope, and instructed Petriskie to raise the hoist rope at the hoist's slowest speed. As the rope was being reeled in, Colton observed a one-inch long gouge in one strand of the rope. Colton told Petriskie to stop the hoist so that the gouge could be examined more thoroughly. Colton testified that in this area he found at least seven broken wires in one lay length of one strand of the rope. 1/ Colton also testified that about two feet farther down the rope he found another gouge with at least five broken wires in one lay.

Section 75.1434(a)(2) requires that a wire rope be removed from service when the number of broken wires within a rope lay length exceeds fifteen percent of the total number of wires within any strand. 2/

1/ A lay length is defined as "the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 629 (1968).

2/ 30 C.F.R. § 75.1434(a)(2) provides in pertinent part:

Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs:

(a) The number of broken wires within a rope lay length, excluding filler wires, exceeds ...

* * * *

(2) Fifteen percent of the total number of wires

Since three broken wires represented 15.8 percent of the 19 wires in one strand of the rope and each of the two damaged areas contained at least three broken wires within a lay length, Colton determined that Rushton had violated section 75.1434(a)(2) and issued to Rushton an order of withdrawal pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). ^{3/} The order indicated that the violation was the result of Rushton's unwarrantable failure, that the violation was of a significant and substantial nature and was due to Rushton's "moderate negligence." Exh. G-1.

Rushton promptly abated the violation by replacing the hoist rope. Subsequently, Rushton initiated a new procedure to examine the rope, whereby Petriskie examines the rope at the hoist house and another miner examines the rope at the sheave wheel while the man trip is lowered into the mine.

At the hearing, Rushton conceded that there were enough broken wires in the hoist rope to satisfy the retirement criteria of section

within any strand;

* * * *

^{3/} Section 104(d)(1) of the Mine Act states:

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

30 U.S.C. §814(d)(1).

75.1434(a)(2). However, Rushton argued that in order to prove a violation the Secretary of Labor also needs to establish that an operator knew or should have known of the presence of the broken wires. The administrative law judge rejected this argument and held that the existence of defects in the rope sufficient to require its retirement constituted a violation of the standard, regardless of whether Rushton knew or should have known of the existence of the defects. 9 FMSHRC 613-614 (March 1987)(ALJ).

In further concluding that the violation of section 75.1434(a)(2) was the result of Rushton's unwarrantable failure, the judge found that Petriskie was a conscientious employee and that because the defects in the wire rope were substantial and "clearly visible on careful examination," Petriskie's failure to detect the broken wires could be due only to a seriously inadequate method of examination requiring Petriskie to do too many tasks at one time. The judge stated that this inadequacy was recognized by Rushton when, after being issued the withdrawal order, it assigned another miner to help Petriskie perform the rope examination. The judge held that the flawed procedure for examining the hoist rope represented a serious lack of reasonable care on Rushton's part. 9 FMSHRC at 615.

Rushton's petition for discretionary review was granted, and we heard oral argument. On review Rushton reiterates its argument that the standard by its terms requires that an operator must know of the existence of defects before its obligation to retire the rope arises. Therefore, in Rushton's view, to establish a violation, the Secretary must prove the existence of the retirement criteria and that the operator knew that the rope met this criteria and nonetheless failed to retire it.

We reject this argument. In interpreting section 75.1434 we look first to its language. Section 75.1434 states that "wire ropes shall be removed from service when any of the following conditions occurs...." (There is no dispute that the conditions set forth in subsection (a)(2) did in fact occur). "Occur" is defined as to "take place" or to "happen." Webster's Third New International Dictionary 1561 (1971). Thus, the standard expressly requires removal from service when any of the criteria for retirement take place or happen. The standard does not provide or imply any requirement that the operator must first have knowledge of the existence of the conditions causing retirement and then fail to retire it before liability for a violation attaches.

Further, section 2(e) of the Mine Act declares that operators with the assistance of miners have the primary responsibility to prevent the existence of unsafe conditions in the nation's mines. 30 U.S.C. §. 801(e). Finding a requirement of operator knowledge would also run counter to an operator's general responsibility under section 2(e) to prevent unsafe conditions in the first instance. Therefore, given the undisputed fact that the rope met the retirement criteria and was not removed from service, we affirm the judge's finding of a violation of section 75.1434(a)(2).

We now turn to the issue of unwarrantable failure. In Emery

Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dism'd per stip., No. 88-1019 (D.C. Cir. March 18, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), we held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history, and judicial precedent. We stated that whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," unwarrantable failure is conduct that is "not justifiable" or is "inexcusable." Only if unwarrantable failure by a mine operator is construed to mean aggravated conduct constituting more than ordinary negligence, can unwarrantable failure sanctions assume their distinct place as intended in the Act's enforcement scheme. See Emery, 9 FMSHRC at 2001. Applying these principles to the case at hand, we hold that substantial evidence does not support the judge's finding that the violation of section 75.1434(a)(2) was the result of Rushton's unwarrantable failure.

The judge's conclusion that Petriskie's failure to detect the broken wires was due to Rushton's seriously inadequate procedure for examining the rope is not supported by the record. Inspector Colton testified that requiring Petriskie to operate the hoist rope and inspect the rope at the same time established a lack of reasonable care on Rushton's part. Colton also based his finding of unwarrantable failure on the fact that he detected the violation shortly after Petriskie had completed his examination without detecting the condition, and because management had countersigned Petriskie's notation of his completed inspection. When Colton inspected the wire rope, however, he used the same examination procedures as Petriskie, using the rag technique and visually examining the hoist rope as it was being reeled. Also, there is no indication in Petriskie's testimony that his duties interfered with his ability to adequately examine the rope. Indeed, Colton testified that "it is conceivable for one person to do both," Tr. 27 (November 18, 1986), and this possibility was reiterated by the Secretary at oral argument before us. Oral Arg. Tr. at 26-27. Colton further conceded that the rope was difficult to examine and that it was possible to miss damaged portions of the rope no matter how carefully it was examined. Tr. 42 (November 18, 1986).

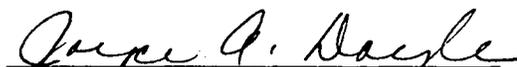
Moreover, Rushton required that the rope be inspected on a daily basis even though the relevant standard (30 C.F.R. § 75.1433) requires inspection only once every 14 days. Rushton also retired its rope every 6 months notwithstanding the absence of any of section 75.1434's criteria requiring replacement. In light of the above, we cannot conclude based on this record that Petriskie's failure to detect the damaged portions of the rope resulted from aggravated conduct exceeding ordinary negligence. The judge's finding that Petriskie was a conscientious employee actually supports a conclusion that at most the oversight resulted from no more than ordinary negligence. The fact that Petriskie's examination took place only shortly before Colton discovered the damage and that Petriskie's report had been countersigned would not

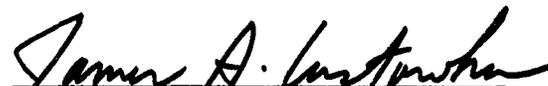
convert ordinary negligence into aggravated conduct. 4/

Accordingly, the judge's finding that Rushton violated section 75.1434(a)(2) is affirmed, the judge's conclusion that the violation was caused by Rushton's unwarrantable failure to comply is reversed, and the proceeding is remanded for reconsideration of the civil penalty. The section 104(d)(1) order is modified to a citation issued pursuant to section 104(a). 30 U.S.C. § 814(a).


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

4/ In view of our disposition of the unwarrantable failure issue, we need not address Rushton's argument that the judge erred in considering Rushton's change in its rope examination procedure after issuance of the withdrawal order.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 1988

WESTERN FUELS-UTAH, INC. :
 :
 v. : Docket No. WEST 86-108-R
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 :
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 :
 v. : Docket No. WEST 86-245
 :
 WESTERN FUELS-UTAH, INC. :

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

DECISION

BY: Backley, Doyle and Lastowka, Commissioners

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Commission Administrative Law Judge Roy J. Maurer concluded that a violation of 30 C.F.R. § 75.200 occurred when a miner employed by Western Fuels-Utah, Inc. ("Western Fuels"), proceeded under unsupported roof at a Western Fuels mine despite his supervisor's order not to do so. 9 FMSHRC 320 (February 1987)(ALJ). Western Fuels petitioned the Commission for review, contending that the judge's decision improperly subjected it to liability for an employee's violative conduct under circumstances in which it should not be held responsible. We adhere to the well-established principle that the Mine Act imposes liability upon operators, without regard to considerations of fault, for violations of the Act committed by their employees. Accordingly, we affirm.

The facts are undisputed. On February 28, 1986, at 10:50 a.m., a fatal accident occurred at Western Fuels' Deserado underground coal mine in Colorado when an unsupported portion of the mine roof fell on Austin

Mullens, a roof bolting machine operator. On the day of the accident, Mullens was working with section foreman Carson Julius in the mine's East Mains installing roof bolts. (Around 10:25 a.m., the foreman had temporarily relieved Mullens' regular partner, who went to lunch.)

Mullens and Julius were using a double-boom, two-person Norse roof bolting machine equipped with an automatic temporary roof support device ("ATRS"). In performing the bolting operation, the miners would place a metal roof mat or "pan" over the ATRS, tram the roof bolter towards the face, raise the ATRS against the roof, drill roof holes for the roof bolts, and install a row of bolts in the roof through the roof mat. Mullens was operating the left-hand boom of the machine installing bolts on the left side of the machine, and Julius was performing the same function with the right-hand boom on that side of the machine.

The two miners set one roof mat and moved the machine forward to install a second. Julius encountered difficulties in drilling the first bolt hole through the mat adjacent to the right rib. The water flow used to control drilling dust was cut off when the water line to Julius' drill became kinked, and his drill stopped. Mullens was able to install one bolt on the left side of the roof mat. To loosen the taut water line to Julius' drill, the miners lowered the ATRS and backed up the roof bolter. When the ATRS was lowered, the right end of the roof mat, which Julius had not been able to bolt through, fell to the floor. Thus, the area of roof from which the mat fell was at that time unsupported.

After straightening out the water line, the miners moved the bolting machine forward again. While standing under supported roof, Julius attempted to lift the fallen mat with a four-foot rod so that Mullens could advance the bolting machine and raise the ATRS under the mat. Julius was unsuccessful and decided to get a longer rod from the storage area in the middle of the roof bolting machine. Just before turning away, he warned Mullens not to go under the unsupported roof.

As soon as Julius began walking away, however, Mullens went under the unsupported roof about seven feet from the last permanent support and attempted to lift the mat manually. Julius, who was near the middle of the roof bolter at that point, turned and twice shouted at Mullens to get back. Mullens did not respond and moments later a large piece of roof fell, killing him.

An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") subsequently issued Western Fuels a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), charging the operator with a significant and substantial violation of 30 C.F.R. § 75.200 in that Mullens had proceeded under unsupported roof for reasons other than installation of temporary support. 1/

1/ Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), provides in relevant part:

No person shall proceed beyond the last permanent

The hearing in this proceeding was conducted before former Commission Administrative Law Judge John A. Carlson. Western Fuels contended below that any violation of section 75.200 was wholly due to the negligence of Mullens, a rank-and-file miner, and that his negligent conduct should not subject it to derivative liability for a violation. Following Judge Carlson's death, Judge Maurer was substituted and, without objection, rendered his decision upon the existing record.

In his decision, the judge concluded that Mullens had violated section 75.200 by proceeding under the unsupported roof. 9 FMSHRC at 322. The judge rejected Western Fuels' challenge to the doctrine of liability without fault under the Mine Act. He stated:

The Commission has consistently and frequently held that an operator is liable, without regard to fault, for violations of the Act or its regulations committed by its employees. ... An operator's negligence has no bearing on the issue of whether a violation occurred. Rather, it is a factor to be considered in assessing a civil penalty.

Id. Among other authorities, the judge cited the Commission's decision in Asarco, Inc.- Northwestern Mining Dept., 8 FMSHRC 1632 (November 1986), pet. for review filed, No. 86-2765 (10th Cir. December 3, 1986), in which the Commission reaffirmed the Mine Act principle of liability without fault. The judge thus held that Western Fuels was liable for the violation of section 75.200, and also affirmed MSHA's significant and substantial finding. In considering the statutory civil penalty criteria (30 U.S.C. § 820(i)), the judge found no negligence on the part of the operator and assessed a civil penalty of \$250. 9 FMSHRC at 323-24. With respect to his finding of no negligence, the judge determined that Mullens had walked out under unsupported roof "contrary to the direct orders of his supervisor" (9 FMSHRC at 323), Mullens' violation was not reasonably foreseeable, proper supervision of the employee was present, and "the operator's training program and its history of disciplining its employees for violations of the mandatory safety standard at issue ... [were] adequate." 9 FMSHRC at 324.

There is no dispute in this case that Mullens' actions in proceeding under unsupported roof violated section 75.200. On review, Western Fuels challenges only the judge's application of the doctrine of liability without fault to impose upon it liability for Mullens' violative conduct. Western Fuels advances two interrelated arguments in

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

Western Fuels' approved roof control plan does not permit persons to proceed beyond the last row of permanent support before temporary support is installed unless they are engaged in installing temporary support. Exh. C-1, p. 9 (Item 2.c.).

support of its position: (1) When read together, sections 104 and 110 of the Mine Act do not permit liability to be placed on an operator unless the operator itself or one of its supervisory agents is actually responsible for a violation; and (2) the Act contemplates only "a kind of strict liability" (W.F. Br. 23), limited to situations in which a violation is attributable to the operator or supervisory agent or, if resulting from the conduct of a rank-and-file employee, also stems in part from the operator's own negligence or fault. Alternatively, Western Fuels asserts that notwithstanding the doctrine of liability without fault, the Commission should recognize an exception in the form of an affirmative defense of unforeseeable employee misconduct. In our opinion, none of Western Fuels' arguments can be reconciled with the basic principles of liability without fault.

We addressed in detail the subject of liability without fault in our Asarco decision. As we noted in Asarco:

The general principle that an operator is liable for the violations of the Act committed by its employees has been stated frequently. Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893 (5th Cir. 1982); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982); American Materials Corp., 4 FMSHRC 415, 419 n. 8 (March 1982); Kerr-McGee Corp., 3 FMSHRC 2496, 2499 (November 1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (January 1981). Cf. Ace Drilling Coal Co., Inc., 2 FMSHRC 790-91 (April 1980), aff'd without opinion, 642 F.2d 440 (3rd Cir. 1981)(construing 1969 Coal Act).

8 FMSHRC at 1634-35. Accord Miller Mining Co. v. FMSHRC, 713 F.2d 487, 491 (9th Cir. 1983). The Mine Act retains the liability without fault structure of its predecessor, the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977)("Coal Act"), and the pertinent Mine Act legislative history shows this retention to have been a deliberate action by Congress. See Asarco, 8 FMSHRC at 1635-36, and authorities cited. As we held in Asarco, rather than being "a determinant of liability," the operator's fault or lack thereof "is a factor to be considered in assessing a civil penalty." 8 FMSHRC at 1636, and authorities cited. 2/

2/ As recently stated by the United States Court of Appeals for the District of Columbia Circuit:

The Act does permit consideration of fault in one context: section 110(i), 30 U.S.C. § 820(i), directs the Commission (and implicitly the Secretary), in setting the level of civil penalties for violations of the Act, to consider, inter alia, "whether the operator was negligent." The presence of this consideration here only serves to underscore its

Citing section 104(a) of the Mine Act, Western Fuels first argues that an operator may be cited for a violation only when an MSHA inspector believes that "an operator ... has violated [the Act], or any mandatory health or safety standard...." 30 U.S.C. § 814(a) (emphasis added). Western Fuels contends that operators and miners are each separately responsible for complying with the Act and that, pursuant to the asserted directive of section 104(a), an operator may be cited only for its own violations. We rejected the identical argument in Asarco, 8 FMSHRC at 1635. While we agree with Western Fuels that section 104(a) and section 110(a), 30 U.S.C. § 820(a), must be read together, what emerges from such construction, as we held in Asarco, is the liability without fault framework of the Act:

Section 104(a) sets forth the duties of mine inspectors in enforcing the Act. It does not define the scope of the operator's liability. The liability of an operator is governed by section 110(a), 30 U.S.C. § 820(a), which states: "The operator of a ... mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty...." (Emphasis added). The occurrence of the violation is the predicate for the operator's liability.

Id. Accord Miller Mining, supra, 713 F.2d at 491; Sewell Coal, supra, 686 F.2d at 1071; Allied Products, supra, 666 F.2d at 893. We also demonstrated in Asarco that the legislative history of section 110(a) and its predecessor, section 109(a)(1) of the Coal Act, 30 U.S.C. § 119(a)(1) (1976)(amended 1977), reflects a clear congressional intent to establish liability without fault in both Acts. 8 FMSHRC at 1635-36.

Western Fuels next asserts that in the previous liability without fault decisions of the Commission and courts, operator fault was always present to some degree. Western Fuels argues that the existing case law is thus consistent with a rule that strict liability does not obtain in circumstances where, as here, operator fault is absent. We disagree. The general doctrine of liability without fault recognized in the referenced decisions has been drawn with sufficient breadth that, by its very terms, it applies to situations in which operators are blameless. The decisions further recognize that the blamelessness of operators in connection with a violation is considered in evaluating operator negligence in terms of the appropriate civil penalty assessment. 30 U.S.C. § 820(i); see also n. 2 supra. For example, in Asarco, the operator was found liable for a violation even though the violation was attributable to an employee's "unforeseeable and idiosyncratic" conduct and the operator itself was not negligent in connection with the violation. 8 FMSHRC at 1634, 1636. Similarly, in Southern Ohio Coal, supra, it was stressed that an operator is liable for violations attributable to even the "idiosyncratic and unpredictable" acts of its

absence in the other provisions of the Act.

Int'l U., UMWA v. FMSHRC and Island Creek Coal Co., No. 87-1136, slip op. at 13 n. 13 (February 23, 1988).

rank-and-file employees (4 FMSHRC at 1462), that such rank-and-file employee negligence is not imputable to the operator for penalty assessment purposes (4 FMSHRC at 1463-64), and that the operator's negligence or lack thereof in such instances must be determined by an examination of the operator's own conduct (4 FMSHRC at 1464-65). The holdings of these decisions and the courts of appeals' decisions cited above cover the full range of liability/negligence circumstances, including those in which the operator is liable for an employee's violation but is without negligence in the context of civil penalty assessment. Accord A.H. Smith Stone Co., 5 FMSHRC 13, 15-16 (January 1983).

Alternatively, Western Fuels asks us to approve an unforeseeable employee misconduct exception to the principle of liability without fault. Such an exception, however, would vitiate the underlying principle. Simply stated, the principle of liability without fault requires a finding of liability even in instances where the violation resulted from unpreventable employee misconduct. As noted, Asarco presented precisely such a situation: the operator, although itself blameless, was held liable for a violation resulting from its employee's unforeseeable and disobedient conduct in failing to comply with supervisory directions to bar down loose ground. 8 FMSHRC at 1631-34, 1636.

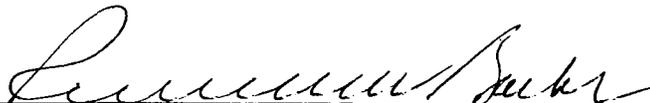
Western Fuels' position in this regard is based upon a defense to liability recognized under the Occupational Safety and Health Act of 1970; 29 U.S.C. § 651 et seq. (1982)("OSHAct"). See, e.g., Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d. 564, 567-71 (5th Cir. 1976). Courts have held that the OSHAct "neither authorizes nor intends" a strict liability standard (Horne, supra, 528 F.2d at 568), and both this Commission and the courts have previously emphasized that liability doctrines drawn from that statute may have no relevance under the Mine Act's scheme of liability without fault. North American Coal Co., 3 FMSHRC 848, 850 n.5 (April 1981) (addressing predecessor scheme of liability without fault under Coal Act); Allied Products, 666 F.2d at 894.

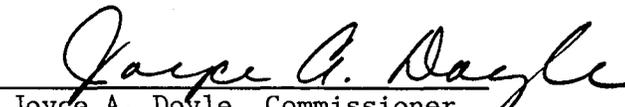
In enacting the Mine Act, Congress formulated a national policy that mine operators were in the best position to further health and safety in the mining industry and that liability without fault would promote the highest degree of operator care. As a key Senate report stated:

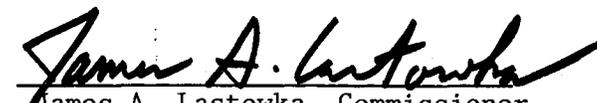
Thus, while miners are required to comply with standards insofar as they are applicable to their own actions and conduct, ... neither the bill, nor current law contemplates that citations and penalties be issued against miners. Operators have the final responsibilities for affording safe and healthful workplaces for miners, and therefore, have the responsibility for developing and enforcing through appropriate disciplinary measures, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

S. Rep. No. 181, 95th Cong., 1st. Sess. 18 (1977), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 606 (1978) (emphasis added). Any appeal to change the Mine Act's principle of liability without fault must be directed not to the Commission but to Congress. Cf. Council of So. Mtns. v. Martin Co. Coal Co., 6 FMSHRC 206, 209 (February 1984), aff'd sub nom. Council of So. Mtns. v. FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985).

For the foregoing reasons, there is no basis for distinguishing this case from prior decisions posing the same issue. The judge properly found from the uncontroverted evidence that a violation of section 75.200 was committed by a Western Fuels employee, and correctly held that Western Fuels was liable for the violation. In considering negligence for civil penalty purposes, the judge appropriately examined Western Fuels' actions in determining that the operator itself was not negligent in connection with the violation. See Asarco, supra. Thus, the judge's decision is consistent with controlling legal principles and is supported by substantial evidence. Accordingly, the judge's decision is affirmed.


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner

Chairman Ford, dissenting:

One would search in vain for a more compelling set of facts than those presented here against which to re-examine the issue of strict operator liability for all violations under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (the Mine Act). Yet the majority, in affirming the judge's decision, continues to hold an absolutist view on the matter in accordance with Secretary of Labor v. ASARCO, 8 FMSHRC 1632 (November 1986).^{1/} Here, as in ASARCO, I continue to hold the view that the Mine Act does not preclude an otherwise blameless mine operator from raising a miner's unforeseeable and idiosyncratic misconduct as an affirmative defense when contesting the Secretary's enforcement actions. Accordingly, I respectfully dissent.

My opinion in ASARCO can be briefly summarized as follows:

- (1) The Mine Act within its four corners need not be read to impose strict liability on mine operators;
- (2) The Mine Act can accommodate a strictly circumscribed affirmative defense based upon unforeseen, idiosyncratic misconduct by a non-managerial employee;
- (3) Courts have recognized such an affirmative defense under the analogous Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq.;
- (4) Recognition of such a defense best advances the fundamental purposes of the Mine Act.

The rationales underlying these four propositions should not have to be fully rehearsed here. However, given the factual circumstances of this case, the persuasiveness of the legal and policy arguments advanced by the Petitioner, and the majority's continuing reluctance to address the adverse policy implications of its decisions both here and in ASARCO, some expansion of the points in my ASARCO dissent is warranted.

I. The Strict Liability Doctrine

Section 110(a) continues to be a thin reed on which to rest the liability without fault theory. If the Mine Act is to have any organic logic, section 110(a) must be woven into the context provided by sections 104 and 105. The sense and purpose of section 110(a) is to establish mandatory rather than discretionary civil penalties for violations of the Mine Act or the mandatory standards promulgated thereto. Section 110(a) is not reached, however, until the prerequisites of sections 104 (citing of the operator) and 105 (proving a violation) have been satisfied. Specifically, the entire enforcement scheme does not engage until the following initial condition is met:

^{1/} It is encouraging that my colleague in dissent has departed from the ASARCO majority to the extent of his narrowly drawn exception to the strict liability doctrine. The factual circumstances of this case, in my view, compel no other result.

If upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine ... has violated this Act, or any mandatory safety standard ... he shall ... issue a citation to the operator. 30 U.S.C. 814(a). [Emphasis added.] 2/

In short, a violative act of commission or omission by the operator is necessary before the sanctions of section 110(a) come into play. To hold that strict liability reposes in section 110(a) so that any and all violations can be charged against the operator would render section 104(a) a superfluous nullity. This, despite the fundamental principle that statutes must be read to give effect to every clause. United States v. Menasche, 348 U.S. 528, 538, 99 L.Ed. 615, 624 (1955).

The traditional and immutable position with respect to strict operator liability has been strongly influenced by a single reference in the legislative history of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970). Indeed the lone reference in question has assumed an almost talismanic power. It reads:

Since the conference agreement provides for violation of the standards against the operator without regard to fault, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine. 3/

2/ The case most often relied upon for the proposition that the Mine Act is unconditionally a strict operator liability statute is Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir., Unit B 1982). With all due respect, however, I question the premise upon which the 5th Circuit's ultimate holding is based. Although section 104(a) requires that an MSHA inspector believe that "an operator ... has violated" the Act or the standards, the Court paraphrased the section as follows: "any failure to comply with the regulations shall result in issuance of a citation to the operator." Id. at 893. The Court's restatement of section 104(a) appears to be fundamentally at odds with the text itself, but the discrepancy nevertheless explains the Court's arrival at its oft-quoted conclusion: "There are no exceptions for fault, only harsher penalties for willful violations." Id.

3/ Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 1515 (1975). (Leg. Hist., 1969 Act). The statement is often cited to the "Conference Report" on the 1969 Act, but it is actually from the "Statement of the Managers on the Part of the House." It is reliable only as an indicator of what the House conferees thought the Conference agreement to provide and thought the Senate conferees' positions to be on the final version of the legislation. There is, in fact, no written "conference agreement" to which the Commission and the courts can refer to divine Congressional intent and consensus.

A search of the legislative history of the 1969 Act, however, reveals no basis or antecedent for the above statement. The terms "strict liability", "vicarious liability" or "liability without regard to fault" were simply not raised in the various committee reports or the extensive floor debates throughout the 94th Congress. Indeed, a review of the relevant history provides evidence of a contrary Congressional view.

For instance, the original vehicle for reform of the 1952 Federal Coal Mine Safety Act was S.2917, introduced on September 17, 1969, by Senator Williams of New Jersey. Leg. Hist., 1969 Act, p. 3. The bill provided discretionary civil penalties for violations of the Act or the mandatory standards. Id., p. 103. During floor debate on the bill Senator Metcalf successfully introduced an amendment to make civil penalties mandatory. Id., p. 677. Later in the floor debate Senator Byrd of West Virginia offered a further amendment to the civil penalty section that, in effect, added as a criterion for assessing civil penalties "whether the operator was at fault." The colloquy surrounding the adoption of the Byrd amendment, however, indicates that Senators Byrd and Metcalf acknowledged circumstances when operators should not be held liable for the independent acts of rank-and-file miners:

Mr. Byrd of West Virginia: Mr. President, under section 308 [ultimately section 109 of the 1969 Act], an operator of a coal mine shall be penalized for violations occurring of a mandatory health and safety standard.

I am not opposed to penalties being assessed against operators where the operators are clearly at fault. The language in my amendment would merely require that, before a penalty could be applied, there be a finding that the operator was indeed at fault.

Senator Williams of New Jersey: Mr. President, we have thoroughly discussed this amendment with the Senator from West Virginia. It would require the Secretary to consider the fault of the operator, or his lack of fault, in determining the amount of the penalty. It is acceptable to us

Senator Metcalf: Mr. President, I was the author of an amendment that required a mandatory penalty and, of course, I do not want a mandatory penalty to be placed upon a coal operator who is penalized for the inadvertent act of a coal employee. I want only a penalty for the coal operator who is responsible for his own actions. Many times it is the inadvertence of an employee which is responsible for a violation, and I feel that the Senator from West Virginia has made a contribution. Id., pp. 728-729. 4/

4/ Senator Williams' statement, while supporting the majority's view that lack of operator fault can only mitigate the size of the civil penalty, mischaracterizes Senator Byrd's intent. Indeed, in the context of the Byrd/Metcalf exchange it is a non sequitur.

Only after passage of S. 2917 (October 2, 1969) was a companion bill, H.R. 13950, reported to the floor of the House (October 13, 1969). H.R. 13950 required mandatory civil penalties but did not contain Senator Byrd's language ("whether the operator was at fault") as adopted by the Senate. Thereafter, the legislative history is silent on the fault issue until the "Statement of the House Managers" quoted above. 5/

In sum neither the Mine Act, its predecessor statute, nor the legislative history conclusively establishes strict operator liability without regard to fault. To the extent that Commission and court precedents hold otherwise, I respectfully contend they are mistaken. Furthermore, with the exception of ASARCO, those precedents involved issues that need not have been resolved by resort to a theory of strict liability.

A careful review of the factual circumstances of prior cases reveals that the operator was liable for other related violations 6/; the violative conduct was committed by a managerial employee whose actions as an agent were directly attributable to the operator 7/; or clear evidence existed that the operator knew of the non-managerial employee's violation but acquiesced in it. 8/ In short, liability in these "strict liability" cases could have been found on the basis of demonstrable operator fault.

5/ It should be noted, however, that on other occasions throughout the legislative history civil penalties are discussed in terms of being assessed against "violators" or "operators found in violation" rather than against operators within whose mines violations occur. See e.g., Leg. Hist. 1969 Act at 1108, 1110, and 1594.

6/ Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir., Unit B 1982) (faulty hydraulic system, lack of roll-over protection and inadequate berm were the fault of the operator and contributed to the accident involving an employee who disregarded orders not to use the equipment at issue); American Materials Corp., 4 FMSHRC 415 (March 1981) (duty to post or barricade areas over which high voltage lines pass is exclusively the operator's); Kerr-McGee Corp., 3 FMSHRC 2496 (November 1981) (failure of operator to distinguish between safety lines and other materials handling cables contributed to employee's unsafe use of inappropriate equipment).

7/ Sewell Coal Co. v. FMSHRC, 686 F.2d 1066 (4th Cir. 1982) (all employees involved in the violations were management personnel); Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982) (foreman failed to supervise and monitor complicated pillar recovery procedure); Ace Drilling Coal Co., Inc., 2 FMSHRC 790 (April 1980) aff'd without opinion, 642 F.2d 440 (3rd Cir. 1981) (foreman's negligent and violative acts are attributable to the mine operator even if the foreman's conduct is arguably unforeseeable).

8/ El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981) (not strictly an employee misconduct case; nevertheless, operator liable for violations caused by customer's truck drivers since operator allowed trucks without back-up alarms on the property).

Missing from the usual recital of precedents is a Commission case that indicates a chink in the strict liability wall. In Secretary v. Southwestern Illinois Coal Corp., 5 FMSHRC 1672 (October 1983), the Commission held that the precise wording of a safety standard may preclude operator liability if failure to comply is attributed to an employee's "disobedience or negligence." Id. p. 1675. The standard in question provided inter alia that "Each employee ... shall be required to wear ... safety belts and lines where there is danger of falling." 30 C.F.R. 77.1710(g). The inspector cited the operator when he found an employee not wearing a safety belt and line even though the inspector believed there was a falling hazard. Determining that "shall be required to wear" did not mean that safety equipment "shall be worn" a majority of the Commission went on to hold that an operator could escape liability so long as he demonstrated that he had required the equipment to be worn through "sufficiently specific and diligent enforcement." Id. at p. 1676.

Two dissenting members took the majority to task for what the dissenters considered a Commission-created exception to the liability without fault doctrine, particularly since the Secretary had argued for application of the doctrine to his own regulation. Id. pp. 1679-1684. The Southwestern Illinois decision is obviously sound but nevertheless inconsistent with the majority holding here. If, indeed, Congress established an absolute doctrine of strict operator liability then the doctrine applies equally to the Secretary as rulemaker and the Commission as adjudicator. If the Commission is constrained here from carving out an affirmative defense based on employee disobedience, then the Secretary is constrained from promulgating, and the Commission from interpreting standards so as to accomplish the same thing, to wit: 30 C.F.R. 77.1710(g).

II. Affirmative Defense Based on Employee Misconduct

As determined above, in spite of conventional but unexamined "wisdom", the Mine Act can accommodate an operator's affirmative defense against a citation based upon unforeseen or idiosyncratic misconduct on the part of a miner. To assure that such a defense is not seized upon by the operator as a means of shirking his responsibilities under the Act, there must be strictly circumscribed criteria by which the defense is to be judged:

- . the adequacy of the operator's general safety training program;
- . the adequacy of the miner's specific job assignment safety training;
- . the adequacy of the level of supervisory control;
- . the operator's system of discipline and sanctions imposed on miners who contravene the operator's safety rules;
- . the consistency in applying those sanctions; and,
- . where determinable, the miner's knowledge that he or she has deliberately and knowingly contravened the operator's safety requirements.

Obviously, operator culpability either with respect to related violations or acquiescence in the miner's violative conduct would preclude raising the defense. Furthermore, since the Commission has consistently and correctly attributed the negligent or violative conduct of managerial employees to the operator, the affirmative defense would only be appropriate in cases involving non-managerial employees. See Secretary v. Wilmot Mining Co., 9 FMSHRC 684 (April 1987).

Given these strictures, I do not see the establishment of the affirmative defense as opening the floodgates to spurious claims by mine operators that the violations charged were caused solely by unforeseeable employee misconduct. Secretary's brief p. 24. ^{9/} I do, however, see a means by which an otherwise blameless operator with a comprehensive safety and training program can defend against unwarranted enforcement actions such as have been taken in this case.

Lastly, as to whether this Commission can judicially fashion an affirmative defense not specifically provided for in the Mine Act, there is persuasive precedent. In a firm line of cases beginning with Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980) rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981) and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981), the Commission has held that an operator can affirmatively defend against a prima facie case of discrimination under section 105(c) of the Mine Act, 30 U.S.C. 115(c), by proving by a preponderance of the evidence that although the adverse action complained of was motivated in part by the miner's statutorily protected safety activities, the operator was also motivated by unprotected activities and that the adverse action would have been taken in any event for the unprotected activity alone. 2 FMSHRC 27992800. This Commission-fashioned defense is not derived from section 105(c) nor from the legislative history of that section, but it is a thoroughly sound means of evaluating discrimination complaints in an equitable manner consistent with the Mine Act's purposes. Likewise, here, equally sound policy reasons exist for fashioning an affirmative defense to citations based on unforeseeable misconduct by miners, provided, of course, that the defense is subjected to the strict scrutiny outlined above. ^{10/}

III. Unforeseeable Employee Misconduct: The OSHA Model

Established policy under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1985 and Supp. 1987) (OSHAct) provides the most persuasive analogous context within which unforeseeable employee misconduct is recognized as an affirmative defense to Secretarial enforcement actions. Both the OSHA statute and the Mine Act require literal employer compliance

^{9/} For instance, careful review of the precedents establishing the strict liability doctrine (discussed at p. 11, above) indicates that with the exception of ASARCO, the affirmative defense of unforeseeable or idiosyncratic employee misconduct would not have been available.

^{10/} It is puzzling that both the majority and the Secretary appear to acknowledge the merit of the affirmative defense of employee misconduct

(Footnote continued)

with mandatory safety and health standards. ^{11/} Both statutes emphasize pre-inspection rather than post-accident compliance as the means for protecting workers from safety and health hazards. Most significantly, both statutes impose compliance responsibilities on employees/miners. Compare: 29 U.S.C. 654(b) and 30 U.S.C. 801(g). As the Secretary points out, miners are not subject to civil penalties under the Mine Act (except as provided in section 110(g)). Secretary's brief, p. 20. As the Secretary might also have indicated, employees are not subject to civil penalties under the OSHAct either.

Yet, even in the absence of an explicit statutory provision for the unforeseeable employee misconduct defense, the Occupational Safety and Health Review Commission and reviewing courts have uniformly adopted the

Fn. 10/ continued

in circumstances such as those presented here while still rejecting it as unauthorized by the Mine Act. "[I]t would be error to create an unforeseeable employee misconduct defense under the Act even if that defense could have a 'salutary impact on the degree of excellence of employer's training programs.'" Secretary's brief in ASARCO v. Secretary pet. for review, No. 86-2765 (10th Cir., December 3, 1986) at p. 23. Constrained by what it considers to be unequivocal precedents, the majority opines that Petitioner's sole recourse is to Congress. Majority slip opinion at p. 7. Under section 113 of the Mine Act, 30 U.S.C. 823, however, this independent Commission is authorized - indeed expressly encouraged - to decide "substantial" or "novel" questions of policy. The principal author of the Senate version of the Mine Act stressed this policy-making role during the confirmation hearings for initial members of the Commission: "It is our hope that ... the Commission ... will develop a uniform and comprehensive interpretation of the law [and] will provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law." Nomination Hearing, Members of the Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources, 95th Cong., 2d Sess., August 24, 1978, p. 1.

It seems obvious that, without doing violence to the Mine Act, the Commission in its policy-making role can and should decide between a policy of questionable merit (liability without regard to fault) and one of salutary impact (the affirmative defense based upon proof of a rigorous safety program).

^{11/} Indeed, the presence of the "general duty" clause in the OSHAct, 29 U.S.C. 654(a)(1), and the lack of same in the Mine Act suggests an even stricter standard of accountability for OSHA-governed employers. By its terms the clause places employers "under a duty to the greatest extent possible, to provide a workplace free of hazards" even where those hazards are not addressed by specific mandatory standards. Congress, however, explicitly declined to incorporate a general duty clause in the Mine Act. Senate Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1316-17 (1978).

defense on firm policy and legal grounds. The most forceful expression of the need for and appropriateness of the defense was stated in the Ninth Circuit's opinion in Brennan v. OSHRC, 511 F.2d 1139, 1145 (1985):

Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine, for the totally independent act of another. 12/

In contrast, the Secretary's reliance by analogy on federal food and drug legislation is misplaced. First of all, such statutes are aimed at protecting an unsuspecting public from tainted or injurious food and drug products, whereas the Mine Act is aimed at protecting miners who are presumed to have been trained to recognize and avoid hazards by reason of the mandatory training requirements of section 115, 30 U.S.C. 825. 13/

Secondly, the Secretary's citation to United States v. Park, 421 U.S. 658, 95 S.Ct. 1903 (1975) proves too much. The ultimate issue in Park was whether a corporate officer of an admittedly guilty corporation could be held criminally liable for violations of sanitation standards at a food warehouse. Park had argued that the trial court's jury instructions erroneously suggested that he could be found criminally liable strictly by reason of his status as corporate president and even though he did not personally participate in the violations. The Supreme Court upheld the instructions on the basis that Park bore a "responsible relationship" to or had a "responsible share" in the violations. Id. at 672. The Court was no doubt strongly influenced by evidence that Park had been previously advised by letter of similar violations at another warehouse in the same region. Id. at 661. In any event, the Court acknowledged that evidence of powerlessness to prevent or correct the violation could be raised defensively at trial. Id. at 673, citing United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 S.Ct. 559 (1964).

Here, the Secretary seeks to hold Western Fuels-Utah liable strictly by reason of its status as operator even though Western Fuels has amply demonstrated that it took affirmative measures to conform its conduct to the level expected by the Supreme Court in Park. Furthermore, the record here clearly indicates that Petitioner was powerless to prevent the unforeseeable and aberrant conduct of the miner.

12/ Accord: Penn Power and Light Co. v. OSHRC, 737 F.2d 350 (3d Cir. 1984); Daniel Int'l Corp. v. OSHRC, 683 F.2d 361 (11th Cir. 1982); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

13/ It should be emphasized that while the Mine Act mandates comprehensive miner training by operators, the OSHA Act does not require that comparable training programs be established by employers. Compare: 30 U.S.C. 825 and 29 U.S.C. 670. This distinction further underscores the appropriateness of the affirmative defense in the Mine Act context provided the operator can establish full compliance with section 115.

IV. Conclusion

Applying the above principles to the circumstances of this case, I would vacate the citation at issue. In arriving at his decision within the constraints of ASARCO the judge below made the following pertinent findings of fact:

- . Western Fuels-Utah had established an adequate safety training program supplemented by a disciplinary program for employee violations of mandatory standards.
- . Mullins, decedent, "violated" standard 75.200 by walking out under unsupported roof on his own and in disobedience of three direct orders from his foreman.
- . Mullins' conduct was "unforeseeable" and motivated by "some reason perhaps known only to himself."

The record further indicates that Mullins was an experienced miner, that he was familiar with the roof control plan and the prohibitions against going under unsupported roof, and that he participated in a safety meeting on roof hazards and control three hours before the fatal accident.

Measured against the criteria set forth above at p. 12, Western Fuels-Utah has convincingly established an affirmative defense of unforeseeable idiosyncratic misconduct on the part of the miner.

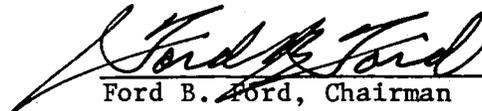
It remains to stress once again the fundamental policy imperative that justifies the adoption of the affirmative defense. In section 2 of the Act, Congress clearly acknowledged that health and safety in this nation's mines could only be achieved through rigorous attention to safety, health and training programs jointly supported and advanced by operators and miners:

[T]he Committee recognizes that creation and maintenance of a safe and healthful working environment is not the task of the operator alone. If the purposes of this legislation are to be achieved, the effort must be a joint one, involving the miner and his representative as well as the operator.

Leg. Hist. 1977 Act at p. 606.

Recognizing that operators are ultimately responsible for maintaining safe and healthful mine conditions, for establishing and enforcing safe mining practices, and for ensuring that miners are adequately trained to recognize and avoid mine hazards, the Mine Act and its purposes can still accommodate the narrowly drawn affirmative defense of unforeseeable employee misconduct. In fact, adoption of the defense by this Commission would provide operators with a powerful incentive to evaluate and improve overall safety programs and would hasten the day when the fundamental purposes of section 2 are fully realized.

I would, therefore, reverse the judge's decision and vacate the citation.



Ford B. Ford, Chairman

Commissioner Nelson, dissenting:

While I agree that the Mine Act generally provides for liability without regard to fault, it is my view that this precept should not be stretched to cover the extraordinary facts of this case -- facts which clearly establish unpreventable employee misconduct. Accordingly, I take the position that my colleagues constituting the majority have erred in failing to recognize and accord proper weight to this narrow exception to the liability without regard to fault doctrine.

The majority opinion correctly acknowledges that in Asarco Incorporated - Northwest Mining Department, 8 FMSHRC 1632 (November 1986), this Commission reaffirmed that under the Mine Act a mine operator may be held liable for a violation even though the operator was not at fault. I joined the majority in the Asarco opinion because I believed, and still do, that Congress enacted a liability without regard to fault scheme in the Mine Act as an incentive for mine operators to comply with the Act's safety and health requirements. My position in this case is consistent with my position in Asarco as it is only in the present case that the issue of unpreventable employee misconduct is addressed squarely by the Commission. In that regard, the majority misreads Asarco (to the extent it suggests that in Asarco the Commission rejected the unpreventable employee misconduct defense) in stating that there "the operator was found liable for a violation even though the violation was attributable to an employee's 'unforeseeable and idiosyncratic' conduct and the operator itself was not negligent in connection with the violation." Slip op. at 5. While the administrative law judge in Asarco found the miner's decision to begin drilling the unstable face to be unforeseeable and idiosyncratic, that finding was treated by the Commission as collateral background material. 8 FMSHRC at 1634. When the Commission got down to the business of deciding Asarco, our focus was upon the liability without regard to fault structure of the Mine Act and not upon whether there exists a narrow exception to that doctrine -- i.e., the unpreventable employee misconduct defense. See 8 FMSHRC at 1634-36. In fact, other than one reference to the administrative law judge's use of "unforeseeable and idiosyncratic" conduct, that term is notably absent in our Asarco decision. The majority also cites Southern Ohio Coal Company, 4 FMSHRC at 1462, incorrectly for the proposition that the Commission "stressed" that an operator is liable for the "idiosyncratic and unpredictable" acts of its employees. Slip op. at 5-6. Although the Commission rejected the operator's argument in Southern Ohio that such employee conduct relieves it of liability for Mine Act violations, the Commission did so noting only "It is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees." 4 FMSHRC at 1462. The unpreventable employee misconduct defense received no substantive treatment by the Commission in Southern Ohio and, to repeat, is faced squarely for the first time in this case.

Generally speaking, by making a mine operator responsible for a violation, regardless of fault, Congress sought to instill in the mine operators a keen awareness not only for identifying hazards already present in the mine, but also for anticipating hazards which might occur sometime in the future. Congress, however, did not place the burden for mine safety and health upon the operators alone. In section 2(e) of the Mine Act, Congress provided that "operators...with the assistance of miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in [the] mines." 30 U.S.C. Sec. 801(e) (emphasis added).

Nevertheless, despite this safety and health partnership between the miners and the operators, given the circumstances in Asarco we noted again that Congress chose to place the ultimate responsibility for a violation on the mine operator, even if that operator appeared to be free of negligence. This assignment of responsibility makes good sense because it is the operator who controls the daily activities at the mine and it is the operator who is in the best position to correct existing hazards and to prevent the occurrence of future hazards. It does not make good sense, however, and I believe it was not intended by Congress, to extend the liability without regard to fault doctrine to a situation where the mine operator operated its mine in the safe and responsible manner expected by Congress and where -- but for an unpreventable and intentional act by a disobedient employee -- there would have been no violation. Such an inflexible extension of the liability without regard to fault doctrine serves no useful safety and health purpose. It serves only to punish the safety and health conscious operator who, no matter how encompassing its precautionary efforts may have been, could not have prevented the violative event caused by an employee unforeseeably.

The facts of the present case illustrate this point well. Here, the administrative law judge found that "the evidence in this record is undisputed that the decedent, Mullens, walked out under the unsupported roof on this own, contrary to the direct orders of his supervisor." 9 FMSHRC at 323 (emphasis added). The judge also found that Mr. Mullens' actions in proceeding under the unsupported roof were not foreseeable and that Mullens was supervised properly. Id. In addition, the judge stated, "I have carefully examined the record concerning the operator's training program and its history of disciplining its employees for violations of the mandatory standard at issue herein and find both to be adequate." 9 FMSHRC at 324. The judge concluded that "it was Mr. Mullens' own negligence, not that of the operator, which caused his death." Id.

In sum, it is undisputed that Mullens proceeded under the unsupported roof immediately after his supervisor ordered him not to do so. Mullens' actions were contrary not only to his supervisor's instructions, but they also were contrary to his general safety training and company policy as well.

Inasmuch as Western Fuels-Utah could not have prevented the violation that occurred in this case and inasmuch as section 2(e) of the Mine Act places a part of the responsibility for safety and health on the shoulders of the miners, I am convinced that Congress did not intend for the liability without regard to fault doctrine to apply to this exceptional situation. Moreover, I find little comfort in the Commission majority's holding that Western Fuels-Utah's lack of negligence was a matter to be considered more appropriately at the penalty assessment stage. If a mine operator has done all that it reasonably could be expected to do to ensure the safety and health of its miners, and if a violation occurs only as the result of unpreventable employee misconduct, reducing the amount of the penalty to be levied upon an otherwise blameless operator does not undo the injustice of the operator's having been found liable for the violation in the first instance.

Accordingly, for these reasons I respectfully dissent.


L. Clair Nelson, Commissioner

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representatives by section 103(f) of the Mine Act. ^{2/} Commission Administrative Law Judge John J. Morris held that: (1) under section 103(f) of the Act a nonemployee representative of miners may accompany an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") during a physical inspection of the mine, i.e., participate in walkaround; (2) failure of a nonemployee miners' representative to have filed the identifying information required by 30 C.F.R. Part 40 ("Part 40") does not, by itself, permit the operator to refuse the representative entry to its mine for purposes of exercising section 103(f) walkaround rights; ^{3/} and (3) Emery could not require

^{2/} The term "walkaround" is used for the sake of convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides:

[1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. [2] Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. [3] Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [4] To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. [5] However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. [6] Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. § 813(f)(sentence numbers added).

^{3/} 30 C.F.R. §§ 40.1-.3 provides in relevant part:

§40.1 Definitions. As used in this Part 40: ...
(b) "Representative of miners" means: (1) Any person or organization which represents two or more

miners at a coal or other mine for the purposes of the Act, and (2) "Representatives authorized by the miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

§40.2 Requirements. (a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by §40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners. (b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the [A]ct relating to representatives of miners. (c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

§ 40.3 Filing procedures.

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

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

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

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

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

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

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

(7) A statement certifying that all information

that a nonemployee miners' representative sign a waiver of liability as a precondition to entering mine property. 8 FMSHRC 1192 (August 1986) (ALJ).

For the reasons explained below, we affirm the judge's conclusion that walkaround rights under section 103(f) extend to nonemployee representatives of miners. Adhering to the Commission's decision in Consolidation Coal Co., 3 FMSHRC 617 (March 1981), we also affirm the judge's determination that an operator may not refuse a miner's representative access to a mine for walkaround purposes solely because the representative has not filed identifying information under Part 40. However, in reversal of the judge, we hold that an operator may require a nonemployee representative to sign a nondiscriminatory waiver of liability required by the operator of all nonemployee visitors to its mine. 4/

I.

Facts and Procedural History

The relevant events in this case occurred on April 15, 1986, at the Deer Creek Mine, an underground coal mine located in Utah. At the time, the mine was owned by Utah Power and Light Company ("UP&L") but was managed and operated by Emery. (Effective April 27, 1986, the operation of Deer Creek and all other UP&L mines managed by Emery transferred to UP&L.) The International Union, United Mine Workers of America ("UMWA"), represented miners at Deer Creek and at the other UP&L mines operated by Emery. On April 15, 1986, Emery and the UMWA were parties to a collective bargaining agreement applicable to the Deer Creek Mine, the Bituminous Coal Wage Agreement of 1984 ("the Wage Agreement").

On the morning of April 15, 1986, Vern Boston, an MSHA Inspector, arrived at the mine to conduct a regular quarterly inspection. 30 U.S.C. § 813(a). At the mine gate the inspector was met by Thomas

filed is true and correct followed by the signature of the representative of miners.

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

4/ This case is one of four related matters. The other three cases are all captioned as Utah Power & Light Company, substituted for Emery Mining Corp. v. Secretary of Labor, Mine Safety and Health Administration (MSHA), & UMWA (Docket Nos. WEST 86-131-R; 86-140-R; & 86-141-R). The parties agreed that the ruling in this proceeding would control the disposition of the remaining three cases. 8 FMSHRC 1210, 1212, 1214 (August 1987)(ALJ). Our consolidated summary opinion in those three cases, consistent with the present decision, is also issued this date.

Rabbitt, a UMWA International Health and Safety Representative. The issues before us center around Rabbitt's attempt that day to accompany Inspector Boston on walkaround as an additional miners' representative. 5/

Rabbitt testified that approximately one week before his visit to the Deer Creek mine, Frank Fitzek, chairman of the UMWA's local three-person safety committee at Deer Creek, had asked him on behalf of the committee to look into allegations concerning "unwarrantable failure" citations and orders (30 U.S.C. § 814(d)) being issued by MSHA during its quarterly inspection at Deer Creek. Rabbitt had indicated that he would visit the mine within a few weeks to assist in the inspection process. Rabbitt further testified that he telephoned Fitzek on the evening of April 14 to inform him that he would visit the mine the next day. (Tr. 87-89, 125-26, 147-48.)

Rabbitt arrived at the Deer Creek mine gate at approximately 7:00 a.m. on April 15. According to Rabbitt, Fitzek appeared and told Rabbitt that he had informed Mine Manager White that Rabbitt was going to be at the mine that day but had stated to White that he "didn't know exactly for what reason...." Tr. 89. Fitzek told Rabbitt that White was "quite disturbed" at the news of Rabbitt's visit. Id. Fitzek then left to begin his work at the mine. 6/

At approximately 7:45 a.m., Inspector Boston arrived at the mine gate, where Rabbitt was waiting. The inspector had not met Rabbitt before but was aware of his position with the UMWA. Mark Larsen, a Deer Creek employee and the third member of the local safety committee, was scheduled to accompany Boston that day on walkaround as the miners'

5/ Rabbitt's duties during his seven and one-half years employment as an International Health and Safety Representative consisted chiefly of investigating mine accidents. Since June 1985 he had been working in Utah on the investigation of the disaster at Emery's nearby Wilberg mine. Rabbitt testified that on two occasions, in January and late February 1986, he had participated with Earl White, mine manager of Deer Creek, and with other Emery and UMWA representatives, in an underground investigation at Deer Creek in connection with a proposed petition for modification of a mandatory standard sought by Emery under section 101(c) of the Mine Act. 30 U.S.C. § 811(c). However, prior to April 15, 1986, he had not participated in walkaround during an inspection at Deer Creek.

6/ Fitzek did not testify at the hearing. Mine Manager White, Emery's witness, testified that on the morning of April 15, Fitzek informed him of Rabbitt's visit but denied to him that the local safety committee had "invited" Rabbitt. Tr. 175. Rabbitt testified that employees are "[q]uite often" reluctant to indicate to management that they have requested the presence of an International representative. Tr. 148. Whatever the details surrounding Rabbitt's visit to Deer Creek, the record makes clear that all three members of the local safety committee were aware of Rabbitt's visit on April 15 and there is no indication that they objected to his presence.

representative. Rabbitt asked Boston if he could accompany him as an additional miners' representative. Boston replied that he had no problem with Rabbitt's participation but would have to check with mine management concerning an additional management representative. (Under the fourth sentence of section 103(f) (n.2 supra), the Secretary's authorized representative may permit each party to have an equal number of additional representatives.)

Inspector Boston proceeded to the mine's safety office and spoke with Dixon Peacock, an Emery safety engineer and inspection representative. Peacock indicated that he had no objection to Rabbitt's participation in the inspection. Inspector Boston was then joined by safety committeeman Larsen, who had just been informed by Fitzek of Rabbitt's presence. Boston and Larsen returned to the gate and asked Rabbitt to join them. The three men then entered the mine premises together.

While Boston was changing his clothes, Larsen and Rabbitt met with Mine Manager White in his office. White questioned Rabbitt's authority to enter the mine pursuant to the Wage Agreement, asserting that Rabbitt had failed to provide mine management with the 24-hour advance notice of a visit required under the Wage Agreement. 7/ Rabbitt responded that he sought access to the mine not under the Wage Agreement, but pursuant to section 103(f) of the Mine Act. The three then went to the safety office where, joined by Peacock and Terry Jordan, another Emery safety engineer, White began reading section 103(f) of the Mine Act.

When Inspector Boston arrived in the room, a discussion ensued concerning the authority for Rabbitt's presence. Boston stated that Rabbitt had a right to participate in the inspection under section 103(f) of the Act because he was a UMWA International Representative. While agreeing that Rabbitt was an International Representative, White contended that under section 103(f) only a representative of miners who is also an employee of the operator is entitled to accompany the inspector. Tr. 32-33, 90-91, 180-82. At that point, and on that basis, White refused to permit Rabbitt to join in the inspection.

Inspector Boston then began writing a section 104(a) citation, 30 U.S.C. § 814(a), alleging a violation of section 103(f) of the Act. Boston told White that he would give him ten minutes to reconsider and, if Emery persisted in its refusal to permit Rabbitt's participation, he would also issue Emery a section 104(b) order for failure to abate the cited violation. 30 U.S.C. § 814(b); Tr. 33, 182. White went to another office and telephoned Dave Lauriski, Emery's director of health and safety, informing him of his actions and of the issuance of the citation. Lauriski agreed with White's position but advised permitting Rabbitt to participate in the inspection rather than risk issuance of a section 104(b) withdrawal order. Tr. 183. White returned and told Boston that he would abate the alleged violation by allowing Rabbitt to accompany the inspection party, and Boston terminated the citation. Tr.

7/ No issue concerning advance notice under the Wage Agreement is involved in this proceeding.

During White's telephone conversation with Lauriski, an additional subject arose concerning whether Rabbitt had signed Emery's waiver of liability form, a procedure that Emery required of nonemployee visitors to all of its mines, including Deer Creek. ^{8/} Before returning to the safety office, White telephoned the guard's shack at the mine entrance and learned that Rabbitt had not signed a waiver. After Boston terminated the initial citation, White stated that Rabbitt would have to sign a waiver before proceeding underground. Tr. 33, 39-41, 184-85. When a waiver form was produced, Rabbitt refused to sign it. Boston telephoned his supervisor for guidance, and was informed that Rabbitt could not be required to sign such a form. Following further discussion, White refused to allow Rabbitt to join the inspection party unless the form was signed. Boston then added a second alleged violation of section 103(f) to the original citation. White finally agreed to Rabbitt's participation and the citation was terminated. Emery's representatives raised no objection on that day to Rabbitt's participation based on the UMWA's failure to designate Rabbitt in its Part 40 filing that identified miners' representatives for the Deer Creek Mine.

The inspection party, consisting of the inspector, miners' representatives Larsen and Rabbitt, and Emery representatives Jordan and Peacock proceeded underground. During the inspection Rabbitt brought to Inspector Boston's attention a condition that resulted in the issuance of a citation for an alleged violation of Emery's roof control plan. Tr. 94.

^{8/} On March 21, 1986, Emery instituted a waiver of liability policy requiring all nonemployee visitors to sign a waiver as a condition of entry to mine property. The Release and Waiver form, which includes a hazard check list, provides in pertinent part:

The undersigned, in consideration of being allowed to come upon the _____ mine property (insert name of mine), hereby forever releases, discharges and waives as to Emery Mining Corporation ("Emery"), any and all claims, rights or causes of action that the undersigned now has or may hereafter acquire against Emery on account of any damages sustained or injuries suffered, presently or hereafter, while present upon or within the mine property. The undersigned further agrees to hold Emery harmless on account of any and all liability which may attach to Emery on account of damages sustained or injuries suffered by the undersigned while upon or within the mine property. All references to Emery shall include its officers, directors, shareholders, employees and agents.

Emery Exh. 3.

On April 17, 1986, Emery filed a notice of contest pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), challenging the alleged violation of section 103(f). On April 24, 1986, Judge Morris granted the UMWA's motion to intervene, and the hearing was held on May 14, 1986.

During the hearing, a copy of the "Miners' Representation Notification" form submitted for the Deer Creek Mine to the MSHA District Manager, pursuant to Part 40, was received into evidence. Emery Exh. 7. Section A of the form lists Frank Fitzek, safety chairman, as the "Selected Representative of Miners," with his home address and telephone number. Section D lists thirteen miners with home addresses and telephone numbers as "Selected Multiple Representatives." Section E lists the UMWA as the "organization" with which the "Representative [Fitzek] is Associated." The form is signed by Fitzek, and a note identifies him as Safety Chairman of UMWA Local No. 1769. Neither Rabbitt nor any other official or health and safety representative of the UMWA International was listed on the form. Before the judge, Emery argued that the UMWA's failure to designate Rabbitt as a miners' representative on this Part 40 form also supported denial of access to Rabbitt on April 15, 1986.

Relying on the language of section 103(f) of the Act, its legislative history, and on the definition of "representative of miners" contained in 30 C.F.R. 40.1 (n.3 supra), Judge Morris, in his decision, concluded that nonemployees may be representatives of miners and participate in walkaround. 8 FMSHRC at 1202-05. He determined that both the UMWA and Rabbitt met the Secretary's definition of a miners' representative. 8 FMSHRC at 1205. Noting that Emery knew that Rabbitt was a UMWA International Representative, he concluded that Rabbitt was permitted to participate in the April 15 inspection as a matter of statutory right under section 103(f). Id. Addressing the question of Rabbitt's refusal to sign Emery's waiver, the judge found that Emery's legitimate right to condition entry to its mines by nonemployee members of the general public did not extend to miners' representatives seeking access pursuant to section 103(f) of the Mine Act. 8 FMSHRC at 1206-07. Last, citing the Commission's decision in Consolidation Coal Company, supra, the judge held that the UMWA's failure to designate Rabbitt on the Part 40 miners' representatives designation form for Deer Creek did not, by itself, justify Emery's attempt to deny Rabbitt access. 8 FMSHRC at 1208.

We granted Emery's petition for discretionary review and heard oral argument in this matter. We now affirm in part and reverse in part.

II.

Disposition of Questions Presented

A. Nonemployee Representatives of Miners

We first address Emery's contention that the judge erred in holding that section 103(f) walkaround rights extend to nonemployee

representatives of miners. Emery does not dispute that nonemployees may serve as representatives of miners. E. Br. 12. Rather, Emery argues that nonemployee representatives may not accompany inspectors during physical inspections of mines as a matter of statutory right under section 103(f) of the Act but may participate in such inspections only through the consent of the operator or private contractual agreement.

The Commission has emphasized repeatedly that the opportunity to engage in walkaround is a vitally important statutory right granted to miners and their representatives by the Act. See, e.g., Secretary on behalf of Richard Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298 (September 1986), and authorities cited. Although, as discussed below, this right is not unqualified, we find no authority for the broad participatory restriction based on employee status urged by Emery.

We find the language of section 103(f) dispositive of the question presented. While the term "miners' representative" is not defined in the Act, we have no difficulty concluding that Congress granted miners a broad right to designate representatives of their choosing for walk-around and other Mine Act-related purposes. The first sentence of section 103(f) (n.2. supra) confers the walkaround right upon miners and their representatives in unambiguous terms: "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary['s] ... authorized representative during the physical inspection of any ... mine made pursuant to ... section [103(a) of the Act]...." (Emphasis added.) This sentence not only confers upon miners the basic right to choose their own representatives for purposes under the Mine Act including participation in walkaround (Truex, supra, 8 FMSHRC at 1298), but imposes no employee-status limitation as to whom they may choose.

The third sentence of section 103(f), authorizing the payment of compensation to some miners' representatives for their walkaround participation, is also instructive: "Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection...." (Emphasis added.) "Also" means "in addition ... as well ... besides, too" (Webster's Third New Int'l Dictionary (Unabridged) 62 (1971)), and its use in this provision evidences congressional awareness that some miners' representatives may be employees and others may not. The plain meaning of the third sentence is that only miners' representatives who are employees of an operator shall be paid compensation for the period of walkaround. By equally plain implication, this language indicates that nonemployee representatives of an operator's employees share in the statutory right to engage in walkaround, but are not entitled to compensation from the operator. The fifth sentence of section 103(f) also contains a reference, with similar intent and effect, to "such representative who is an employee of the operator...."

Thus, read together, the first and third sentences of section 103(f) convince us that as a matter of statutory right a nonemployee may be chosen by the miners of a given mine as their representative and that such a representative may properly be afforded the opportunity to

participate in walkaround at that mine -- although without compensation from the operator. See also Conf. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 1323 (1978) ("Legis. Hist."): "[T]o encourage miner participation [the conference substitute bill] provide[s] that one such representative of miners, who is also an employee of the operator, be paid by the operator for his participation in the inspection...." 9/

Further, the first sentence of section 103(f) states that the exercise of the walkaround right is "[s]ubject to regulations issued by the Secretary," and the Secretary's Part 40 regulations are fully consistent with the conclusion that we reach today. Section 40.1 (n.3 supra) defines "representative of miners" as including "[a]ny person or organization which represents two or more miners at a ... mine for the purposes of the Act...." (Emphasis added.) As the Secretary has noted on review, this definition obviously includes nonemployees:

This definition recognizes that there is no statutory limitation on the miners' right to choose their representatives. It is obvious that an "organization" cannot be an employee of the operator. This part of the definition was included in recognition of miners' frequent practice of designating either their union, or other specialized organization as their representatives.

S. Br. 9-10 (footnote omitted.) Congress specifically delegated to the Secretary the authority to issue implementing regulations under section 103(f) and we find that the Secretary's broad definition of representative is in accord with the underlying statutory text discussed above.

Finally, as we have stressed previously, section 103(f) and the Secretary's Part 40 regulations reserve to miners -- not mine operators -- the right to select their representatives for purposes under the Act, including the exercise of the walkaround right. Truex, supra, 8 FMSHRC at 1298. If adopted, Emery's position would impermissibly abridge that right of choice.

9/ Emery has cited certain other portions of the legislative history in support of its contrary argument. For example, during Senate debate over a proposed amendment that would have deleted the compensation guaranty under section 103(f) for employee miners' representatives, Senators Javits and Helms used the words "workers," "employees" and "miners." Legis. Hist. at 812, 1053-56. Their debate, however, was concerned with the question of compensation for employee miner representatives. Contrary to Emery's arguments, the use of these words did not indicate a restrictive construction of "miners' representative," but rather related only to the question of whether such representatives who are employed by an operator should be compensated by that operator for participating in inspections at the operator's mine.

Accordingly, we affirm the judge's decision insofar as it held that nonemployee representatives are afforded a right under section 103(f) to accompany inspectors during physical inspections of mines. ^{10/}

B. Part 40 Filing Requirements

We turn to the question of whether the failure to name Rabbitt as a miners' representative in the Part 40 filing submitted for the Deer Creek Mine entitled Emery to deny him entry to the mine for walkaround purposes. Relying on Consolidation Coal, supra, the judge held that, on the facts presented, the failure to list Rabbitt did not, by itself, defeat his walkaround rights. 8 FMSHRC at 1207-08. Emery argues that Consolidation Coal is factually distinguishable from the present case and is not controlling. Alternatively, Emery argues that the holding of Consolidation Coal should be reexamined and declared incorrect as a matter of law.

In Consolidation Coal the Commission held "that failure of a person to file as a representative of miners under Part 40 does not per se entitle an operator to deny that person walkaround participation under section 103(f)." 3 FMSHRC at 619. Like the present matter, that case involved an operator's objection to walkaround participation by UMWA International personnel whose names had not been listed in a Part 40 filing for the mine in question although the UMWA was the undisputed organizational representative of the miners at the mine. The Commission noted that "[n]either the statute nor the legislative history indicates that prior identification of miners' representatives is a prerequisite to engaging in the section 103(f) walkaround right...." 3 FMSHRC at 619. The Commission also observed that the Part 40 filing requirements were not promulgated merely to identify representatives for walkaround purposes but to facilitate secretarial cooperation with representatives and to further their inclusion in the range of representative functions contemplated by the Act. 3 FMSHRC at 619 n. 3.

In particular, the Commission emphasized that in promulgating the Part 40 regulations, the Secretary had noted that: "[M]iners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part." 3 FMSHRC at 619, quoting 43 Fed. Reg. 29,508 (July 7, 1978) (Secretary's Part 40 Preamble). The Commission agreed with this position, but as a safeguard against abuse or fraud expressly recognized that "[i]n a

^{10/} Emery's reliance on Council of So. Mtns. v. Martin County Coal Corp., 6 FMSHRC 206 (February 1984), aff'd sub nom. Council of So. Mtns. v. FMSHRC, 751 F. 2d 1418 (D.C. Cir 1985), is misplaced. In that proceeding, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission's holding that the Mine Act does not grant nonemployee miners' representatives a general right of access to mine property for purposes of "monitoring" an operator's miner training program. However, both the Commission and Court emphasized that the case did not involve participation in walkaround by an authorized miners' representative. 6 FMSHRC at 207; 751 F.2d at 1421 n.21 & 1423. Here, in contrast, we deal with that clearly conferred statutory right.

particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners." 3 FMSHRC at 619. Thus, the Commission held that there may be "circumstances where an operator can legitimately refuse walkaround participation to a person who failed to comply with Part 40's filing requirements." Id.

In light of Emery's arguments, we have carefully reexamined the reasoning and bases of Consolidation Coal. We find that decision to represent a sound interpretation of section 103(f) and to accurately reflect the Secretary's clearly expressed intent in promulgating his Part 40 regulations. We therefore reaffirm that decision and conclude that application of its principles to the present case dictates affirmance of the judge on this question.

Here, as noted above, Rabbit's name was not listed on the representatives' notification form submitted for the Deer Creek Mine pursuant to the filing requirements of 30 C.F.R. §§ 40.2 & 40.3 (n.3 supra). However, the UMWA was named on the form as the organization with which the local employee miners' representatives were affiliated. The record leaves no doubt that this affiliation and the UMWA's status as the organization representing miners at the Deer Creek Mine were well known to Emery. The record is devoid of any prior objection by Emery to the UMWA's representative status.

There is also no dispute that Rabbitt was a valid International Representative of the UMWA, and was recognized as such by Deer Creek's management. No one at the mine on April 15, 1986 -- miners, Emery management, or Inspector Boston -- doubted Rabbitt's credentials as a UMWA official. Indeed, the facts show that Rabbitt was well known in his official capacity by Mine Manager White and had previously visited the Deer Creek Mine in connection with the proposed modification of the application of certain mandatory standards.

Part 40 permits both organizations and individuals to serve as miners' representatives. In light of the evidence developed in this case, the judge properly determined that the UMWA as an organization and Rabbitt as an official of that organization were miners' representatives of the Deer Creek miners. That same evidence defeats any assertion that Emery entertained a good faith doubt on April 15, 1986, as to Rabbitt's status as a bona fide agent of the organization representing its miners. As was the case in Consolidation Coal, the operator "was aware of who [this] perso[n] [was] and why [he was] at its mine." 3 FMSHRC at 619.

Emery's attempts to distinguish Consolidation Coal are unpersuasive. First, Emery has argued in its brief (E. Br. 31-32) and at oral argument before us (Tr. Oral Arg't 70-71) that Rabbitt's presence at Deer Creek on April 15 had not been sought by the local safety committee. Our reading of the record shows that all three members of the Deer Creek safety committee were aware of Rabbitt's visit on April 15 and did not object to his presence. See n.6 supra. The only objection to Rabbitt's presence revealed in the record is that of Emery. Moreover, the judge found that the local members of that committee, including Fitzek, "wanted Rabbitt's expertise and

assistance." 9 FMSHRC at 1205. Rabbitt's previously described testimony concerning the safety committee's request that he visit the Deer Creek mine provides substantial evidence to support the judge's finding. Second, Emery asserts that the inspection in Consolidation Coal was conducted pursuant to a miner's request under section 103(g) of the Mine Act, 30 U.S.C. § 813(g)(1), while the April 15 inspection at Deer Creek was a regular, quarterly inspection conducted pursuant to section 103(a) of the Act. This case does not require us to detail the interrelationship between sections 103(a) and (g). The concise answer to this argument is that section 103(f), by its express terms, links walkaround rights to inspections made pursuant to section 103(a).

In further challenging the rationale of Consolidation Coal, Emery relies on the principle that an agency must comply with its own regulations, which, in this instance, require the filing of information identifying miners' representatives. First, we note that here it is a failure of the miners' representative to file under Part 40 that is at issue, not a failure of the government to follow its regulations. Second, it is settled that an agency possesses broad authority to delineate, explain, and interpret its regulations. See generally, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.) With respect to the Part 40 regulations, the Secretary did so in his promulgation of the rules and indicated clearly that a failure to file under Part 40, by itself, does not vitiate walkaround rights.

For the above reasons, we agree with the judge that the failure to specifically name Rabbitt as a miners' representative in the Part 40 filing did not defeat his right to accompany the MSHA inspector. Nevertheless, we are constrained to observe that this type of issue has arisen several times before us on review. Thus, we are aware that a level of uncertainty is present in the mining community concerning the purpose of and the need for adherence to the Part 40 filing requirements. Clarity in the administration and enforcement of the Act is vital. In promulgating the Part 40 regulations, the Secretary expressly stated that he would monitor the experience of representation by organizations in order to address any problems encountered. 43 Fed. Reg. 29,508 (July 7, 1978). The interests of the mining community and the cause of cogent enforcement might be well served by instituting secretarial review of the Part 40 filing requirements with the object of clarifying the intent, implementation and need for compliance with filing requirements by miners' representatives.

C. Waiver of Liability Policy

We next turn to the issue of whether, in view of our conclusion that a nonemployee may be designated as a miners' representative authorized to accompany an MSHA inspector during an inspection, Emery could nonetheless require such nonemployee representative to sign a waiver of liability as a condition of entry into the mine. The administrative law judge concluded that Emery's insistence that Rabbitt sign a waiver before entering its mine was an impermissible interference with the exercise of the miners' walkaround rights under section

103(f). 11/ For the reasons that follow, we reverse.

The right given to miners to have a representative accompany an inspector is an important right. Congress concluded that miner participation in inspections "will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Legis. Hist. 616-617. Nevertheless, the right to accompany an inspector is not an unqualified right. Certain qualifications on the exercise of the right are stated in section 103(f) itself. Section 103(f) begins by providing that the exercise of the right is "[s]ubject to regulations issued by the Secretary." 12/ 30 U.S.C. § 813(f). Also, rather than mandating that a miners' representative be present during any inspection, the section simply requires that a representative "be given an opportunity to accompany" the inspector and it is expressly provided that "compliance with [section 103(f)] shall not be a jurisdictional prerequisite to the enforcement of ... this Act." Id. Further, although more than one miners' representative may accompany the inspector if an inspector determines that such participation would aid the inspection, only one miners' representative employed by the operator is entitled to compensation from the operator for the time spent on the inspection. Id.; see also Magma Copper Co. v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981). Thus, Congress provided miners' representatives a carefully delineated right that, although important, is far from an absolute, unconditional right of accompaniment. 13/

11/ The judge also addressed whether Emery's waiver of liability policy violated the laws of the State of Utah. The proper concern in this proceeding, however, is whether Emery violated the Mine Act. We express no opinion, therefore, on any question concerning state law.

12/ The Secretary has not promulgated a regulation addressing the relationship between 103(f) rights of nonemployee representatives and waiver of liability policies. Rather, this theory of violation was enunciated by the Secretary for the first time in the enforcement proceeding presently before us.

13/ The Secretary of Labor's Interpretative Bulletin addressing section 103(f) walkaround rights also recognizes that the exercise of walkaround rights of miners' representatives is subject to appropriate qualifications:

Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate

In this case the operator asserts that its requirement that a waiver of liability be executed was a good faith, reasonable condition of entry applicable to all nonemployee visitors, and that Rabbitt's refusal to sign the waiver justified Emery's denial of entry into its mine. In essence, Emery argues that its policy requiring waivers of liability as a condition of entry into its mine is proper because it protects a legitimate private property right of the operator without impermissibly interfering with the exercise of the statutory walkaround right granted to miners under section 103(f).

The Supreme Court has recognized that in appropriate circumstances conflicts between statutory rights of employees and private property rights of employers must be resolved by seeking a proper and balanced accommodation between the two. See, e.g., Hudgens v. NLRB, 424 U.S. 507, 521-22 (1976). Such accommodation between employees' statutory rights and employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). In striking these balances, the Court has approved restrictions upon organizational activity under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1982), carried on by nonemployees on employers' property (e.g., Babcock & Wilcox, supra, 351 U.S. at 112-14), and limitations of access to employers' business records by nonemployee bargaining representatives (Detroit Edison Co. v. NLRB, 440 U.S. 301, 318-19 (1979)). See also Marshall v. Barlow's, Inc., 436 U.S. 307, 314-17 (1978) (in part applying the Babcock & Wilcox principles to strike down warrantless inspections under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1982) ("OSHAAct")); Council of So. Mtns., supra, (nonemployee miners' representative not entitled to monitor training classes on mine property.) The Court has emphasized that in fixing "the locus of accommodation," the difference between activities carried on by employees and by nonemployees may be, in a given context, "one of substance." Hudgens, supra, 424 U.S. at 521-22 & n.10. With these general principles in mind, we turn to a balancing of the competing interests at issue here.

delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners. Where necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection. The inspector can also require individuals asserting conflicting claims regarding their status as representatives of miners to reconcile their differences among themselves and to select a representative. If there is inordinate delay, or if the parties cannot resolve conflicting claims, the inspector is not required to resolve the conflict for the miners and may proceed with the inspection without the presence of a representative.

43 Fed. Reg. 17546 (1978).

Emery's evidence concerning the adoption of its waiver of liability policy established that following the disaster at Emery's Wilberg Mine in December 1984 in which 27 miners died, large portions of Emery's liability insurance coverage were canceled and Emery was unable to replace the canceled coverage. As a result, Emery decided to attempt to limit its liability exposure. Accordingly, the challenged policy requiring nonemployees to sign the waiver of liability was implemented. 8 FMSHRC at 1195-96. (State and federal mine inspectors were not asked to sign the waiver forms. 8 FMSHRC at 1196). The judge rejected Rabbitt's suggestion that the waiver policy was adopted to restrict his activities at Emery's mines. 8 FMSHRC at 1206. Instead, the judge found the reasons set forth by Emery concerning its adoption of the policy to be credible. Id. In sum, it is clear from the record that the policy requiring nonemployee visitors to Emery's mines to execute liability waivers was adopted in response to Emery's serious difficulties in obtaining a satisfactory level of liability insurance coverage and was not targeted at nonemployee miners' representatives in an attempt to hinder the exercise of their representational rights. Thus, the record demonstrates that Emery's interest in obtaining liability waivers from nonemployees entering its mines was legitimate and substantial.

The interests of the miners and of their nonemployee representative in having such representative accompany an MSHA inspector into Emery's mines without executing a waiver of liability must also be considered. On a basic level, their interest in being able to do so appears obvious. Most, if not all, individuals would prefer to participate in any undertaking or activity without having to sign a waiver of liability prior to such participation. Such personal desires alone, however, are insufficient to override legitimate private property interests of the party requesting a waiver. Of more importance is the effect that execution of such a waiver would have on the miners' right to have a nonemployee accompany an MSHA inspector as the miners' representative during an inspection. On this question, we find that the record is devoid of convincing evidence supporting the claim of interference or chilling effect raised by the Secretary and the UMWA.

As the judge found, Rabbitt himself had signed a similar "Visitor Release" in visits to Emery's mines, including the Deer Creek Mine. 8 FMSHRC at 1189 & n. 9. This release stated that the visitor "will not hold Emery ... liable should [he or she] suffer injury or death while ... in the mines." Emery Exh. 4. Further, at oral argument, counsel for the UMWA expressed uncertainty that requiring nonemployee miner representatives to sign such waivers would actually hinder their entry into the mines in their capacity as representatives of miners. Tr. Oral Arg't 65-67. (The same representatives participate in inspections and investigations under the applicable collective bargaining agreement and in this capacity are required to sign waivers. Tr. 268; 8 FMSHRC at 1197.) In sum, no specific evidence of an identifiable impairment of a nonemployee representative's entry into Emery's mines was presented. Nor has any other material impairment of rights granted to miners under section 103(f) been established in connection with the inspection at issue. Here, Rabbitt was serving as an additional miners' representative, the miners also being represented on the inspection by

Mark Larsen, an employee of Emery and member of the UMWA safety committee at the Deer Creek Mine. Although there is evidence that during the inspection Rabbitt pointed out a roof control violation to the inspector, there is no suggestion that the miners would not have had effective walkaround representation if Rabbitt had not appeared to participate in the regular inspection taking place that morning.

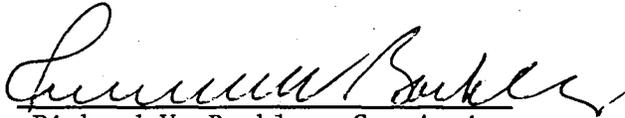
Balancing the competing interests at stake here, and based on the record before us, we conclude that Emery's requirement that Rabbitt, a nonemployee, as part of Emery's general policy directed at nonemployees entering its mines, sign a waiver of liability as a condition of entry did not violate the Mine Act. Rather, we view this condition of entry as good faith, nondiscriminatory attempt to protect a legitimate and substantial private property interest. Cf. Hercules, Inc. v. NLRB, 833 F.2d 426, 429 (2d Cir. 1987)(nonemployee industrial hygienist granted access to plant upon condition that agreement not to divulge trade secrets was signed). Although the Mine Act grants nonemployees access to operators' mines when serving as miners' representatives, it does not address the economic question of who bears the cost of injuries that they might suffer while they are on the mine site in their representative capacity. Accordingly, based on the record before us, we find that the balance of legitimate competing interests tips in favor of Emery on the question of whether Emery's requirement that a nonemployee miners' representative sign a waiver of liability as a condition of entry into its mine violates the Mine Act. The judge's contrary conclusion is therefore reversed.

III.

Conclusion

We have concluded that Emery's denial of entry to Rabbitt based on his status as a nonemployee cannot stand. The record shows that this was the initial objection raised by Emery on April 15, 1986. The evidence also demonstrates that even had Rabbitt agreed to sign the waiver, Emery would have interposed its nonemployee objection. Under these circumstances, we conclude that insofar as Emery denied Rabbitt access for walkaround purposes based on its nonemployee objection, its conduct violated the Act. The fact that Emery's insistence that Rabbitt sign the waiver did not violate the Mine Act will be taken into account in determining the appropriate civil penalty to be assessed, an issue not presented by this proceeding.

Accordingly, for the foregoing reasons, the judge's decision is affirmed insofar as it held that a nonemployee may serve as a miners' representative under section 103(f) and that the failure to specifically name Rabbitt in a Part 40 filing did not defeat his right to accompany the inspector. We reverse the decision insofar as it found that Emery's waiver of liability policy violates the Mine Act.


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner

Chairman Ford, concurring in part and dissenting in part:

Subject to the caveats discussed below, I agree with my colleagues in the majority that section 103(f) of the Mine Act, 30 U.S.C. 813(f), allows for walkaround participation in MSHA inspections by nonemployees. I further agree that walkaround participation in such circumstances can be made subject to reasonable nondiscriminatory preconditions such as signing the liability waiver at issue in this case. I part company with my colleagues, however, on their holding that walkaround participation by a nonemployee purporting to be a miner representative can not be made contingent upon his compliance with the filing requirements of 30 C.F.R. Part 40. Accordingly, I would hold that a mine operator does not violate the Mine Act by refusing access to a nonemployee who has not complied with Part 40.

To begin with, walkaround rights are textually and effectually conditioned by the introductory language of section 103(f) itself: "Subject to regulations issued by the Secretary ... a representative authorized by [the] miners shall be given an opportunity to accompany the Secretary or [her] authorized representative during the physical inspection of any coal or other mine..." The "regulations" referred to in section 103(f) are obviously those set forth in Part 40. Thus, the "opportunity to accompany", i.e., the "walkaround right", is contingent upon the miner representative's compliance with the requirements of Part 40. 1/

The requirements of Part 40 are not burdensome. Briefly stated, the representative of miners "shall file" with the appropriate MSHA District Manager the following: (1) his or her name, address and telephone number, or in the case of an organization such as the UMWA, the "official or position" who is to serve as representative; (2) the name, address and identification number of the subject mine; (3) a copy of the document evidencing the designation of the representative; (4) a statement of those statutory functions the representative is authorized to perform; (5) names, addresses and telephone numbers of alternate representatives; (6) a statement that all information filed has been delivered to the affected mine operator; and (7) a signed certification that the information provided is true and correct. 30 C.F.R. 40.3.

Of particular importance to this case are requirements (1), (3), (4) and (6). They not only establish the representative's bona fides,

1/ The Secretary is correct in asserting that Part 40 is meant to identify miner representatives for other purposes in the Act as well. Indeed, the authority headnote to Part 40 appears to cite every instance in the Mine Act where "representative of miners" or a variant thereof is used. I find it compelling, however, that section 103(f) is the only instance that directs the Secretary to issue regulations addressing the activities of miner representatives and the only instance where the term "authorized miner representative" is used. [Emphasis added].

they also put the affected mine operator on notice as to the identity, authority, and scope of responsibilities of the nonemployee representative when he presents himself at the mine and asserts his right of access for walkaround purposes. In such circumstances, the mine operator is in no position to question the representative's authority since section 30 C.F.R. 40.4 requires the operator to post the information provided by the representative, pursuant to item (6) above, on the mine bulletin board.

Had Mr. Rabbitt or his employer, the UMWA, complied with Part 40 - particularly after having been denied access to another of Emery's mines on an earlier occasion - Emery's refusal to allow him to participate in the inspection would have been a violation of section 103(f). On the basis of the record here, however, Emery cannot be said to have denied access to an "authorized miner representative" as that term is used in section 103(f). Indeed, even absent the written filing and operator notice requirements of Part 40, the evidence that Mr. Rabbitt was specifically designated as a walkaround representative by two or more miners in the Deer Creek Mine is insufficient at worst, equivocal at best. 2/

It is well-established that an agency is bound by its own regulations. See e.g., United States v. Nixon, 418 U.S. 683 (1974); Vitareli v. Seaton, 359 U.S. 535 (1959); and Accardi v. Shaughnessy, 347 U.S. 260 (1954). Here the Secretary requires certain filings pursuant to Part 40 that would establish the credentials of a non employee as an authorized miner representative but then proceeds to ignore the lack of compliance. To be sure, the Secretary does not "authorize" miner representatives; the miners do. Her MSHA district offices, however, are meant to serve as repositories of all information documenting that individuals who purport to be miner representatives have indeed been authorized by the miners for purposes of walkaround participation under section 103(f). Had the Secretary insisted on compliance with Part 40 by both her own representatives and Mr. Rabbitt, the citation at issue would have had some credibility.

Much has been made of a sentence in the preamble to Part 40 (not, incidentally, printed in the Code of Federal Regulations) which states, "[I]t should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part." 43 F.R. 29508 (July 7, 1978). See also Consolidation Coal Co. v. Secretary and UMWA, 3 FMSHRC 617 (1981). Read together with the mandatorily - styled provisions of Part 40, the Secretary appears to be saying, "This is what you must do in order to be considered an 'authorized miner representative' under section 103(f), but if

2/ I am not persuaded, as my colleagues appear to be, that a lack of the safety committeemen's objections to Mr. Rabbitt's presence at the mine somehow translates to authorization for him to have served as the designated walkaround representative on April 15, 1986. (Majority Slip Opinion at pp. 5 and 12). Furthermore, only one of those committeemen was called to testify.

you don't comply you may, nevertheless, be considered an 'authorized miner representative' under section 103(f)." I find that construction of Part 40 to be illogical and absurd particularly when the walkaround right in section 103(f) was intended by Congress to be "subject to" the very regulations that appear to be honored more in the breach than in the observance. ^{3/} The gloss placed on Part 40 by the Secretary's preamble directly contradicts the regulations themselves and, therefore, the Commission need not give it any weight. See Udall v. Tallman, 380 U.S. 1 (1965) (an agency's interpretation of an administrative regulation may not be set aside unless it is plainly erroneous or inconsistent with the regulation). Furthermore, the Secretary's position here with respect to the authority of a contemporaneous interpretative statement issued with a regulation is contrary to the Secretary's position taken in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986).

At oral argument it was suggested that the Commission ought to recognize a presumption that a representative of a collective bargaining agent is also a representative of the miners for purposes of section 103(f). (Statements of UMWA Counsel, Oral Argument, July 30, 1987, at pp. 57-61). Such a presumption, it was argued, would eliminate the need to file under Part 40. That argument, while appealing to the majority (Slip opinion at p. 12), is unpersuasive on several counts.

First, Part 40 delineates "representative of miners" to include "organizations", presumably labor organizations. As such, they too are subject to the filing requirements of Part 40. Second, absent the information required by a filing, neither the Secretary nor the operator is placed on notice as to what statutory functions the collective bargaining agent's representative is authorized to perform, including the walkaround function. 30 C.F.R. 40.3(a)(4). Third, and most importantly, as this Commission has often held, "the Mine Act is not an employment statute." United Mine Workers of America on behalf of James Rowe et al. v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (1985) Aff'd 822 F.2d 1134 (D.C. Cir. 1987).

In affirming the Commission's holding in the above case, the D.C. Circuit explicitly rejected the Secretary's argument that "miner", as used in the Act, could be expanded to include persons on layoff status "contractually entitled to employment" by reason of the collective bargaining agreement's seniority provisions. "We certainly cannot infer from the Act that Congress intended privately-bargained contracts to determine who is or is not a miner entitled to receive the section 115 safety training," Id. at 1148.

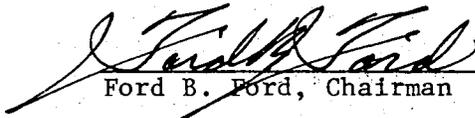
^{3/} As to any loss of statutory rights in this case, I note that Mr. Larsen, an employee of the Deer Creek mine, a mine safety committeeman, and an authorized miner representative who filed pursuant to Part 40, was a member of the inspection party and was not challenged by Emery. Furthermore, section 103(f) explicitly provides that where there is no authorized representative, the inspector is to consult with a reasonable number of miners on matters of safety and health as he moves through the mine.

Here, likewise, the status and authority of a purported "authorized miner representative" should be established by the labor contract - neutral indicia of Part 40 in determining who is entitled to accompany MSHA inspectors under section 103(f).

In summary, I join with my colleagues in criticism of the Secretary's lackadaisical attitude toward Part 40 compliance, but fundamental fairness dictates that the citation be vacated since Emery cannot be found to have denied access to an "authorized miner representative" when it denied access to a nonemployee who did not comply with Part 40. 4/

Mine operators, of course, have the option of granting access to anyone they choose including nonemployee "walkarounds" who have not complied with Part 40. My views address only those situations where the operator challenges the credentials of, and denies access to, a nonemployee who purports to be an authorized miner representative for purposes of section 103(f), but who has not complied with the Secretary's filing requirements.

Accordingly, I would reverse the judge's decision.


Ford B. Ford, Chairman

4/ It is of little consequence that Emery did not question the lack of Part 40 compliance on the day Mr. Rabbitt sought access to the mine (April 15, 1986), since the issue was fully presented to the judge below as an alternative defense to the citation.

Commissioners Doyle and Nelson, concurring in part and dissenting in part:

We join in the majority's decision to the extent that it affirms the administrative law judge's conclusions that walkaround rights under section 103(f) of the Mine Act extend to nonemployee representatives of miners and that an operator may not deny such walkaround rights solely because the representative has not filed identifying information under 30 C.F.R. Part 40. We respectfully dissent, however, from the majority's decision to the extent that it reverses the judge and permits an operator to extract a release and waiver of liability from the nonemployee miners' representative before he is permitted to exercise his section 103(f) rights.

Congress, in granting to the miners' authorized representative an opportunity to accompany the inspector for the purpose of aiding the inspection, placed no conditions or qualifications upon the representative's exercise of this statutory right, other than it being subject to regulations to be issued by the Secretary of Labor. While it is true, as the majority states, that the statute does not mandate the presence of a miners' representative during an inspection nor require the operator to pay more than one employee representative, the fact remains that the only condition placed by Congress on the exercise by the miners' representative of his statutory right to accompany the inspector is that the right is subject to regulations issued by the Secretary. 1/

We do not disagree with the majority that, under labor relations law, there must be a balanced accommodation between the rights granted to employees under the National Labor Relations Act ("NLRA") and the legitimate property rights of employers. 2/ "However, these [labor] cases arise under statutes whose very purpose is the governance of labor-management relations.... The entirely discrete purpose of the Mine Act ... prevent[s] us from transferring this reasoning to the

1/ The Commission has decided that those regulations do not operate to deprive Mr. Rabbitt of his right to accompany the inspector.

2/ The decision in Council of So. Mtns., 751 F. 2d 1418 (D.C. Cir. 1985) cited by the majority in support of this proposition rests not on a balancing of employers' property rights with employees' statutory rights but rather on a finding by the court that no statutory right to monitor training classes existed. 751 F.2d 1422. See also n. 10 of the majority's decision.

It should be noted also that none of the cited cases go beyond accommodation of the rights granted under the NLRA to deal with the question of liability or indemnification for injuries suffered while those rights are being exercised.

Mine Act." UMWA v. Peabody Coal Co., 7 FMSHRC 1357, 1365, aff'd sub nom. Brock v. Peabody Coal Co., 822 F. 2d 1134 (D.C.Cir. 1987). Accordingly, we do not find the labor relations cases, nor the balancing of interests test, to be dispositive of the issue at hand. 3/

Rather, we submit that the proper test for determining whether Emery may impose its waiver of liability policy is whether the imposition of this requirement upon the miners' representative interferes with his representational rights, Council of So. Mtns., v. FMSHRC, 751 F.2d 1418, 1420, 1422 and n. 31 (D.C. Cir. 1985), or inhibits the miners or the representative from exercising those rights granted to them under the Mine Act.

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

No person shall ... interfere with the exercise of the statutory rights of any ... representative of miners ... because of the exercise by such ... representative of miners ... of any statutory right afforded by this Act.

The legislative history of section 105(c)(1) states:

The wording of section 10[5](c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. (Emphasis added.)

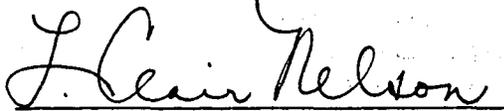
S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

Irrespective of whether Emery's Release and Waiver would be enforceable or would fail for lack of consideration, we believe that the very act of requiring the nonemployee miners' representative to sign it, before permitting him to exercise a right that the Commission has unanimously agreed was granted to him by the Mine Act, interferes with his statutory rights and is inhibiting both to him and to the miners who might otherwise request his assistance. As the procedure advocated by Emery is contrary to Congress' intent as set forth in the legislative history of section 105(c)(1), we would affirm the administrative law

3/ The majority also notes that Mr. Rabbitt was an "additional miners' representative" and that "there is no suggestion that the miners would not have had effective walkaround representation if Rabbitt had not appeared to participate..." (Emphasis added.) We find the distinction between one miners' representative and another to be without merit and the relative effectiveness of the representation to be an inappropriate consideration.

judge's conclusion that the operator may not require the representative to sign a release and waiver of liability in order to exercise his section 103(f) rights. 4/


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

4/ We intimate no view in this dissent as to the existence or extent of any liability on Emery's part in the event of injury to Mr. Rabbitt while underground nor as to the enforceability of the waiver. Those matters lie beyond the purview of the Mine Act.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1988

UTAH POWER & LIGHT COMPANY, :
Substituted for :
EMERY MINING CORPORATION :
 :
v. : Docket Nos. WEST 86-131-R
 : WEST 86-140-R
SECRETARY OF LABOR, : WEST 86-141-R
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
and :
 :
UNITED MINE WORKERS OF :
AMERICA (UMWA) :

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

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and pose the same issues that are presented in Emery Mining Corp., 10 FMSHRC _____, Docket No. WEST 86-126-R (March 1988), issued this date. The parties stipulated that the decision in each of these three cases would be controlled by the disposition of Emery. Accordingly, we consolidate these three cases for purposes of decision.

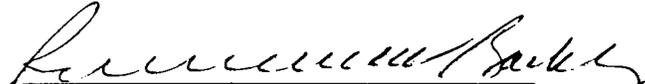
For the reasons expressed by the Commission in Emery, the administrative law judge's decisions in these cases are affirmed insofar as they hold that under section 103(f) of the Mine Act a nonemployee may accompany an inspector as a miners' representative during a physical inspection of a mine and that the failure of a nonemployee miners' representative to file the identifying information required under 30 C.F.R. Part 40 does not by itself permit the mine operator to deny the miners' representative entry into its mines. Further, the judge's decisions are reversed insofar as they hold that under the Mine Act the mine operator could not require the nonemployee miners' representative to sign a waiver of liability as a condition of entry into its mines.

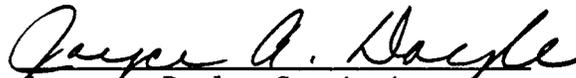
For the reasons stated in his separate opinion in Emery, incorporated herein by reference, Chairman Ford would reverse the judge as to the Part 40 issue. For the reasons stated in their separate

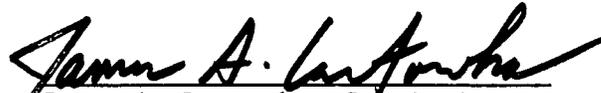
opinion in Emery, also incorporated herein by reference, Commissioners Doyle and Nelson would affirm the judge on the waiver of liability issue.

Accordingly, consistent with the stipulations of the parties and the Commission's decision in Emery, the administrative law judge's decisions in these three cases are affirmed in part and reversed in part.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 3 1988

ROBERT L. TARVIN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 87-90-D
: MSHA Case No. BARB CD 87-23
JIM WALTER RESOURCES, INC., :
Respondent : No. 5 Mine

DECISION

Appearances: Patrick Nakamura, Esq., Birmingham, Alabama,
for the Complainant;
R. Stanley Morrow and Harold Rice, Esqs.,
Jim Walter Resources, Inc., Birmingham,
Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed with the Commission on May 21, 1987, by the complainant Robert L. Tarvin, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Tarvin filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and following an investigation of his complaint, MSHA made a determination that a violation of section 105(c) had not occurred, and informed Mr. Tarvin of this finding by letter of April 17, 1987. Mr. Tarvin then filed a timely complaint with the Commission pro se, but subsequently retained counsel to represent him.

A hearing on the merits of the complaint was held in Birmingham, Alabama, and the parties appeared and participated fully therein. The parties waived the filing of posthearing briefs, but were permitted to present oral arguments on the record in support of their positions. I have considered these arguments in the course of my adjudication of this matter.

In his complaint, Mr. Tarvin asserted that he was removed from his job as a shuttle car operator on a coal producing

section on February 18, 1987, and replaced by an inside laborer. He alleges that he was removed from the section because he had reported to his foreman 2 days earlier that a ventilation line curtain was 20 feet from the face and had not been advanced while coal was being cut. Mr. Tarvin also stated that some 3 weeks earlier, he told his foreman and his crew that they never checked for methane while mining and did not use their methane monitors, and that since this was the case, there was no need for them to bring their methane monitors if they were not going to use them. Mr. Tarvin also implied that he refused to continue to work because of what he reasonably believed to be a violation of the Act.

Mr. Tarvin's requested relief includes a request for a finding that the respondent discriminated against him by removing him from the section, that he be put back on a coal producing section, and an order prohibiting the respondent from further discriminating against him or harassing him for refusing to do work which he believes to be in violation of the Act.

The respondent filed a timely answer and denied that it has discriminated against Mr. Tarvin. The respondent admitted that the ventilation curtain in question was not installed as required by mandatory safety standard 30 C.F.R. § 75.302-1, and stated that it was reinstalled as soon as it came to the attention of the foreman. Respondent admitted further that Mr. Tarvin was moved to another section of the mine, but contended that he was transferred because the area where he was working was "mined out," and that he was having problems coordinating his activities with those of the other equipment operators.

The respondent further asserted that Mr. Tarvin suffered no loss in pay, or any change in his job classification as a shuttle car operator, and that no adverse action has been taken against him. Respondent also stated that the same facts and issues presented in this case were the subject of a grievance filed by Mr. Tarvin under the National Bituminous Coal Wage Agreement of 1984 (Contract), and that the grievance was dismissed when it was determined that the respondent followed correct procedure and was justified in transferring Mr. Tarvin. Respondent concludes that it has not violated section 105(c) of the Act, and contends that this dispute is a contractual matter which has been settled under the terms of the contract.

Issues

The crucial issue in this case is whether or not the complainant's transfer from a coal producing section to a rock

construction section was motivated in any way by his engaging in any protected safety activity, and whether the transfer was made in retaliation for that activity. Additional issues raised by the parties are disposed of in the course of my adjudication of this case.

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.

Stipulations

The parties stipulated to the following (Tr. 17-18):

1. Complainant is a miner and Respondent is an operator and Complainant's employer as defined by the Federal Mine Safety and Health Act of 1977 (Act).

2. The Administrative Law Judge has jurisdiction to hear this case.

3. Complainant, through his representative, and Respondent, are both signatories to the National Bituminous Coal Wage Agreement of 1984 (Contract) and are bound by the terms and conditions therein.

4. Article 1A, Section (d) of the contract states, inter alia, ". . . the direction of the working force . . . is vested exclusively in the Employer."

5. Article XXIII of the Contract provides for settlement of disputes.

6. Complainant has suffered no loss in pay due to his transfer and is in the same classification as he was prior to this transfer. Complainant continues to work on the same shift.

7. Complainant filed a Discrimination Complaint with the Mine Safety and Health Administration (MSHA). MSHA found that no violation of Section 105(c) of the Act existed.

Bench Ruling Denying the Complainant's Motion for a Continuance

Complainant's counsel telephoned me at my hotel on the afternoon of the day before the scheduled commencement of the hearing. He advised me that he had just been retained by Mr. Tarvin to represent him, and he requested a continuance in order to prepare his case. I advised counsel that his request was denied, but that he would be given an opportunity to re-new his motion on the record after the convening of the hearing, and that I would consider any further arguments after an opportunity to hear further as to why he was not retained by Mr. Tarvin earlier than a day before the hearing.

At the hearing, Mr. Tarvin explained that his late retention of counsel was due to the fact that he had previously believed that his UMWA Union District 20 office would represent him in this matter. Mr. Tarvin confirmed that he contacted the union 3 weeks prior to the hearing, and spoke with one of its representatives. Union representative Thomas Ed Wilson, who was present in the courtroom, confirmed that he had spoken to Mr. Tarvin "about the court case coming up," but that he had not seen any further correspondence on the matter from July until the present. Mr. Wilson stated that he was under the impression that the Department of Labor's Solicitor's Office would represent Mr. Tarvin, and he came to that conclusion because he had not seen any correspondence between Mr. Tarvin and the respondent. Mr. Wilson was aware of the fact that MSHA advised Mr. Tarvin of the fact that it did not believe that a violation had occurred, and that Mr. Tarvin had written to the Commission for further relief. From that point on, Mr. Wilson stated "the next thing I know the case is coming to trial" (Tr. 6-9).

Mr. Tarvin acknowledged that he was made aware of the fact that based on MSHA's investigation of his complaint, MSHA was of the opinion that the respondent did not discriminate against him and was not in violation of section 105(c) of the Act, through MSHA's letter of April 17, 1987, informing him of its decision. When asked whether it was his understanding at that time that when he filed his complaint with the Commission he would be proceeding on his own, Mr. Tarvin responded "I still thought the union lawyer was going to be representing me" (Tr. 9). When asked whether he believed that MSHA would

be representing him, Mr. Tarvin responded "I really don't know" (Tr. 10). With regard to his belief that the union would represent him, Mr. Tarvin stated "Well, I thought they would have a lawyer here, you know. If I'd knowed that they wouldn't, I would have got a lawyer of my own, you know" (Tr. 10).

The parties were reminded of the fact that given the presence of counsel, the number of witnesses present, a court reporter, and the time and expense expended in convening the hearing upon more than timely notice to the parties, it was my view that Mr. Tarvin had more than ample time to retain counsel, and the request for a continuance was neither timely or justified, and it was denied (Tr. 10).

I reviewed and discussed Mr. Tarvin's complaint with the parties, including the answer and the defense presented by the respondent. I pointed out that the facts did not appear to be complicated, and that the issue presented was rather basic and simple (Tr. 11-14). Mr. Tarvin's counsel was afforded an opportunity to review the proposed stipulations tendered by the respondent (Tr. 16-19), and he was afforded an opportunity to review the official record with respect to the complaint, and to speak with Mr. Tarvin and his witnesses, who were present, before the taking of any testimony. Counsel was also afforded an opportunity to review MSHA's report of investigation, which was made available by the respondent, and he made a copy of the report for his file (Tr. 82).

In addition to the testimony of Mr. Tarvin, three witnesses were called to testify on his behalf. I take note of the fact that in the course of the hearing, Mr. Tarvin's counsel confirmed that while he has not previously been involved in discrimination cases, he has some knowledge about coal mining, and has been involved in two or three coal cases in the past. He also displayed a keen awareness of the issues presented in this case, and conducted a most effective direct examination of his witnesses, and cross-examination of his adversary witnesses (Tr. 112-113; Tr. 240-250). Although the parties waived the filing of posthearing briefs, they were afforded a full opportunity to state their positions and to give supporting arguments on the record (Tr. 239-251), and I have considered these arguments in the course of my decision of this case. Under all of these circumstances, I cannot conclude that Mr. Tarvin has been prejudiced by my denial of his request for a continuance of the hearing.

Complainant's Testimony and Evidence

Complainant Robert L. Tarvin testified that he has been employed by the respondent for 3 years, and is presently a shuttle car operator. He has never been disciplined for operating the machine dangerously, nor has he been criticized in any manner concerning the operation of the machine. He confirmed that he is a member of a ten-person crew who work together on a particular section. On the evening of February 16, 1987, his crew was assigned to the No. 1 Section, and he was assigned to that crew approximately 6-months earlier (Tr. 19-24).

Mr. Tarvin stated that on the evening of February 16, 1987, while operating a shuttle car at the Number 2 place on the section, he pulled his car in behind a continuous-mining machine which had "gassed out." He explained that the miner automatically shuts down in any area where the methane level reaches 2 percent or more. The place was being cut, and as he looked over his shuttle car, he observed that no ventilation curtain was installed to course the air around the face. He was positioned approximately 10 feet behind the miner machine, and when he observed that the curtain was not up, he backed his machine completely out of the area, informed the miner crew that "they needed to get the curtain up," and he left to summon the section foreman, Gary Allinson. After returning with the foreman, Mr. Allinson looked into the area and instructed the crew to put up some curtain, and Mr. Tarvin stated that he informed Mr. Allinson that no curtain had been up in the 20 foot cut, and that "there was one more shuttle car left on the clean up" (Tr. 27). Mr. Allinson sent the miner helper to obtain some curtain, and he returned with the curtain approximately 8 minutes later and put it up (Tr. 28).

Mr. Tarvin confirmed that although ventilation curtain had been installed on the previous cut, when the miner machine proceeded to cut the next 20 feet, the curtain was not advanced or put up, and when asked why the curtain was not advanced, he responded "the miner crew was trying to cut--they was trying to break a record, you know, each one trying to outdo the other one (Tr. 28).

Mr. Tarvin stated that after the curtain was put up, since it was the end of the work shift, he loaded out one more load of coal, finished cleaning up, and prepared to leave to go home. Before leaving, he informed Mr. Allinson that he would report the matter to the safety committee. Mr. Tarvin confirmed that before leaving the mine that evening, he reported the matter to safety committeeman Robert Glasgow.

Mr. Glasgow discussed the matter with Mr. Allinson, and "got on his case" about the curtain being down, and Mr. Allinson admitted that the curtain was not up. Mr. Tarvin had no knowledge about any violation being written, nor was he aware of any formal complaint being filed with MSHA over the accident. He simply reported it to the safety committeeman (Tr. 30).

Mr. Tarvin stated that he reported to work the next evening, February 17, but Mr. Allinson was not at work. The following evening, February 18, while in the bath house preparing for work, Mr. Allinson informed him that he was needed on rock crew foreman Scott's crew, and that he was to go with Mr. Scott. Mr. Tarvin explained that rock crew work is done outby the face, and the work includes the construction of overcasts, cribs, loading out rock, and picking up trash, and does not involve coal production. Although he is still classified as a shuttle car operator, and is occasionally used in that capacity on the construction crew to load out rock, Mr. Tarvin preferred to be back on his coal producing crew doing the job that he bid for. When asked why, Mr. Tarvin responded "it just seems like I was taken off because I told them about the safety. I feel like I was discriminated against. I'd rather be in a producing section" (Tr. 35-36).

Mr. Tarvin stated that he was aware of other miners who were transferred to the rock crew for making complaints, and he believed that he was transferred to punish him for making complaints. He confirmed that after he was transferred from the No. 1 Section, he was replaced as a shuttle car operator on that section by an inside laborer, Tommy "Dukey." As a result of this, Mr. Tarvin filed a grievance, and the job was placed for bid. The laborer was removed from the job, and Mr. Eldon Sides successfully bid on the job, and he presently occupies it (Tr. 36-41).

Mr. Tarvin confirmed that prior to his transfer to the rock crew, he had been on Mr. Allinson's crew for approximately 6 months, and that he was originally placed there as a result of a grievance he filed against another foreman, John Kuzio. Mr. Tarvin stated that he was taken off Mr. Kuzio's section after complaining to him that the shuttle car he was operating had no brakes. Mr. Tarvin stated that he filed a grievance, as well as a complaint with MSHA, and that the grievance was arbitrated. However, the case was resolved at the third stage of the grievance, and he was awarded his job back, and placed on Mr. Allinson's crew. Mr. Tarvin claimed that MSHA investigated his complaint, but found no violation, and the respondent's counsel disputed this claim (Tr. 41-43).

Mr. Tarvin stated that Mr. Allinson was aware of his complaints while working with Mr. Kuzio, but that he had no prior trouble with Mr. Allinson until he was transferred to the rock crew (Tr. 44).

Apart from running over cables "once in awhile" while passing another shuttle car, which other operators also do, Mr. Tarvin denied that anyone had ever told him that he was having problems with trailing cables, or that anyone complained about his operation of the shuttle car (Tr. 44-45). Mr. Tarvin confirmed that he had reminded his crew 2-weeks prior to his transfer for the need to check for methane, but they just "laughed it off," and he filed no complaint. He also confirmed that prior to his complaint to Mr. Allinson about the curtain, he had never filed any safety complaints with the safety committee, or with MSHA or state inspectors (Tr. 46-49).

Mr. Tarvin confirmed that he lost no status or pay as a result of his transfer, and is still working the same shift. Assuming he prevails on his complaint, he simply wishes to be put back with his prior crew on a coal producing section (Tr. 50).

On cross-examination, Mr. Tarvin confirmed that while he did not complain to MSHA about the fact that members of his crew were not using their methane monitors to check for methane, he did inform Mr. Allinson about the matter, and after that, the crew used the monitors (Tr. 51-52). Mr. Tarvin conceded that no action was taken against him as a result of his complaint to Mr. Allinson (Tr. 54).

Although Mr. Tarvin contended that the respondent was utilizing untrained and unskilled general laborers as shuttle car operators, he never complained, and he conceded that before becoming a shuttle car operator, he too was a general laborer and was trained as a shuttle car operator. Although he insisted that untrained laborers operate shuttle cars, he stated "I don't know whether they're test trained or not" (Tr. 62).

Mr. Tarvin confirmed that someone classified as a shuttle car operator was working on the rock crew before he was transferred, and that after that person bid off that job, a vacancy resulted. However, he contended that after the vacancy was posted, it was removed, and the job was not awarded to anyone, and he denied that he was transferred to fill that vacancy (Tr. 64-65). He conceded that when he initially bid on a shuttle car job, his bid was for that specific job, rather

than a bid for any particular place in the mine, because the places are always moving. He "guessed" that the respondent had the right to place him in any shuttle car operator's job in the mine, regardless of the working section, as long as he continued to operate a shuttle car. He conceded that the respondent may assign him as a shuttle car operator for "one night," and that the shifting of personnel and job bidding is a contract matter. When asked whether it was true that he does not have to necessarily operate a shuttle car as long as he is working and being paid in his job classification, he responded "I don't know that" (Tr. 66).

Mr. Tarvin contended that although ten shuttle car loads of coal had been loaded out during the course of his shift on the evening of February 16, he first observed that the curtain was not up when he pulled in behind the gassed out mining machine. He explained that his position on the shuttle car placed him on the opposite side of the curtain and he could not see it (Tr. 76). Mr. Tarvin disputed any suggestion that the mine bottom was being graded as it was cut, or that the curtain was installed, but simply down, and he insisted that the curtain was not put up at all (Tr. 77-79). He conceded that since the miner was gassed out, his shuttle car could not have been loaded anyway, and that he did not stop production or refuse to work. He reaffirmed his belief that he was transferred because he complained to Mr. Allinson about the curtain, and that "I was ran off when I told the safety man about it" (Tr. 80). Mr. Tarvin admitted that while the committeeman advised him later in the bath house on February 16, that Mr. Allinson had admitted to him that the curtain was down, he could not remember telling the safety committeeman the next day that he was transferred because of his reporting the fact that coal was being mined without a curtain (Tr. 81).

In response to further questions, Mr. Tarvin stated that he did not speak with committeeman Glasgow the day after he was transferred, could not recall speaking with him after that, and that he could have asked why he was no longer with Mr. Allinson. Mr. Tarvin denied that Mr. Glasgow ever advised him that he was transferred because he had trouble running over cable (Tr. 85).

Mr. Tarvin identified a copy of the grievance that he filed, and while it reflects that it was settled, Mr. Tarvin stated that he did not agree with the settlement disposition (exhibit R-3, Tr. 86). Mr. Tarvin's counsel explained that the union has the authority to settle a grievance which is not arbitrated, even though the miner does not agree with that decision (Tr. 87).

Eldon Sides, shuttle car and ram car operator, testified that subsequent to Mr. Tarvin's transfer from the production section to the rock construction section, the vacancy created was put up for bid to replace Mr. Tarvin, and he bid on the job and got it. However, immediately after Mr. Tarvin's transfer, and before the job was posted for bid, a general inside laborer was assigned to the section. Mr. Sides stated that when he got the job, he continued to work on the No. 1 Section for a month or two until the entire crew was moved to the No. 4 Section and began mining there. No other crew replaced the crew that moved from the No. 1 Section, and it remained an idle evening shift, with only an electrician and a service crew there working to prepare the section for the day shift. Although the day shift worked the section, it remained idle during the evening (Tr. 97-101).

Mr. Sides confirmed that prior to bidding on the vacancy created by Mr. Tarvin's transfer, he had bid on a shuttle car operator's job vacancy on the rock crew created approximately 2 months before Mr. Tarvin's transfer. The vacancy came about when the rock crew shuttle car operator transferred to another job. However, the respondent withdrew the job bid, and stated that it was posted in error, and that there was no vacancy. As far as he knew, the job was never re-posted for bid, and he simply waited until he bid on Mr. Tarvin's former job on the No. 1 production section (Tr. 106).

On cross-examination, although Mr. Sides contended that MSHA was "involved" in the incident concerning the ventilation curtain which Mr. Tarvin reported, he had no knowledge whether a citation was issued or whether any investigation was conducted (Tr. 107). With regard to the job biddings he testified about, he could furnish no specific details or dates. He confirmed that when anyone bids on a job, they bid the specific job, and not the location of the job, and stated that "you can go anywhere," and "wherever management wants to put you," including the rock project (Tr. 107-109). Mr. Sides confirmed that he has never filed any safety complaints (Tr. 120).

Marteen Nichols, testified that he is employed by the respondent as a general inside laborer on the rock crew. He identified the individual who worked on the same rock crew, and who subsequently transferred from the job filled by Mr. Tarvin when he was transferred to the crew, as Ms. Elizabeth Hamner. He explained her duties as follows (Tr. 122-123):

A. She was just basically like anyone else that was on the rock crew. If it was rock dusting, we all rock dusted. If it was picking up trash, we picked up trash. If we had rock to be hauled, we hauled rock, she was just like everybody else. The rock crew is just a crew more or less.

Q. Did she operate a shuttle car?

A. If there was a shuttle car that needed to be operated, she would run one -- not a shuttle car, but a ram car.

Q. A ram car?

A. Right. I think the reason she was on the section was because she didn't run a shuttle car. She just ran a ram car.

Q. What's the difference?

A. Well, the ram cars are battery operated. You've got a little more visibility out of them and they're a little bit simpler to operate.

Q. Are there any shuttle car used on the rock crew?

A. If we go to a section that needs rock work that has shuttle cars, we use shuttle cars.

Q. Do you use ram cars more often than shuttle cars?

A. Since they've done away with most of the ram cars we don't. You know, the section that we're on now has ram cars, but that's the first section we've had ram cars for awhile.

Mr. Nichols stated that Ms. Hamner transferred from the rock crew when she bid on a job on the day shift, and he could not remember anyone replacing her immediately. Since there was no other ram car operators to operate the cars after she left, either he or other crew members would operate the ram and shuttle cars as needed. Mr. Nichols confirmed that work on the rock is such "that you might run a shuttle car one day and you might go months and you'll never run one for a month" (Tr. 124). He confirmed that the rock crew is usually

short-handed, and that miners are sometimes borrowed from the rock section and sent elsewhere to work (Tr. 125). Mr. Nichols stated that several weeks or a month elapsed after Ms. Hamner left the rock crew before Mr. Tarvin arrived, and in the interim, other rock crew members, including laborers, would operate the shuttle cars. It was not unusual for laborers to run cars because they use this opportunity to train on the cars, and then bid for one of those jobs (Tr. 126).

Mr. Nichols could not recall what the rock crew was doing when Mr. Tarvin was first assigned there, and he confirmed that when he worked with Mr. Tarvin at another coal company prior to his present job, Mr. Tarvin never had any problems with his shuttle car cable. Mr. Nichols stated that he worked one night with Mr. Tarvin on Mr. Allinson's production crew and had no problems coordinating the shuttle cars with Mr. Tarvin, nor has he heard of any such problems (Tr. 128-129).

On cross-examination, Mr. Nichols confirmed that he could not recall the dates of Ms. Hamner's departure, and Mr. Tarvin's arrival on the rock crew, but it was possible that Ms. Hamner left on February 15, approximately 4 days prior to Mr. Tarvin's arrival (Tr. 132). Mr. Nichols recalled that when Ms. Hamner bid on the day shift job, she remained on the rock crew for awhile before leaving (Tr. 133).

Michael Gaines, ram car/shuttle car operator, testified that he worked with Mr. Tarvin for 2 or 3 months on the No. 1 production section in February, 1987. Mr. Gaines could recall no problems that Mr. Tarvin ever had with his car or cable during the time he worked with him, nor could he recall foreman Allinson or any other member of management complaining about Mr. Tarvin's operation of his shuttle car (Tr. 137). He could recall no crew members complaining or receiving complaints about the manner in which Mr. Tarvin operated his shuttle car, and he confirmed that cable problems occur when the cars are operating in the same entry and have to pass each other close together (Tr. 136-137).

On cross-examination, with regard to the ventilation curtain, Mr. Gaines stated that he paid little attention to it, and after Mr. Tarvin advised him that it was 20 feet back from the face, Mr. Gaines told him that he would check it on his next trip. Mr. Gaines stated that when he went back, the curtain "may have been down," and "evidently, it was because when I went back, they were working on it" (Tr. 141-142). He estimated that a minute or two passed from the time Mr. Tarvin

advised him about the curtain, and the time he observed the curtain being put back up, and he could not recall whether the bottom was being graded at that time (Tr. 142).

Mr. Tarvin was recalled, and confirmed that when he advised Mr. Allinson that the curtain was down, approximately 8 minutes transpired before the matter was taken care of, and work resumed after this was done. When asked about the statement in his complaint that Mr. Allinson removed him from the section for "refusing to load a shuttle car while the line curtain was 20 feet outby the working face," Mr. Tarvin confirmed that he never said anything to Mr. Allinson that he would not work while the curtain was down, but simply went to find him and informed him that the curtain was down. Mr. Allinson. Mr. Tarvin stated that "I didn't tell him anything except the curtain needed to be up" (Tr. 150).

Respondent's Testimony and Evidence

Gary Allinson, section foreman, testified that on the evening of February 16, 1987, he was the foreman on the No. 1 Section, and that at 10:00 p.m., he went into the section where the continuous-miner was mining and observed Mr. Tarvin sitting in his almost fully loaded shuttle car. Mr. Tarvin informed him that the ventilation curtain "was down and it was too far back." Mr. Allinson then spoke with the miner operator and helper and they installed a curtain. The miner operator informed him that he was grading some bottom and needed additional clearance which he had forgotten to take earlier. Mr. Allinson stated that no coal production was lost and that "I didn't think it is a very substantial complaint." He denied that he transferred Mr. Tarvin because of the complaint because "I don't have the right to do that," and he also denied that he discussed the incident with management, or that he asked that Mr. Tarvin be transferred or discipline because of the incident (Tr. 151-153).

On cross-examination, Mr. Allinson stated that Mr. Tarvin worked for him for less than 6 months, and when asked why he was transferred, he stated as follows (Tr. 155-157):

A. I don't know exactly why. I have a good idea why. I think it was just because of his track record, as far as his ability to run the

car and the amount of down time we had on him.
He was just not that good of a car operator.

* * * * *

THE WITNESS: He would run over his cable. He had a lot of problems with his cable. He was slow. Other members of the section, other union representatives would come to me -- this was on the crew of nine men, and they had complaints about him. Things that I never seen Mr. Tarvin do, the union people coming to me and telling me things that he had done.

Mr. Allinson confirmed that he had never "written up" Mr. Tarvin, and when asked to document his assertion that Mr. Tarvin had problems with his shuttle car cables, he alluded to the daily foreman's production report (P&D report) (Exhibit R-2). He explained that the reports simply show the shuttle car "down time," but do not reflect the name of the shuttle car operator, nor do they provide any details concerning any problems with cables (Tr. 157-158).

Mr. Allinson stated that in some instances, if a shuttle car operator runs over his cable, this would be grounds for disciplinary action against the operator. He confirmed that he has never disciplined Mr. Tarvin in this regard, and confirmed that Mr. Tarvin continued to operate a shuttle car for him after he had cut cables. He could not provide any specific dates or details concerning the cutting of cables by Mr. Tarvin, and confirmed that in the interest of "team work," he is lenient with his crew, and conceded that he ignored Mr. Tarvin's running over cables (Tr. 160).

Mr. Allinson identified exhibit R-2 as a production report filled out by foreman James Hilliard, on the evening shift of February 17, 1987, and it reflects that shuttle car No. 60 was down four times that day, and that shuttle car No. 59 had a "cable in two," but he could not state which car was operated by Mr. Tarvin because "I wasn't there that day" (Tr. 161). He believed that Mr. Gaines operated the No. 59 car, and stated that "Mr. Gaines seldom ever cut a cable" (Tr. 162).

Mr. Allinson stated that Mr. Tarvin "may have" been transferred when the No. 1 Section "mined out," and that "I don't handle that part of it." He confirmed that he was later told by mine foreman Frank Blake that Mr. Tarvin was transferred because the section had "mined out," and that the transfer

took place "a couple of days" after the curtain incident. He explained that the section was "mined out" in that after advancing at six entries, mining stopped, and the area was cleaned up and turned in another direction. All ventilation was being established, four new entries were started, grading work was taking place, and "we stopped the section going." However, they were still in section 1, and the crew continued in that section, Mr. Gaines continued as a shuttle car operator on the section, but Mr. Tarvin was replaced by Wilmer Smith, who is known as "Dukey," a general inside laborer (Tr. 165).

Mr. Allinson confirmed that while he may have informed Mr. Tarvin that he would be going with foreman Scott's rock crew on February 18, he could not recall any conversation with Mr. Tarvin, and he did not discuss it with Mr. Scott. Mr. Allinson explained that he has 15 minutes to "line up" his available crew and has no time to discuss or "bicker" over over who will work on his crew. He further explained that Mr. Blake designates the crew members with "no questions asked," and that at the time of Mr. Tarvin's transfer, he did not discuss the matter with Mr. Blake, that "it happens all the time," and "I can have a different person on my crew every night" (Tr. 167).

Mr. Allinson confirmed that he has nothing to do with the job bidding process, and that his duties do not include posting jobs for bid (Tr. 167). He denied that he was ever disciplined over the curtain incident, and stated that he did not come to work on February 17, the day after that incident, because he had to take his wife to the hospital (Tr. 168).

Mr. Allinson recalled one occasion prior to Mr. Tarvin's transfer when he spoke to him about not bringing his shuttle car up to the continuous miner for loading, and that he told Mr. Tarvin that "he needed to do better," and that Mr. Tarvin responded "I am doing better, I'm doing the best I can" (Tr. 175). Mr. Allinson also stated that Mr. Tarvin frequently cut his car cable, and that it is reported on the production records. Respondent's counsel produced several copies of the production reports for January to March, 1987, and reviewed them. The reports, which were not offered for the record, alluded to the No. 59 and No. 60 shuttle cars, and Mr. Tarvin confirmed that he operated the No. 60 car (Tr. 176). Mr. Allinson stated that Mr. Tarvin ran over and cut the shuttle car cable "approximately every night or every other night in the three or four months that he worked for me" (Tr. 178-179). In one instance, or possibly three or four times, he personally observed Mr. Tarvin cut his cable (Tr. 179, 181).

When asked whether or not the cutting of cables by Mr. Tarvin is reflected on the reports in question, Mr. Allinson responded "whether it was 59 car or 60 car, I don't know" (Tr. 180). He confirmed that accidents do happen, and that the cable cutting was probably unintentional (Tr. 181). He also confirmed that he never "wrote up" or gave Mr. Tarvin a "work slip" for cutting cable, because he does not make it a practice to write up the crew (Tr. 182). Mr. Allinson agreed that one could not conclude that the shuttle car "down time" as reflected in the reports were attributable to Mr. Tarvin (Tr. 188).

Mr. Allinson stated that he never discussed Mr. Tarvin's work performance with Mr. Blake, and he confirmed that since his transfer, Mr. Tarvin has worked for him as a shuttle car operator on the Number 8 producing section filling in during the regular operator's absence, and that this has occurred three or four times (Tr. 184-185). With regard to Mr. Tarvin's work performance on these occasions, Mr. Allinson stated (Tr. 185):

Q. And you say you are still having problems with him?

A. Oh, worse now than ever. Worse now than ever.

Q. Why worse now than ever.

A. Cables, running over cables, and like I said, I've tried to reason with Mr. Tarvin. I've tried to take him as slow as I can and explain to him what I want him to do, to get off, walk his roadway, look for rocks, look for things, and stay off that cable, but it hasn't worked.

Q. Why don't you just tell Mr. Blake that -- are you required to take a shuttle car operator that you feel is incompetent.

A. I've got no choice in the matter. That's Mr. Blake. Mr. Blake directs the work force and says who goes where. I have no say so about that.

Mr. Allinson stated that Mr. Blake knew nothing about the curtain incident, and did not discuss it with him. Mr. Allinson confirmed that he did discuss the incident with

the safety committeeman the following morning by telephone and informed him that "we have a problem, let's work it out," but that by the next day, the matter "had ballooned," and Mr. Allinson believed that Mr. Tarvin filed a safety grievance over the curtain being down" (Tr. 190). Mr. Allinson again denied seeking Mr. Tarvin's transfer, and he believed that the safety grievance was probably filed after the transfer, but Mr. Allinson did not know whether it was a safety grievance, or a grievance connected with his transfer (Tr. 191). Mr. Allinson stated that he tried to work the matter out "one-on-one" with the safety committeeman, because "there was not really a big deal about it," and that Mr. Tarvin "wasn't happy with us doing that" (Tr. 191). Mr. Allinson again denied that "he had it in for Mr. Tarvin" and had him transferred for complaining or "making life miserable for him" (Tr. 192).

Henry F. Blake, III, evening shift mine foreman, testified that his duties include all decisions concerning the assignment of miners on his shift, and he confirmed that he made the decision to transfer Mr. Tarvin from the No. 1 section to the rock project. He explained his reasons for the transfer as follows (Tr. 195-196):

Q. Could you tell us why you made that decision?

A. Like I said, I have to go around and observe the different sections. I observed Mr. Tarvin on many occasions on different sections and his manner of work, and I had also been told by several different section foremen that his work wasn't up to par in that he hit other cables. I observed a lot of down time on his equipment.

One of the main reasons I moved him to another project was I had a ram car/shuttle car operator that had bid from the evening shift to the day shift, leaving a vacancy. This person I held for approximately 30 days, which I can hold a person for 30 days before assigning them or releasing them to go to their new job or new shift. In this case, I think her name was Liz Hamner and she went to the day shift.

Mr. Blake could not recall the date that Ms. Hamner left the rock project, but confirmed that it would have been on a Friday, and that Mr. Tarvin would have been transferred the

next Monday or Tuesday, and within a week. He confirmed that Mr. Tarvin's section reached a point where it was temporarily mined out, and since the section was "turning directions" and ventilation changes needed to be made, the crew was "broken up for a couple of days," and Mr. Scott needed a shuttle car operator. Mr. Blake confirmed that under the contract, he has the authority to move anyone in the mine, and that he moved Mr. Tarvin to fill a vacancy on the rock project. He decided to select Mr. Tarvin because he was aware through his own observations and from the maintenance foreman that Mr. Tarvin was having problems. Since the rock project moves at a slower pace than the producing section, and there are two cars on that project for use by one individual in the event one machine breaks down, he does not have to worry about a machine being down because someone runs over a cable (Tr. 198).

Mr. Blake stated that he was not aware of the ventilation curtain incident which occurred on February 16, and that he first became aware of it the following Wednesday or Thursday, after Mr. Tarvin was transferred. Since he had no knowledge about the incident, Mr. Blake denied that it had anything to do with Mr. Tarvin's transfer (Tr. 200).

On cross-examination, Mr. Blake confirmed that he meets with his section foremen at least once a week to discuss the mining operations, and possible personnel problems. He confirmed that at some point in time he has discussed with Mr. Allinson "everybody on his crew and everybody with everybody at one point in time" (Tr. 204). He was certain that he has discussed shuttle car operations and "down time" with Mr. Allinson, as well as with his maintenance foreman. He confirmed that he did not advise Mr. Allinson that he was transferring Mr. Tarvin from his crew, and did not believe that Mr. Allinson was at work when the crew was moved (Tr. 205). He could not recall specifically discussing with Mr. Allinson the reasons for Mr. Tarvin's transfer.

Mr. Blake confirmed that he reviews and signs the foremen's production reports, and that based on these reviews and his own observations, he made the personnel decision concerning Mr. Tarvin (Tr. 207). Although he did not consider Mr. Tarvin to be "a bad guy at all" or that he was "deficient" or a "bad operator," he stated that "my job is to place the man where I can get the best production with the least amount of hassle from everybody concerned" (Tr. 211). Since he has been in the mine 14 to 15 years, Mr. Blake stated that he was aware of the section "down time" by the reports and his own observations, and that he was aware of this when he decided to move Mr. Tarvin (Tr. 211). With regard to his prior knowledge

of the ventilation curtain incident, Mr. Blake stated as follows (Tr. 216-217):

THE WITNESS: You -- the bottom line is, did I move Tarvin because of the line curtain? That's what I hear y'all asking me. No, I did not. I moved Mr. Tarvin because I felt like -- and I've stated my reasons. I had no knowledge of the line curtain being back or him reporting it to anyone. I think Gary or either Bob Glasgow, who is a safety committeeman, told me something about it and I cannot be honest in telling you exactly how long it was, but we're going to say three or four days later. That's being as honest as I can be because I can't pinpoint it. Your Honor, that is as honest as I can be. I mean, I can't give you a specific date, but I know it was after the fact of me moving him. That's being as honest as I know how to be with all of you.

When asked why he did not transfer Mr. Tarvin earlier if he were not considered a good shuttle car operator, Mr. Blake stated that he became mine foreman in January, 1987, and had no power to transfer anyone prior to that time (Tr. 219). He reiterated that his opinion of Mr. Tarvin's work is based on his personal knowledge and observations, and that he recently observed Mr. Tarvin run over a miner cable 2 weeks ago because he got too close to the rib with his shuttle car (Tr. 221). Mr. Blake conceded that one cannot conclude from simply reviewing production reports that Mr. Tarvin was specifically responsible for the shuttle car down time noted in the reports (Tr. 221-223). He reiterated that Mr. Allinson had nothing to do with the transfer of Mr. Tarvin (Tr. 224). Mr. Blake stated that the only complaint he was aware of by Mr. Tarvin was a grievance that he filed a year ago because he was transferred by foreman Rick Nichols, but that he was unaware of the details (Tr. 225).

With regard to the grievance filed by Mr. Tarvin after his transfer, (exhibit R-3), Mr. Blake confirmed that although he became aware of it later, he took no part in the grievance (Tr. 228). He explained his knowledge of the grievance as follows at (Tr. 226-227):

A. I'll tell you, the only thing I know, I was on the rock project later on and Mr. Tarvin approached me and I dug this note out of some of my old notes, and he said I would like to

speaking with you, and I said okay, and he was running the shuttle car. He said "what am I doing here?" I said "running the shuttle car." He said "you mean to you've got a GIL on a coal running section and I'm up here." I said "well, what are you doing?" He said "I'm running a shuttle car." I said, "well, you know" -- he said "you're not going to put me back on a section." I said, "no, I don't have any intentions," to the best of my knowledge. I wrote it down after I walked away, and his voice got very high, about three octaves, four octaves, I don't know. He said "you'll see, you'll see, you'll see," and that was work for George Scott running a shuttle car. If he filed a grievance after that, y'all never brought me any grievance and I didn't know about it.

With regard to Mr. Tarvin's assertion that rock project foreman Scott uses a laborer, rather than Mr. Tarvin, when there is a need for shuttle car operator, Mr. Blake stated that he has never seen this done, and that he found it hard to believe. If he was aware of this, he would instruct the foreman to use Mr. Tarvin on the shuttle car. Mr. Blake stated that while it was possible for a foreman on the rock project to use a laborer who knew how to operate a shuttle car instead of Mr. Tarvin, this should not occur "because he's got a bid man there to run the car" (Tr. 231).

When asked who informed Mr. Tarvin of his transfer, Mr. Blake stated as follows (Tr. 232-233):

Q. Who told Mr. Tarvin that he was being transferred, do you know?

A. I think I told Mr. Scott to take him with him that day. That's usually how -- I don't go out and tell the rank and file union people that I'm transferring them here and there. I go to my foremen and line them up with who I want them to take.

Q. Would you have notified Mr. Allinson that Mr. Tarvin was being transferred?

A. I don't think Gary was there.

Q. If he was there would you have notified him?

A. I don't know who I told. I told one of the foremen to take him, or go make the change. That's how I do it.

Q. Could it have been Mr. Allinson?

A. It could have been but I don't remember whether it was Mr. Allinson or Mr. Scott, but I transferred him to Mr. Scott.

Mr. Tarvin was recalled by the Court, and when asked whether he had ever run over a cable with his shuttle car, or had problems with the car which may have caused any down time, as testified to by Mr. Allinson, he responded "maybe once a month or something like that. Not every other night like he said" (Tr. 234). Mr. Tarvin clarified his prior testimony, and stated that he did not mean to imply that when there is shuttle car work to be done on the rock project, that a laborer is assigned that work, rather than him. His complaint is that when there is a need for a substitute shuttle car operator on another section, a laborer from the rock crew is sent to the section, rather than him, and he is used for crib work (Tr. 234). However, he conceded that on at least two occasions since he has been on the rock crew, he has in fact been assigned to Mr. Allinson's production crew as a substitute shuttle car operator (Tr. 235).

Mr. Tarvin stated that in the bathhouse on February 18, 2 days after the curtain incident, Mr. Allinson "told me I wasn't going with him no more, to go with Mr. Scott" (Tr. 236). As he finished dressing, Mr. Scott "came in and told me to go with him" (Tr. 237). Mr. Tarvin confirmed that he did not speak with Mr. Blake at this time, but did speak with him 2 or 3 weeks later when he came to the section. Mr. Tarvin further confirmed that he assumed that Mr. Allinson made the decision to transfer him because "he's the one that came told me I wasn't going with him anymore" (Tr. 237).

Respondent's Arguments

The respondent argues that even assuming that Mr. Tarvin has made a prima facie case that his transfer came about as a result of his complaint about the ventilation curtain, the respondent has completely rebutted this claim, and has shown that Mr. Blake made the decision to transfer Mr. Tarvin for legitimate business reasons, and that he was unaware of the

curtain incident at the time he made the decision to transfer Mr. Tarvin. The respondent argues further that the dispute which gave rise to the discrimination complaint is a contractual matter which was taken to grievance by Mr. Tarvin, and should not be relitigated in this case (Tr. 239-240).

Complainant's Arguments

The complainant maintains that the purported "business reasons" justification for his transfer are entirely pretextual, and that the respondent's assertions concerning his alleged deficiencies are not documented and have been fabricated. The complainant suggests that although the respondent could have transferred him at any time, it did not do so until after he complained about the curtain, and that "it's too much of a coincidence that it was done two days after" his complaint. Conceding that the respondent took immediate action to correct the curtain condition, the complainant nonetheless believes that the coincidence of the transfer after alleged months of ineptitude with regard to his work, is too much to believe. Complainant suggests that he was transferred either as punishment or retaliation, or because Mr. Allinson did not want him on the section after he complained, and that this was a violation of the Act (Tr. 240-245). The complainant agreed that there is no issue of any "work refusal" in this case, and that when he observed that the curtain down, he immediately summoned his foreman to take care of the problem (Tr. 246-248).

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. Hecia-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 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, 462 U.S. 393, 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 discrimination 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.

Mr. Tarvin's Protected Activity

The record in this case establishes that Mr. Tarvin had worked under Mr. Allinson's supervision on the No. 1 producing section as a shuttle car operator for approximately 6-months prior to his transfer to the rock project on or about February 18, 1987. Mr. Tarvin was not a member of the mine safety committee, and I find no credible evidence to suggest that he was a "safety activist," or that he regularly filed safety complaints. Indeed, Mr. Tarvin confirmed that prior to his bringing the ventilation curtain matter to the attention of his foreman, Gary Allinson, on the evening of February 16, 1987, he had not previously filed any safety complaints with mine management, the safety committee, or with any state or Federal mine enforcement agencies. Although Mr. Tarvin stated that approximately 3-weeks prior to his transfer, he mentioned to Mr. Allinson and his crew that they were not using their methane detectors to check for methane in the section, Mr. Tarvin confirmed that he did not report the matter to MSHA, and that after he spoke with Mr. Allinson, the crew began to use their detectors. Further, Mr. Tarvin conceded that his "complaint" in this regard did not result in any action being taken against him, and I find no credible evidentiary basis for concluding that this particular incident had anything to do with Mr. Tarvin's transfer.

The credible evidence in this case establishes that Mr. Tarvin did in fact register and communicate a timely safety complaint to Mr. Allinson, as well as to a member of the mine safety committee, during the end of the working shift on the evening of February 18, 1987. Mr. Tarvin's complaint concerned a ventilation curtain which was not in place, or had not been advanced, to within 10 feet of the working face in an area where coal was being mined, and where Mr. Tarvin was expected to work while operating his shuttle car. I find no credible evidence to establish that Mr. Tarvin reported the matter to any state or Federal inspector, or that any violation was issued to the respondent as a result of the complaint. Further, the record establishes that once the matter was brought to Mr. Allinson's attention, he took immediate action by instructing members of the work crew who were present to install or advance the curtain to the required distance from the face. Although Mr. Tarvin's original complaint statement filed with MSHA on February 18, 1987, suggested that Mr. Tarvin may have refused to work because the ventilation curtain was not located where it should have been, I find no credible evidence to support any such conclusion, and in fact, Mr. Tarvin has conceded that he did not refuse to work because of the absence of the curtain.

I conclude and find that Mr. Tarvin's February 16, 1987, complaint to Mr. Allinson concerning the ventilation curtain is protected activity, and that mine management, including Mr. Allinson, is prohibited from intimidating or harassing Mr. Tarvin, or otherwise retaliating against him because of that complaint. Transferring Mr. Tarvin from one mine section to another, or similar personnel actions taken against him because of any protected activity on his part is a form of retaliatory discrimination which is prohibited by the Act, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Secretary ex rel Johnny N. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (November 1981), rev'd on other grounds, sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

Respondent's Motivation for Mr. Tarvin's Transfer

The record establishes that Mr. Tarvin has lost no pay or job classification status as a result of his transfer, and he is still on the same work shift (Tr. 50). The relief requested is that he be put back on a producing section (Tr. 50). In my view, the trust of Mr. Tarvin's complaint lies in his belief that the respondent is not fully utilizing him as a shuttle car operator on the rock section, and has assigned him to do other work, such as rock dusting, building cribs, cleaning up, or installing ventilation curtains. Mr. Tarvin also complains that when the need arises for the services of a shuttle car operator elsewhere in the mine, either by temporary detail or assignment, the respondent assigns a laborer or someone other than Mr. Tarvin to do this work (Tr. 87-90). As a matter of fact, Mr. Tarvin candidly admitted that this is the basis for his complaint (Tr. 92-93).

Mr. Tarvin's assertions that he has not been used as a shuttle car operator in other sections of the mine since his transfer are not accurate. Mr. Allinson testified that since his transfer, Mr. Tarvin has worked for him on the No. 8 producing section on three or four occasions during the absence of the regular shuttle car operator (Tr. 184-185). Mr. Tarvin admitted that on at least two occasions since his transfer to the rock crew, he has worked for Mr. Allinson on a production crew as a substitute shuttle car operator (Tr. 235).

With regard to Mr. Tarvin's work assignments on the rock crew, one of his own witnesses, Marteen Nichols, testified that everyone on the rock crew rock dusted and picked up trash, including Ms. Hamner, who was a shuttle car and ram car operator (Tr. 122, 127).

Mr. Tarvin's transfer from the production section to the rock project was the subject of a contract grievance filed by Mr. Tarvin's union on his behalf (Tr. R-3). Although the respondent asserted in its answer to the complaint that the grievance "was denied," the fact is that the grievance was settled and did not go to arbitration.

Mr. Tarvin stated that he disagreed with the settlement of his grievance. However, under the terms of the contract, any settlement of a grievance apparently becomes final, and there is nothing to show that Mr. Tarvin's grievance was taken any further. Mr. Tarvin confirmed that he filed no further grievances. I take particular note of the fact that the grievance form executed by Mr. Tarvin contains no suggestions that his transfer was in any way connected with any safety complaints on his part. As a matter of fact, Mr. Tarvin's grievance appears to be based on an issue of job classification, and the relief requested by Mr. Tarvin is shown as "I'm asking to be retained on my bidded job (R/C operator on running section)." The respondent's position is stated as "Every reasonable effort shall be made to keep an employee at work on the job duties normally and customarily a part of his regular job."

Mr. Tarvin confirmed that at the time of his transfer to the rock section, he did not seek out Mr. Blake to discuss the matter with him, and there is no evidence that Mr. Tarvin lodged any protest with Mr. Blake at that time, or otherwise suggested to Mr. Blake that his curtain safety complaint to Mr. Allinson was the reason for his transfer. As a matter of fact, Mr. Blake's testimony, which I find credible, establishes that he had no knowledge of Mr. Tarvin's complaint when he made the decision to transfer him. Further, the un rebutted testimony of Mr. Allinson and Mr. Blake, which I also find credible, establishes that Mr. Blake alone made the decision to transfer Mr. Tarvin, and that Mr. Allinson took no part in that decision.

Mr. Tarvin confirmed that he filed his grievance about a week after his transfer to the rock section on February 18, 1987. I take note of the fact that the grievance form executed by Mr. Tarvin, (exhibit R-3), contains a notation "2/25/87. F. Blake" on the line designated "Date of Foreman's Decision." Mr. Blake testified that he had a conversation with Mr. Tarvin subsequent to his transfer during which Mr. Tarvin protested the fact that a laborer was being used on a production section, while he was left on the rock project.

Mr. Blake advised Mr. Tarvin at that time that he had no intention of transferring him back to a production section, and Mr. Tarvin responded "you'll see, you'll see" (Tr. 226-227). One can reasonably conclude from this that Mr. Tarvin's grievance was prompted by Mr. Blake's refusal to transfer him back to a producing section. As a matter of fact, Mr. Tarvin confirmed that as a result of his grievance, the laborer who had been assigned to the shuttle car job on the No. 1 Section after his transfer, was removed from the job. Mr. Sides subsequently bid on the position and was awarded the job. Mr. Tarvin did not pursue the matter further and filed no more grievances (Tr. 39-40).

With regard to Mr. Tarvin's purported poor work performance, his counsel pointed out that this issue was raised for the first time during the course of the hearing, and that the respondent never informed Mr. Tarvin of any poor work performance, and had never given him any work deficiency notices. Counsel concluded that the alleged poor work record argument advanced by the respondent has been fabricated as a further excuse to justify Mr. Tarvin's discriminatory transfer (Tr. 240-241).

With regard to Mr. Tarvin's alleged poor work performance as a shuttle car operator on the production section, while it is true that the respondent did not specifically detail this as part of its initial answer and defense to the complaint, I take note of the fact that in paragraph four of its answer, the respondent's counsel did state that Mr. Tarvin's transfer came about in part because "he was having problems coordinating his activities with those of the other equipment operators." Although Mr. Tarvin's purported problems with his shuttle car did not result in his being officially disciplined or reprimanded by the respondent, the testimony of Mr. Allinson and Mr. Blake, which I find credible, do support the respondent's contention that Mr. Tarvin has experienced some problems with running over his cable from time-to-time. As a matter of fact, Mr. Tarvin admitted that he had run over cables "once in awhile" (Tr. 44), and that he had experienced problems with his shuttle car which resulted in "down time" "maybe once a month," but not to the degree stated by Mr. Allinson (Tr. 234).

Both Mr. Allinson and Mr. Blake confirmed that they have personally observed Mr. Tarvin frequently running over shuttle car cables, and Mr. Allinson's unrebutted testimony is that he had previously discussed this with Tarvin and informed him that he needed to do better. Mr. Allinson explained that while he was concerned with Mr. Tarvin's performance, he did

not "write him up" out of concern for continued "team work" among his crew, his lenient attitude towards his crew, and his reluctance to discipline them or to make it a practice to hand out "work slips" for poor performance. Mr. Allinson further explained that since Mr. Blake has the sole authority to assign the work and the crews, he has no say in rejecting a crew member who may be incompetent.

Mr. Blake testified that since he only assumed the evening shift mine foreman's position in January, 1987, he had no prior authority to transfer Mr. Tarvin earlier. Mr. Blake confirmed that his personal observations of Mr. Tarvin running over cables, and the fact that the section had a lot of "down time" because of shuttle car problems which may or may not have been attributable specifically to Mr. Tarvin, was only one part of the reasons for his decision to transfer him.

After careful consideration of the testimony of Mr. Blake and Mr. Allinson, which I find credible, and Mr. Tarvin's own admissions, I cannot conclude that the respondent has concocted or fabricated Mr. Tarvin's problems with his shuttle car as an excuse for his transfer. Indeed, Mr. Blake's credible testimony is that Mr. Tarvin's problems with his shuttle car on a producing section were only a part of the reasons for his decision to transfer Mr. Tarvin, and the fact that the respondent failed to include this as part of its original answer and defense in this case is not particularly significant.

Mr. Tarvin's counsel asserted that the vacancy on the rock crew had existed for some time prior to the transfer, and that other qualified miners were available to fill the vacancy just as easily as Mr. Tarvin (Tr. 102-103). Counsel suggested that the respondent had an ample opportunity to transfer Mr. Tarvin to the rock crew prior to his ventilation curtain complaint, and in view of the fact that the respondent has contended that Mr. Tarvin's work as a shuttle car operator on a producing section was less than adequate, the respondent could have legitimately transferred him for that reason, but chose not to do so until he complained to his foreman about the curtain. Under these circumstances, counsel argued that the timing of Mr. Tarvin's transfer, shortly after his complaint to his foreman, raises an inference that his transfer was motivated by his complaint, rather than his alleged poor work performance, and that the respondent's contention that Mr. Tarvin was transferred to an existing and available vacancy on the rock crew because a shuttle car operator was required for work on the rock project is pretextual and simply an excuse for the discriminatory transfer.

Mr. Sides testified that the vacancy on the rock crew created by Ms. Hamner's successful bid on a day shift job, came about approximately a month or two prior to Mr. Tarvin's transfer, and that he (Sides) bid on the job. However, Mr. Sides confirmed that Ms. Hamner's job vacancy on the rock crew was withdrawn by the respondent on the ground that it was posted "in error" and that no jobs were available (Tr. 105, 108). Mr. Sides conceded that when such a vacancy is posted for bid, management may, in its discretion, assign the successful bidder to any place in the mine, including the rock crew, and that one simply bids on the position and not for any particular mine location (Tr. 108). Mr. Sides also confirmed that the posting of a shuttle car job indicates that there are more available jobs than car operators, and that "they needed jobs on the rock crew" (Tr. 110). Mr. Sides confirmed that after Mr. Tarvin was transferred, he (Sides) successfully bid on the job vacancy created by the transfer. Mr. Sides confirmed that Mr. Allinson is no longer his foreman, and he also confirmed that foremen are in fact moved "every now and then" (Tr. 114).

Marteen Nichols, who worked on the rock crew with Ms. Hamner, testified that the rock crew is usually short-handed because personnel are borrowed for other sections (Tr. 125). He could not recall anyone immediately replacing Ms. Hamner after she left the rock crew, and he believed that several weeks, and possibly a month, passed before Mr. Tarvin arrived to replace her (Tr. 125). He later stated that he was unsure of the dates that Ms. Hamner left and Mr. Tarvin arrived, and that "she was gone and then Robert was up there" (Tr. 133). He also recalled that Ms. Hamner's departure from the rock crew after she bid on the day shift job was delayed, but he did not know the reason for this (Tr. 133).

Mr. Blake confirmed that Ms. Hamner's bid on a day shift job resulted in a vacancy for a shuttle car operator on the rock project. He stated that rather than transferring Ms. Hamner immediately, he kept her on the rock crew for approximately 30 days, and subsequently transferred Mr. Tarvin to fill the vacancy. Although he could not recall the specific dates, Mr. Blake stated that following his usual practice, Ms. Hamner would have transferred to the day shift on a Friday, and Mr. Tarvin would have been transferred on a Monday or Tuesday of the following week. Mr. Blake stated that his decision to transfer Mr. Tarvin, rather than someone else, was based on his knowledge of the down time on the producing section, and the fact that Mr. Tarvin had problems with his shuttle car on the producing section. Mr. Blake

further explained that the work on the rock project is at a slower pace than the work on the producing section, and since only one shuttle car is used most of the time on the rock project, there is little chance of the operator running over cables. Further, since a back-up car is usually available on the rock project, in the event one car breaks down, the operator can simply use the other one to continue to "run the rock" (Tr. 196-198). Mr. Blake also confirmed that since he only became the evening shift mine foreman in January, 1987, he lacked the authority to transfer Mr. Tarvin earlier (Tr. 219-220). Since there is only one shuttle car operator on the rock project, he needed someone to fill the vacancy created by Ms. Hamner's bid to a day shift job, and he alone made the decision to fill it by transferring Mr. Tarvin to the position (Tr. 223).

After careful consideration of all of the testimony, I conclude and find that Mr. Blake has provided a plausible and believable explanation as to why Mr. Tarvin was not transferred earlier to the rock project. More to the point, however, is the fact that as the evening shift mine foreman, Mr. Blake had the absolute authority and discretion to assign and transfer his available mine personnel to any section where he believed they could be best utilized. Absent any credible evidence that Mr. Blake's personnel action concerning Mr. Tarvin was in violation of the contract, or that it was otherwise arbitrary, or the result of any disparate treatment of Mr. Tarvin, I cannot conclude that Mr. Blake had any ulterior motive, such as punishment or retaliation in mind when he made the decision to transfer Mr. Tarvin to the rock project.

Mr. Tarvin's counsel also questioned the respondent's assertion that Mr. Tarvin was transferred because the No. 1 Section was "mined out" and that his services were needed on the rock project. The use of the term "mined out" by the respondent in its answer to the complaint does convey the impression that all of available coal on the section had been taken, and that there was no further need for Mr. Tarvin on that section. If this were true, it would lend credence to the respondent's assertion that there was a legitimate reason for Mr. Tarvin's transfer. If not, it would raise an inference that the respondent may have been motivated by reasons other than the section being mined out.

Mr. Tarvin testified that after his transfer, the crew remained on the No. 1 Section (Tr. 32). Mr. Tarvin asserted that after Mr. Sides successfully bid on the vacancy created by his transfer, Mr. Sides continued to work on the section

for a month and a half, until he and the entire crew were transferred to the No. 4 Section (Tr. 38, 41). Mr. Tarvin did not know why they were transferred (Tr. 41).

Mr. Sides testified that when he bid on the job created by Mr. Tarvin's vacancy on the No. 1 Section, the evening shift was idled and the entire crew was moved and started mining on the No. 4 Section. He confirmed that different shifts are idled from time-to-time, and that after the crew was moved, an electrician and a service crew were left on the No. 1 Section (Tr. 100-101). This lends credence to the following explanation by Mr. Blake as to whether or not the section had been "mined out" (Tr. 197):

A. The section that Robert was working on was temporarily mined out. In other words, it had reached a point it was going to go. Then the crew was all broken up for a couple of days to the best of my memory. Some of them stayed, some of them went here and there, but the section was turning directions. There was ventilation changes to be made, and I needed an operator for Mr. Scott. He didn't have one.

Q. A shuttle car operator?

A. Right. Shuttle car/ram car.

Q. As long as you go in conformity with the contract and don't, of course, discriminate against people because of race, sex, or age, or something like that, can you move a person anywhere in the mine you want to?

A. I certainly can.

Q. Okay. I don't know if I asked you this or if you answered it, but could you tell us why you moved Mr. Tarvin to that position?

A. Mainly there was a vacancy. There was a vacancy created on the rock project.

While it may not be clear precisely when the crew on the No. 1 producing section was moved, or whether the area had been "mined out" in the usual sense of that term, when taken in context, I believe one can conclude from the testimony presented that active mining on the No. 1 producing section evening shift was temporarily discontinued, and that this was not

a particularly unusual event since sections are idled from time-to-time, and miners are transferred and reassigned on any particular section. Under the circumstances, I cannot conclude that the respondent's use of the term "mined out" was a deliberate attempt to conjure up an after-the fact reason to support Mr. Tarvin's transfer. The record in this case reflects that Mr. Blake had several reasons for his decision to transfer Mr. Tarvin, and the discontinuance of mining on the evening shift was not the sole reason for this action.

Although the timing of Mr. Tarvin's transfer, coming 2 days after he complained to Mr. Allinson about the ventilation curtain, raises an inference that the transfer may have resulted from the complaint, I conclude and find that the respondent has rebutted this presumption by a clear preponderance of the credible evidence adduced in this case.

Mr. Tarvin confirmed that he assumed that Mr. Allinson made the decision to transfer him to the rock crew, and he believed that he did so in retaliation or to punish him for complaining about the ventilation curtain. However, the unrebutted testimony of Mr. Allinson and Mr. Blake, which I find credible, establishes that Mr. Blake alone made the transfer decision, and that Mr. Allinson was not a party to that decision. Mr. Blake's credible testimony also establishes that he was not aware of Mr. Tarvin's safety complaint to Mr. Allinson at the time he made the decision to transfer him. Although Mr. Tarvin testified that he was aware of other miners who were transferred for making safety complaints, there is absolutely no evidence or testimony to support Mr. Tarvin's claim.

I find no evidence in this case to even suggest that Mr. Tarvin has ever been harassed, intimidated, or threatened by mine management because of his work or any work-related safety complaints. In fact, the only evidence of any safety complaints by Mr. Tarvin while in the respondent's employ is the complaint he made about the ventilation curtain on February 16, 1987. With regard to Mr. Tarvin's chastizing of his crew for their alleged failure to use their methane monitor, there is no probative or credible evidence to establish that this particular allegation resulted in any bona fide safety complaint lodged with mine management. Further, that particular incident took place much earlier than Mr. Tarvin's transfer, and he conceded that no action was taken against him for any such "complaint," and he did not believe that it had anything to do with his transfer.

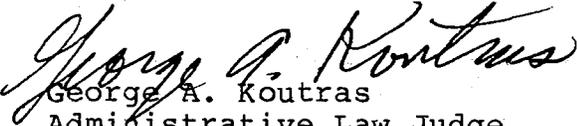
I find no credible evidence to establish any disparate treatment of Mr. Tarvin by the respondent. As stated earlier, Mr. Tarvin's assertion that he is not used as a shuttle car operator while assigned to the rock crew has been rebutted by Mr. Allinson's credible testimony that since his transfer, Mr. Tarvin has been assigned to work as a shuttle car operator for Mr. Allinson on a production section, and Mr. Tarvin himself has admitted that this is the case. Further, the record establishes that Mr. Tarvin is still classified as a shuttle car operator, with the same pay, and on the same work shift, which he enjoyed prior to his transfer. As for Mr. Tarvin's complaint that he is assigned other work on the rock crew, his own witness and fellow crewman on the rock crew confirmed that everyone on the crew, including the shuttle car operator, are assigned other work duties from time-to-time.

I find Mr. Blake's explanation as to the factors which he considered in making his decision to transfer Mr. Tarvin to be reasonable and plausible, and that his decision was motivated by a legitimate managerial concern to assign mine personnel where he best believed they could be utilized as effective and productive members of the available workforce, rather than to discriminate against Mr. Tarvin for complaining to Mr. Allinson about a ventilation curtain which had not been installed or advanced to its proper location. In short, I conclude and find that any inference of discriminatory intent by the respondent in connection with Mr. Tarvin's transfer has been rebutted by the respondent's credible evidence which I believe establishes that the transfer of Mr. Tarvin constituted a reasonable and plausible management business-related decision made by Mr. Blake, the evening shift mine foreman, acting within his clear authority and discretion to manage his own mine personnel. In this regard, I take particular note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decision, the Commission stated in part as follows at 4 FMSHRC 993: "* * * 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."

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish that his transfer on or about February 18, 1987, was discriminatory, or motivated by the respondent's intent to retaliate against him, or to

punish him, for exercising his statutory right to make a safety complaint to his foreman. Accordingly, the complaint IS DISMISSED, and the complainant's requests for relief ARE DENIED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 9 1988

EMERY MINING CORPORATION	:	CONTEST PROCEEDINGS
AND/OR UTAH POWER & LIGHT	:	
COMPANY,	:	Docket No. WEST 87-138-R
	:	Citation No. 2844750; 3/24/87
Contestants	:	
	:	Docket No. WEST 87-139-R
v.	:	Citation No. 2844751; 3/24/87
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 87-140-R
MINE SAFETY AND HEALTH	:	Citation No. 2844752; 3/24/87
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 87-141-R
	:	Citation No. 2844753; 3/24/87
and	:	
	:	Docket No. WEST 87-142-R
UNITED MINE WORKERS OF	:	Citation No. 2844754; 3/24/87
AMERICA,	:	
Intervenor	:	Docket No. WEST 87-143-R
	:	Citation No. 2844760; 3/24/87
	:	
	:	Docket No. WEST 87-148-R
	:	Citation No. 2844801; 3/24/87
	:	
	:	Docket No. WEST 87-149-R
	:	Citation No. 2844803; 3/24/87
	:	
	:	Docket No. WEST 87-151-R
	:	Citation No. 2844806; 3/24/87
	:	
	:	Docket No. WEST 87-154-R
	:	Citation No. 2844810; 3/24/87
	:	
	:	Docket No. WEST 87-162-R
	:	Citation No. 2844825; 3/24/87
	:	
	:	(Consolidated)
	:	
	:	Wilberg Mine
	:	Mine I.D. 42-00080

ORDER OF DISMISSAL

Before: Judge Morris

The issues presented here involve the renewed motion of Utah Power & Light, Mining Division, ("UP&L") for a summary decision in its favor pursuant to Commission Rule 64, 29 C.F.R. § 2700.64.

PROCEDURAL HISTORY

On May 26, 1987, UP&L moved for a summary decision.

In support of its motion, UP&L stated that it is entitled as a matter of law to a summary decision that it is not liable as "successor in interest" to Emery Mining Corporation for the violations alleged in the citations and orders contested in the captioned proceedings. 1/

UP&L has submitted affidavits in support of its position. These affidavits establish the following facts:

1. The Utah Power and Light Company ("UP&L"), a public electric utility, purchased the Deseret, Beehive and Little Dove Mine in 1971 and the Deer Creek and Wilberg Mine in 1976. Exhibit A, paragraph 2. In 1972, UP&L initially contracted with the American Coal Company and later, beginning in June 1979, with Emery Mining Corporation ("Emery") to operate its mines. Exhibit A, paragraph 3. The Wilberg Mine Fire occurred on December 19, 1984, killing 27 miners, including a number of Emery's upper management personnel.

2. Mine recovery efforts were conducted over an extended period of time, concurrent with the course of MSHA's investigation. Representatives of Emery Mining Corporation were closely involved in those efforts but UP&L personnel were not permitted to participate by MSHA. Exhibit A, paragraph 9.

1/ The identical issue is raised in other contest proceedings involving the same parties and pending before the Judge. The cases are docketed as WEST 87-130-R, WEST 87-131-R, WEST 87-132-R, WEST 87-133-R, WEST 87-134-R, WEST 87-135-R, WEST 87-136-R, WEST 87-137-R, WEST 87-144-R, WEST 87-145-R, WEST 87-146-R, WEST 87-147-R, WEST 87-150-R, WEST 87-152-R, WEST 87-153-R, WEST 87-155-R, WEST 87-156-R, WEST 87-157-R, WEST 87-158-R, WEST 87-159-R, WEST 87-160-R, WEST 87-161-R, WEST 87-162-R, WEST 87-163-R, WEST 87-243-R, WEST 87-244-R, WEST 87-245-R, WEST 87-246-R, WEST 87-247-R, WEST 87-248-R, WEST 87-249-R. This issue will also affect three penalty cases, docketed as WEST 87-208, WEST 87-209 and WEST 88-25.

3. Subsequently, on April 16, 1986, UP&L bought for cash all of Emery's assets with respect to the operation of all of its mines, including the Wilberg Mine, and for the first time assumed operating control of the Wilberg Mine. Exhibit A, paragraph 4. The owners of Emery Mining Corporation did not receive stock in UP&L as part of that transaction, nor did UP&L receive stock in Emery. Exhibit A, paragraph 5. The asset purchase agreement between UP&L and Emery stated that Emery retained any liability resulting from the Wilberg Mine Fire, specifically including "Emery's liability, if any, for MSHA fines assessed to Emery for events caused by Emery and which occur(ed) prior to the Closing Date" of April 16, 1986. Exhibit A, paragraph 8; Exhibit B, paragraph 5; Exhibit C. In addition, Emery reserved sufficient funds to pay for any future Wilberg liabilities. Exhibit B, paragraph 7. Although UP&L retained most of Emery's workforce, UP&L's officers and directors replaced Emery personnel as the top management of the company while those management personnel who were retained assumed subordinate positions in the new organization. Exhibit A, paragraph 7. None of Emery's present or former officers or directors have become UP&L officers or directors since the Asset Purchase Agreement was executed. Exhibit A, paragraph 6.

4. On March 24, 1987, as a result of its Wilberg Mine Fire accident investigation, MSHA issued 34 ^{2/} citations and orders to "Emery Mining Corp. and its successor-in-interest (UP&L)." Emery continues to exist, since execution of the Asset Purchase Agreement in April of 1986, as a legally and financially viable company. Exhibit B, paragraph 7. Emery accepts responsibility for any MSHA civil penalties which ultimately result from the 34 Wilberg Mine Fire investigation citations and orders issued on March 24, 1987, and Emery has sufficient funds available to pay those civil penalties. Exhibit B at paragraphs 6 and 7.

(The foregoing affidavits were attached to UP&L's Motion filed May 26, 1987).

On June 29, 1987 the Secretary filed his response in opposition to UP&L's motion and his cross motion for summary decision.

^{2/} In fact, a total of 41 citations and orders were issued by MSHA. However, seven citations were issued after Exhibit B, the relevant affidavit, was executed.

The Secretary, in his response and cross motion stated the following facts:

1. UP&L obtained the mining rights to the Wilberg Mine from the Peabody Coal Company in March 1977. UP&L was officially listed as lessee of the Mine on September 1, 1977 (Exhibit A, page (3-1), UP&L Mining Application to the Bureau of Mines, Revised 11/21/83). UP&L's mining plan for the Wilberg Mine was subsequently submitted to the Bureau of Mines (Exhibit B, page 8).

2. Emery was under contract with UP&L to operate the Wilberg Mine from June 1979 to April 16, 1986. During the time Emery was under contract to operate the Wilberg Mine, UP&L had a resident engineer present at the mine on a daily basis to make sure that the mining plan referred to above, was followed (Exhibit B, page 12-14).

3. UP&L purchased and owned the major mining equipment utilized by Emery at the Wilberg Mine during the June 1979 to April 16, 1986 period (Exhibit B, page 14).

4. UP&L and Emery mutually agreed on production goals for the Wilberg Mine during this period (Exhibit B, page 13).

5. Under the Mine Act and implementing regulations, mine operators are required to submit a number of mine plans to MSHA for approval. UP&L reviewed Emery's mine plans before they were submitted to MSHA when the plans concerned the mining system in use at the mines (Exhibit B, pages 11, 12).

6. UP&L prepared and submitted to the Bureau of Land Management extensive mining plans for the Wilberg Mine. These plans were prepared and submitted without Emery involvement (Exhibit B, pages 8-9).

7. After the Wilberg Mine fire on December 19, 1984 and after UP&L's purchase of Emery's assets in the operation of the mine, including Emery's supervisory and labor personnel, UP&L directly participated in MSHA's investigation of the fire origin area of the Mine (Exhibit C, Exhibit C-1).

David D. Lauriski, presently UP&L's Safety Director (formerly Emery's Safety Director) helped plan and direct UP&L employees in this most crucial aspect of MSHA's investigation. Mr. Lauriski and/or other UP&L personnel were present or nearby at all times during the underground investigation (Exhibit C, Exhibit C-1).

8. As stated by UP&L (page 3, Statement of Facts to its Motion for Summary Judgment), UP&L retained most of Emery's workforce when it took over complete operation of the Wilberg Mine in April 1986. Although this transfer did not include all of the same officers and directors, UP&L did retain Emery mining supervisors and management personnel including David D. Lauriski, Safety Director, and John Boylen, Mine Manager, at the Wilberg Mine (Exhibits C, D and E).

9. After UP&L purchased Emery assets, Emery appears to exist only as a skeleton corporation. Emery apparently has corporate officers, secretaries, and legal counsel, but few other employees (since UP&L retained them), and Emery exists with no other apparent corporate purpose than the resolution of outstanding claims arising out of the fire. There has been no specific evidence presented concerning Emery's financial situation and its ability to pay any civil penalties imposed (UP&L Exhibit B).

10. On March 24, 1987, when the mine fire investigation orders and citations were issued, UP&L owned, operated and fully controlled the Wilberg Mine. This is indicated by the Legal Identity Reports filed by Emery and UP&L with MSHA as required by law (Exhibits D and E). At the time the citations and orders were issued, UP&L, not Emery, had responsibility for abatement of violations and compliance with mandatory federal mine safety and health standards at the Wilberg Mine.

11. As indicated by the pleadings in this proceeding, both UP&L and Emery are represented by the same legal counsel.

(The foregoing facts were attached to the Secretary's motion and affidavits filed June 29, 1987.)

On July 9, 1987, UP&L filed its reply to the Secretary's response.

On August 5, 1987, the Judge denied the motions filed by both parties. The Judge stated the Secretary had raised a genuine issue of fact "whether UP&L was in control of the Wilberg Mine at the time of the alleged violations", citing Bituminous Coal Operator's Association v. Secretary of the Interior ("BCOA"), 547 F.2d 240 (4th Cir. 1977).

On the same date the parties filed pleadings indicating that Emery Mining Corporation, ("Emery"), had paid the proposed penalties in each of the cases listed in the caption of this order. Accordingly, the Judge dismissed said cases as to Emery. (Order, August 5, 1987).

On September 21, 1987, UP&L moved the Judge to reconsider his order of August 5, 1987 denying UP&L's motion for summary decision.

On October 13, 1987, the Secretary filed his response to UP&L's motion for reconsideration.

On October 14, 1987, the Judge denied UP&L's motion to reconsider his order of August 5, 1987. The Judge did not further explain his prior ruling.

On November 16, 1987, UP&L filed a petition for interlocutory review with the Commission. After responses by the Secretary and Intervenor the Commission denied the petition. Utah Power & Light Co., Mining Division, 9 FMSHRC 2028 (December 1987). In its order the Commission considered the Secretary's pleadings as "unfocused and confused providing neither UP&L nor the Commission with a clear statement of his asserted basis for imposing liability on UP&L." Further, "(t)he Secretary, as prosecutor, is responsible for charging violations under the Mine Act, not the Commission." In addition, the Commission observed that "(t)o avoid any possibility of prejudice to UP&L, a clear articulation of the liability theory or theories that the Secretary is alleging and intends to pursue in this important litigation is required," 9 FMSHRC at 2030.

The Commission further indicated "(t)he Secretary must clarify the theory of liability upon which he intends to proceed." In addition, "it is incumbent on the judge to fully explain the basis of his rulings on any such further motions," 9 FMSHRC at 2031.

After the Commission's Order was issued the Secretary did not move to amend his petition nor did UP&L move for a more definite statement of the petition.

Accordingly, on January 11, 1988, the Judge directed the Secretary to clarify his theory of liability against UP&L. The Judge's Order indicated the Secretary could plead in the alternative. Further, UP&L and UMWA ^{3/} could reply (Orders, January 11, 1988 and January 15, 1988).

^{3/} The UMWA filed in opposition to UP&L's petition for interlocutory review but has filed no other pleading on the successorship issue raised by UP&L.

On February 1, 1988 the Secretary's statement on UP&L's liability was filed. The Secretary's theories of UP&L's liability are twofold. His initial theory is that UP&L is liable as a coal mine operator (or co-operator) at the time of the fire; further, and in the alternative, UP&L is liable as a successor-in-interest to Emery.

His statement on his theories of liability reads as follows:

The Secretary of Labor (Secretary), by the undersigned counsel, states the following in response to the Judge's Order of January 11, 1988, regarding the Secretary's theory of liability against Utah Power and Light (UP&L). The Secretary contends that UP&L is liable as a co-operator with the Emery Mining Corporation ("Emery") or in the alternative, as a successor-in-interest operator to Emery.

The Secretary cited UP&L under the alternative theory as a successor-in-interest to Emery since that characterization of UP&L more graphically described UP&L's status at the time the citations and orders were issued. This does not prevent the Secretary from defending the citations and orders under any available theory relating to UP&L liability that can be shown to apply.

Argument

Utah Power and Light Company ("UP&L") is liable under the Federal Mine Safety and Health Act of 1977 (Mine Act) for mandatory safety violations found during the Mine Safety and Health Administration ("MSHA") investigation of the December 19, 1984, Wilberg Mine fire.

Theories of Liability

I. UP&L is liable as a coal mine operator at the time of the fire.

Under Section 3(d) of the Mine Act, 30 U.S.C. § 803(d) an "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine. If more than one entity participates as an operator in a mining operation, either one or

both can be cited for violations that occur at the mine. See Bituminous Coal Operator's Association v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977); Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 at 797 (4th Cir. 1981). Further, multiple operations can be cited regardless of fault. (Footnote)

The footnote in the Secretary's statement reads as follows:

"Congress, when it enacted the 1969 Coal Act, recognized that the Act:

Provide[d] liability for violation of the standards against the operator without regard to fault, [and] ... also provide[d] that the Secretary [would] apply the more appropriate negligence test, in determining the amount of penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine."

The facts which will be introduced at the hearing in this case will show that UP&L was a co-operator of the Wilberg Mine.

Factual Basis

As indicated in the Secretary's Response to UP&L's Motion for Summary Decision (Secretary's Response, pages 4-6) on the issue of UP&L liability, both Emery and UP&L were involved with coal production monitoring, planning and development involving the Wilberg Mine from the beginning of their relationship. Also:

1. UP&L was the lessee of the Wilberg Mine from the Bureau of Mines at the time of the fire (see page 4, Secretary's Response).

2. Prior to the fire, UP&L had purchased the major mining equipment utilized by Emery at the Wilberg Mine. UP&L owned this equipment at the time of the fire. (Secretary's Response, page 4).

3. UP&L and Emery mutually agreed on production goals for the Wilberg Mine (Secretary's Response, page 4).

4. UP&L had a resident engineer present at the mine on a daily basis to make sure that UP&L's mining plan was followed (Secretary's Response, page 4).

5. When Emery's mine plans affected the mining system at the Wilberg Mine UP&L reviewed the plans before they were submitted to MSHA for approval (Secretary's Response, page 5).

II. In the alternative, UP&L is liable as a successor-in-interest operator to Emery

The Federal Mine Safety and Health Review Commission has squarely ruled that a successor mine operator is jointly and severally liable for correcting the illegal acts of discrimination committed by a predecessor operator. In such instances the remedies of back pay, costs and civil penalties for the Mine Act violations are included in the liability of the successor-in-interest. See Secretary of Labor v. Sugar-tree Corporation, Terco, Inc. and Randall Lawson, 9 FMSHRC 394 (March 30, 1987), affirmed by 6th Circuit, Dec. 8, 1987. Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463 (1980). This result is necessary because the purposes of Mine Act liability are both prospective and remedial. Only UP&L, the current operator, has the capacity to correct or abate violations subsequently cited by MSHA and related to the fire investigation. From the time it became the mine's sole operator on April 16, 1986, only UP&L could take remedial and prospective action designed to prevent such health and safety violations from recurring. Only UP&L can comply with Section 109 of the Mine Act which requires that citations be posted at the mine in order to encourage present and future compliance (Secretary's Response, page 17).

The Secretary's statement continues:

Further, UP&L substantially meets the successor-in-interest criteria as highlighted in EEOC V. Mac Millan Bloedel Containers, Inc., 503 F.2d 1986 (6th Cir. 1974) and Terco, supra, which are:

1. Whether the successor company had notice of the charge against the predecessor; (2) the ability of the predecessor to provide relief; (3) whether there was substantial continuity of business operations; (4) whether the new employer uses the same plant (mine); (5) whether the new employer retains the same or substantially the same work force; (6) whether the new employer retains the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the same machinery, equipment, and method of production are used; and (9) whether the same product is produced. Id. at 1094, citing Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, 417 U.S. 249, 256-258 (1974).

Factual Basis

The relevant facts supporting UP&L being liable as a successor are as follows:

1. UP&L had notice of these violations (See copies of citations and orders issued).

2. UP&L itself has stated that it retained most of Emery's Wilberg Mine work-force. (See Statement of Facts to UP&L's Motion for Summary Judgment, page 3).

3. Emery's Director of Safety and its Mine Manager at the mine were retained by UP&L. (Secretary's Response; page 5 and Exhibits C, C-1 thereto).

4. UP&L uses most of the same equipment Emery used. (Secretary's Response, page 20).

5. UP&L produces the same product - coal, and it uses the same method of production. (See Exhibits D-G to Secretary's Response).

6. UP&L operates the same mine, Wilberg.

7. As stated previously, only UP&L can now provide the remedial and prospective relief pertaining to the health and safety conditions and practices cited by MSHA. This goes beyond the payment of any civil penalties assessed. (See Secretary's Response pages 4-6 and attached exhibits).

8. UP&L itself, by other pleadings before the Department of Labor termed itself successor-in-interest to Emery (Secretary's Response, Exhibit F).

9. The Secretary anticipates other documents and evidence in support of UP&L liability after discovery is completed. (Footnote)

The footnote in Secretary's Argument reads:

Requests for answers to Interrogatories and production of documents are pending against Emery and UP&L as of May 13, 1987, and a second set of Interrogatories and request for production of documents have been submitted as of January 29, 1988.

Conclusion:

As stated in the Secretary's Response at page 13, the Secretary has the authority and discretion to cite appropriate parties under the Mine Act in order to achieve the statutory goals of health and safety enforcement. Secretary of Labor v. Cathedral Bluffs Shale Oil, 796 F.2d 533 at 538 (D.C. Cir. 1986). Citing UP&L as a co-operator or in the alternative as a successor-in-interest accomplishes this purpose. Under both theories, UP&L has remedial and prospective health and safety responsibilities under the Act, and it is liable for the Wilberg Mine Act violations.

On February 12, 1988 UP&L filed its response to the Secretary's statement and renewed its motion for summary decision.

On March 4, 1988 the Judge severed the cases listed in the caption of this order from the remaining pending cases.

Discussion

I

In support of his position that UP&L was a coal mine operator at the time of the fire, the Secretary argues that he has discretionary authority to cite an operator, an independent contractor, multiple operators, or even an owner for violations of an independent contractor, regardless of fault, citing, among other cases, Bituminous Coal Operator's Ass'n. ("BCOA") v. Secretary of Interior, and Harman Mining Corporation, supra.

Further, the Secretary argues that his decision to impose joint and several liability on Emery and UP&L is particularly appropriate. UP&L is not in the position of a stranger who might purchase a mining operation without any connection with or knowledge of past events at that mine. At all pertinent times, UP&L owned the mining rights. Furthermore, Emery and UP&L worked together when Emery operated the mine. The fact that they continue to have a close business relationship is shown by the fact that they are represented by the same law firm and counsel.

In addition, the Secretary contends that since it acquired the Wilberg Mine in 1977, it exercised ultimate control over the mine's development and production. Emery, which exercised day-to-day operational responsibility at the mine from June 6, 1979 to April 16, 1986, was always ultimately subservient to UP&L control of the mine. This situation was directly analogous to the relationship between a production operator and his independent contractor. The federal courts of appeals have been unanimous in holding that the Secretary has wide discretion to hold either or both liable for violations of the Mine Act committed by the contractor and its employees.

I completely agree that the Secretary has broad discretion in issuing citations and orders under the Act. But the fact remains: UP&L was not cited as an operator but as a successor-in-interest. An enforcement action cannot be sustained absent implementation by the issuance of a citation or order against UP&L as an operator, Act § 104(a),(d).

The citations and orders on their face indicate UP&L was only cited as a successor-in-interest. Further, various statements of the Secretary clearly confirm this view. Specifically, the Secretary states he cited UP&L under the alternate theory as a successor-in-interest to Emery since that characterization of UP&L more graphically described UP&L's status at the time the citations and orders were issued. ^{4/} Further, "Emery was properly cited as the operator and UP&L was properly cited as a successor-in-interest." ^{5/}

It is clear that the requirements of the Act have not been met. The Secretary did not "issue a citation to the operator" to initiate a proceedings under § 104(a) or § 104(d). If the Secretary seeks to charge UP&L in its own right as an operator liable for the Wilberg fire violation, a citation or order must be issued to UP&L charging it with direct liability for those violations.

In addition, the Commission and the courts have ruled that procedural shortcuts are unlawful under the Act. The Commission invalidated a procedural shortcut in Monterey Coal Co., 7 FMSHRC 1004 (July 1985). In Monterey an order and associated penalties had been contested by the mine operator to whom the order had been issued, on the ground that its independent contractor, Frontier-Kemper, "was the operator responsible for the violation," 7 FMSHRC at 1004. During the course of the litigation, the Secretary moved to amend his penalty proposal to join Frontier-Kemper as an additional respondent. Although the judge granted the motion, the Commission reversed, holding that:

Before the Secretary may institute a proceeding before this Commission seeking a civil penalty from an operator for a violation of the Mine Act or a mandatory standard, the operator must have been cited for a violation and been given the opportunity either to contest or to pay the Secretary's proposed penalty.

^{4/} Secretary's statement on UP&L's liability filed February 1, 1988, (at 1).

^{5/} Secretary's response to UP&L motion for reconsideration filed October 13, 1987, (at 3-4).

We believe that Congress did not intend the Secretary to be able to leapfrog over these procedural steps and begin a civil penalty proceeding against an operator by the filing of a proposal for penalty in the first instance, before the Commission.

7 FMSHRC at 1005, 1006.

The foundational principles set forth in Monterey bar the Judge from holding UP&L liable for civil penalties assessed directly against it as a mine operator in the absence of UP&L being cited as an operator and a civil penalty being proposed against it directly. UP&L has only been cited, and it is being subjected to civil penalty liability in these proceedings, for Emery's alleged violations. Had UP&L been cited as an operator, the entire course of this litigation would have been different. Any proposed penalties assessed by MSHA against UP&L as an operator would most likely have been dramatically lower. This is one of the reasons why the Commission in Monterey would not allow the Secretary to shortcut the Act's required procedures by commencing a proceeding against Frontier-Kemper in the midst of an ongoing proceeding against another operator. As the Commission explained:

Our insistence on the need for compliance with the procedural requirements [of the Act for initiating such proceedings] also serves a practical purpose and furthers the enforcement scheme contemplated by Congress in the Mine Act. Providing a mine operator with the opportunity to pay a civil penalty before the institution of litigation promotes judicial and administrative economy and can assist more expeditious resolution of enforcement disputes.

7 FMSHRC at 1007. See also Phil Baker v. U.S. Department of Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978), wherein the Court held that a judge could not find a violation of a mandatory safety standard absent the particular statutory proceedings for bringing that issue to federal attention. 595 F.2d at 750.

The Judge previously denied UP&L's motion and Secretary's motion. But his prior analysis of the facts was erroneous. The motions by UP&L and the Secretary for summary decision were denied because it was the Judge's view that a genuine issue of fact was

raised as to whether "UP&L was in control of the Wilberg Mine at the time of the alleged violations." (Order, August 5, 1987). While such a fact issue still exists, control by UP&L would be relevant only if UP&L had been cited and could be held liable as an operator or co-operator.

In short, I conclude that the Secretary's claims that he could have cited UP&L as an operator independently liable for the alleged violations does not empower the Judge to uphold the citations, orders and Emery-based civil penalties here, or to otherwise assess civil penalties against UP&L as an operator. The Secretary's post hoc assertions on UP&L's liability cannot take the place of citations and orders citing UP&L with violations pursuant to the Act.

As the Supreme Court has stated, an agency's action "must ... be supported by the findings actually made by the Secretary, not merely by findings that we believe he might have made." Industrial Union Dep't., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 659, 100 S.Ct. 2844. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549, 98 S.Ct. 1197 (1978), ("When there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding'": American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539, 101 S.Ct. 2478 (1981), ("the post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action").

The Secretary also relies on the fact that, as indicated by the pleadings in the cases, both UP&L and Emery are represented by the same legal counsel (Paragraph 11, Secretary's response filed June 29, 1987).

The fact that UP&L and Emery are represented by the same law firm has no relevance to the issues of UP&L's liability. The interests of UP&L and Emery are not adverse particularly since Emery agrees that it, and not UP&L, bears the liability for any violations as they are finally adjudicated.

The facts relied on by the Secretary would generally establish, if true, that UP&L was an operator at the Wilberg Mine at the time the citations were issued. However, since it is clear UP&L was not cited as an operator, the stated facts are not relevant.

Further, the cases relied on by the Secretary are not controlling. In these cases the owners were, in fact, issued an MSHA citation.

In BCOA the mining company was cited for violations committed by a construction company. In Harman Mining the defense failed but it focused on the issue that the Secretary had not cited the independent contractor. In Cyprus Industrial the owner was cited but was not insulated from liability because an independent contractor committed the violation. The remaining cases relied on by the Secretary are not inopposite the view expressed herein.

In sum, UP&L was never cited as an operator and for the reasons expressed herein the Secretary's attempt to impose liability on UP&L as an operator cannot be sustained.

II

In his alternative theory of liability the Secretary relies on the successorship doctrine and he asserts that UP&L substantially meets the successor-in-interest criteria.

As a threshold matter it appears the Commission has considered the issue of successorship liability only in the context of discrimination cases. Sugartree Corp., 9 FMSHRC 394 (1987) and Glen Munsay v. Smitty Baker Coal Co., 2 FMSHRC 3463 (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). In the cited cases the Commission has held the successor corporation liable for the discrimination committed by the predecessor. The Commission followed the discrimination and labor law precedents and disregarded the general successor liability rule. ^{6/} The rationale for its ruling in discrimination disputes was explained by the Commission as follows:

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

^{6/} The general rule is that a corporation which purchases the assets of a company does not assume the liabilities of the seller. Certain exceptions exist but they are not involved here. The rule has been applied frequently by courts in many jurisdictions. See Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, (11th Cir. 1985); Mozingo v. Correct Manufacturing Corp., 752 F.2d 168 (5th Cir. 1985); Travus v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); R.J. Enstron Corp. v. Interceptor Corp., 555 F.2d 277 (10th Cir. 1977); Cooper v. Utah Light & Railway Co., 35 Utah 570, 102 P. 202 (1909). 6A Fletcher's Cyclopedia on Corporations, § 2953, § 7122.

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 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.

Sugartree, 9 FMSHRC at 397.

The cases at bar do not in any way involve discrimination. The citations and orders arise from the dramatics of a mine fire but all the cases involve disputes as to whether the mine operator did or did not violate a particular mandatory standard; further, whether the facts involve the operator's unwarrantable failure to comply and the appropriate penalty. In short, all the cases pending before the Judge are contest and penalty cases of alleged violations of specific safety standards.

In the pending cases there are present none of the considerations which compelled the Commission in Munsey and Sugartree to adopt the labor/discrimination subject matter exception to the general rule governing successor liability. Even if remedy is a consideration, the violations have all been abated and Emery has paid the penalties involved in the captioned cases. Further, Emery has the funds available to pay any remaining civil penalties.

The fundamental differences between the present enforcement disputes and the discrimination cases the Commission addressed in Sugartree and Munsey are critical since "the resolution of any question concerning successorship involves 'striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee.'" Munsey, 2 FMSHRC at 3468, quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 181 (1973). A fair balancing of these interests in this case requires that successor liability not be imposed on UP&L. Unlike the facts in Sugartree and Munsey, the Wilberg miners have no compelling interest which would be vindicated by such an action. The miners who were discriminated against in Munsey and Sugartree could only obtain reinstatement if the successor corporation were held liable. In contrast, any safety violations which may have existed at the Wilberg Mine before the fire have long since been abated (and even if still uncorrected, they could be corrected by UP&L without holding that company liable for Emery's actions).

The Secretary also argues that successorship liability should be imposed because UP&L hired the Emery workforce and certain Emery personnel; namely, the mine manager and safety director.

The Secretary's position lacks merit. Many cases hold that in order to establish successorship a common identity of officers, directors and stockholders is the critical element in determining whether a purchaser of assets is a successor, not the purchaser's "mere employment" of the seller's personnel - even its officers. Bud Antle, Inc. v. Eastern Foods, Inc., supra, 758 F.2d at 1459. There is no such common identity here.

The Secretary's arguments that UP&L must be a successor since Emery now lacks the capacity to abate any violations or post citations are not persuasive. The citations and orders on their face reveal that all of the alleged violations had been corrected or abated the date they were issued. If the Secretary believes UP&L as an operator has violated a regulation then it is his duty to cite UP&L. It will then be UP&L's obligation to comply with the posting requirement of the Act. But at this time the Secretary's assertions that UP&L must be held liable as a successor for remedial reasons are meritless.

The Secretary further contends that some of the violations were charged as "unwarrantable" under Section 104(d) of the Act (Secretary's Response, filed June 29, 1987, page 17). Hence, only the current operator can assume responsibility for the termination of the unwarrantable sequence, because that sequence runs with the mine until a complete inspection of the entire mine discloses no further "unwarrantable" violations. ^{7/}

The Secretary's premise is flawed. The nature of the unwarrantable failure sequence precludes automatic application to a subsequent operator of the mine. The unwarrantable failure sequence is a special sanction for dealing with a particular operator who has not responded adequately to the normal, lesser sanctions imposed under § 104(a). See Consolidation Coal Co., 4 FMSHRC 1791, 1794 (1982) ("graduated scheme of sanctions"); S.Rep. No. 181, 95th Cong., 1st Sess. 31 (1977) reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 619 (1978). An unwarrantable failure is operator specific: it means that the violation occurred as a result of the operator's indifference, willful intent, or serious lack of reasonable care. Westmoreland Coal Co., 7 FMSHRC 1338, 1342 (1985). Further, it

^{7/} The cases in the caption involving the issue of unwarrantable failure are WEST 87-149-R, WEST 87-154-R and WEST 87-162-R.

has been held that a mine operator cannot be held liable for an unwarrantable failure order where the cited operator did not know (nor should have known) of the violation, GEX Colorado Incorporated, 2 FMSHRC 1347, 1350 (1980) (Morris, J). It is one thing to hold a party liable for a violation without fault, but quite another to hold that he unwarrantably failed to comply without fault.

The Secretary's position, cited without authority, is accordingly rejected.

The Secretary also contends that UP&L represented itself as a successor-in-interest to Emery in Docket No. 86-MSA-3 involving a petition for modification (Secretary's Exhibit F).

The evidence relied on merely shows that UP&L voluntarily assumed Emery's position in ongoing litigation. It falls far short of establishing that UP&L is liable for the violations the Secretary has urged against Emery.

As noted above, the issues presented in this motion appear in other related pending cases. Unless directed otherwise by a higher authority the Judge will, in due course, enter the same order as to UP&L where the issue arises.

In sum, the rationale for imposing the successorship liability doctrine on UP&L does not exist in an enforcement action involving violation of a safety or health standard. Accordingly, the facts and the case law relied on by the Secretary do not support his position.

Emery has paid the penalties in the cases listed in the caption of this order and those cases have been dismissed as to Emery. The Judge further concludes there is no issue of material facts as to UP&L.

Accordingly, for the reasons stated herein, I enter the following:

ORDER

1. The motion of Utah Power & Light for the Judge to reconsider his order denying Contestant UP&L's Motion for summary decision is granted.
2. The Judge's order of August 5, 1987 denying said motion is reconsidered.

3. The order of August 5, 1987 denying the motion is vacated.
4. The renewed motion for summary decision by Contestant Utah Power & Light is granted.
5. The contest filed by Utah Power & Light is sustained.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 14 1988

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEVA 87-166-R
	:	Order No. 2699493; 4/9/87
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 87-306
	:	A. C. No. 46-03805-03806
	:	
	:	Martinka No. 1 Mine
	:	
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: W. Henry Lawrence, Esq., Steptoe & Johnson,
Clarksburg, West Virginia, for Contestant/
Respondent;
Susan M. Jordan, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Penn-
sylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

These consolidated cases concern the contest pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), challenging the legality of a section 104(d) (2) order issued to the contestant at its Martinka No. 1 Mine on April 9, 1987. The captioned proceedings have been consolidated for hearing and decision because the order contested in the contest proceeding charges a violation of a mandatory safety standard for which the Secretary seeks a penalty in the civil penalty proceeding.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on November 16, 1987. The parties filed post-hearing proposed findings of fact, conclusions of law, and briefs which have been considered by me in the course of making this decision.

Section 104(d)(2) Order No. 2699493, which is the subject of this proceeding, was issued by an MSHA inspector on April 9, 1987. The order alleges a violation of the mandatory safety standard found at 30 C.F.R. § 75.507-1(a) and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

After making a 103(g)(1) inspection of the complaint alleging the continuous mining machine was trammed down the No. 2 entry return air course in the 1 north 017 section on the afternoon 4-3-87, it was revealed that Joe Metz, mechanic found 3 openings in junction boxes on the continuous mining machine and reported this to Tom Permo (sic) prior to the machine being moved down the return, this was heard by Fred Shingleton who was present in the area at the time. Tom Permo (sic) was present during the time the continuous miner was being tramed. Tom Permo (sic) was the foreman in charge of the area at this time. To terminate this Order all Foremen shall be instructed to see that all electrical equipment taken into the return air course outby the last open crosscut be in an permissible condition, and a list of Foremen instructed given to MSHA.

30 C.F.R. § 75.507-1(a) provides in pertinent part as follows:

All electric equipment . . . used in return air outby the last open crosscut in any coal mine shall be permissible

STIPULATIONS

The parties stipulated to the following:

1. The Southern Ohio Coal Company owns and operates the Martinka No. 1 Mine and both are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. The presiding Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.
3. The subject Order No. 2699493, its modification and termination were properly served by duly authorized representatives of the Secretary upon an agent of the contestant at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
4. The assessment of a civil penalty in this proceeding will not affect contestant's ability to continue in business.

5. The appropriateness of the penalty, if any, to the size of the contestant's business should be determined based on the fact that the Martinka No. 1 Mine has an annual production of approximately 2.5 million tons of coal and the Southern Ohio Coal Company has an annual tonnage of approximately 7.3 million.

6. There was no intervening clean inspection between the § 104(d)(2) order being contested and the previous § 104(d)(1) citation.

ISSUES

The ultimate question presented is whether or not the cited condition or practice constitutes a violation of 30 C.F.R. § 75.507-1(a). Included as part and parcel of any determination of that question is whether or not the violative act took place in "return air outby the last open crosscut" as stated in section 75.507-1(a). Additional issues are whether the cited violation was of such a nature as would significantly and substantially contribute to the cause and effect of a coal mine safety hazard and whether the cited violation was caused by an unwarrantable failure to comply with the standard in question. Also, an appropriate penalty must be assessed in the event that a violation is found.

FINDINGS OF FACT

1. MSHA Inspectors Wayne Fetty and Frank Bowers issued the subject order on April 9, 1987, subsequent to their investigation of a section 103(g) complaint. The order and the complaint concern an incident that occurred on the afternoon shift of April 3, 1987, in the 1 North Section of the mine.

2. The crew assigned to the 1 North Section on the afternoon shift of April 3rd consisted of section foreman Tom Premo, mechanic Joe Metz and general inside laborers Tim Dotson, Fred Shingleton and Joe Hardesty. Joe Metz actually worked for maintenance supervisor Bud Boone. His particular assignment that afternoon was to perform permissibility checks on a miner, roofbolter, flight pump and two shuttle cars that were physically located in the 1 North Section, and also to repair any nonpermissible conditions he found. The crew's assignment from Shift Supervisor Fred Rundle was to move the roofbolter, one of the shuttle cars and the mining machine from their then existing locations in the section to a fall area in the No. 2 entry, so that the roof fall could be cleaned up.

3. An unintentional roof fall had occurred in the No. 2 entry as depicted on Government Exhibits 1 and 2, some weeks prior to April 3, 1987.

4. No mining occurred in the 1 North Section on April 3, 1987, active mining having ceased two shifts earlier. The face areas were left squared off and "faced-up." Mining subsequently resumed in the section after the fall area was cleared.

5. Mechanic Metz began his permissibility checks with the roofbolter. Metz detected a nonpermissible condition on the roofbolter's lighting system and unplugged it, placed a danger tag on the plug and placed the plug in a lockbox. Foreman Premo asked Metz if the lights could be turned out and the machine moved anyway, but Metz opined that it could not. Premo then called Shift Supervisor Rundle, told him the bolter was not permissible, and asked if he could move it. Rundle told Premo not to move the bolter, but rather to move the miner instead at that time.

6. At the start of the shift, the continuous miner was located in the No. 6 entry up towards the face. The crew's mission then was to move the miner from there to the fall area in the No. 2 entry. In the process of doing that, Dotson, Hardesty, and Shingleton had trammed the miner as far as the No. 5 entry, marked with an "X" on Government Exhibits 1 and 2, when they had to stop because of a line curtain fastened across the entry.

7. At this point in time and space, Metz arrived and informed the crew that he would perform his assigned permissibility checks on the miner while the miner was stopped and the crew was removing the curtain. In the process of making these checks, he found three junction boxes on the miner that his five thousandths (.005) of an inch feeler gauge would penetrate. Metz thereupon told and showed Dotson, who was operating the miner, what he had found. At this point, Premo arrived on the scene and was told by Metz that there were permissibility violations on the miner. There followed an exchange between Premo and Metz, the substance of which I find to be that Premo felt Metz was being an obstructionist on the issue of moving the miner and responded with words to the effect that he had a job to do and that he was not going to lose his job over something as minor as these openings.

8. Following the discussion between Metz and Premo, Premo ordered the crew to move the miner to the fall area. At that time, Shingleton expressed his concern to Premo that the crew would get into trouble for moving the miner in a nonpermissible condition. Premo responded to the effect that if anyone got into trouble it would be him, not them. I find the sense of the situation to be that Premo clearly understood that the miner was in a nonpermissible condition, but he ordered it moved anyway in order to accomplish his assigned mission.

9. Prior to moving the miner, Shingleton took methane readings with a methane detector at the faces of the Number 5, 4, and 1 entries and at the fall area and did not detect methane. Premo had earlier checked all the faces for methane without detecting any.

10. The miner was then trammed from the No. 5 entry across the faces and then down the No. 2 entry to the fall area.

11. The curtain at the intersection of the No. 2 entry and the face was taken down to allow the miner and later the shuttle car to enter the No. 2 entry, but it was replaced after each piece of equipment entered the entry. Nevertheless, there was some degree of air movement in that entry moving away from the faces.

12. After the miner was moved to the fall area, Metz completed his permissibility checks on the miner and corrected the nonpermissible conditions. He also recorded the violative conditions in the permissibility book on the surface at the end of the shift.

13. On April 3, 1987, the 1 North Section had eight (8) entries. The No. 1 and 2 entries were the returns on the right side of the section and the No. 6, 7, and 8 entries were the return airways on the left side of the section. The No. 3, 4, and 5 entries were the intake airways with the No. 3 entry as the main intake escapeway and the No. 4 and 5 entries as the belt and track entries, respectively.

DISCUSSION WITH FURTHER FINDINGS

Reduced to its essentials, the Secretary's position in this case is that (1) the miner was in a nonpermissible condition and (2) it was used in return air outby the last open crosscut in the No. 2 entry.

30 C.F.R. § 18.31(a)(6) provides that the allowable limit for the openings in the junction boxes on the continuous miner is .004 of an inch. Metz' unrefuted testimony on this point was that there were three such openings in the junction boxes that were in excess of this limit. Dotson directly corroborates this testimony at least as to the one junction box on the operator's side of the miner. Furthermore, Metz and all the other miners who testified stated that the permissibility violations were discovered while the miner was stopped at the No. 5 entry before it was moved into the No. 2 entry, and that Premo was advised of the nonpermissible conditions found on the miner at that time. More specifically, Dotson, Shingleton, and Hardesty, as well as Metz himself, all

stated that Metz informed Premo that he had found permissibility violations on the continuous miner and that it should not be moved in that condition.

In making these credibility findings in favor of the Secretary, I am aware that Premo testified that no one reported any impermissible conditions on the miner to him when the miner was stopped in the No. 5 entry and in fact he maintains that he first learned of Metz' allegations that the miner was moved in a nonpermissible condition three days later on April 6.

The operator points out that on February 16, 1987, Metz had received a two week suspension for refusal to wear his safety glasses, and had only returned to work on February 26, 1987, five weeks prior to this incident. The operator urges that this suspension angered Metz and provided the motivation for him to fabricate this violation out of whole cloth. He could use MSHA to take his revenge against the company. This argument might have some appeal if it was only Metz' word against Premo's, but in this case all the percipient witnesses to the incident with the exception of Premo tell the same tale. To be sure there are minor variations in their testimony, but no more than might be expected. In fact, I would be very surprised if four individual witnesses to an incident related their impressions and recollections of that event in exactly identical terms. The argument also overlooks the difficulty Metz might have in convincing three other miners who had not been suspended to commit perjury on his behalf. Metz did not even have the luxury of being able to choose which miners he would have corroborate his complaint. He was stuck with the crew at hand. It is simply too far fetched to believe that a single individual with his own personal grievance against the company could convince three out of three witnesses to the incident to go along with a completely fabricated version of events and stick by it for the next seven months through various and sundry investigations, interrogations, and hearings. A more plausible explanation is that Premo, who was assigned to move three pieces of equipment that evening, had already failed to move the first and didn't want to have to call Rundle back again to report he also couldn't move the second. There was testimony at the hearing from Premo's supervisors to the effect that Premo was overly cautious and indecisive and that had a question arisen about the miner, he would have passed it to them. These characteristics had been adversely commented upon in his annual job performance reviews, and in my view, Mr. Premo was attempting to correct this flaw on the evening of April 3. He made the decision to get the miner to the fall area in spite of the fact that it was not in a permissible condition and he knew it was not.

Before there could be a violation though, the nonpermissible miner must have been used in return air outby the last open crosscut. The term "return air" is not specifically defined in the Act or regulations. It is defined, however, in the Dictionary of Mining, Mineral and Related Terms (1968) published by the Department of the Interior simply as "Air traveling in a return." "Return" is then defined by the same dictionary as "any airway which carries the ventilating air outby and out of the mine." In my opinion, therefore, since the No. 2 entry was a designated return airway and the testimony of the miners was that there was a detectable current of air flowing from the face area down the No. 2 entry toward the mine exit, this entry would constitute "return air" as that term is used in the mandatory standard.

I specifically reject the proposition that since there was no coal actually being mined at the time, there could be no return air. Both Windsor Power Coal Co. v. Secretary, 2 FMSHRC 671 (1980), an ALJ decision by Judge Melick; and Mid-Continent Coal and Coke Co. v. Secretary, 3 FMSHRC 2502 (1981) involved temporary delays or halts in production, similar to the instant situation, that were found not to affect the ventilation requirements. In all three cases, including this one, coal production had recently ceased and other work was being performed to prepare the section for resumed production.

Lastly, I find as a fact and conclude as a matter of law that the miner was "used," i.e., trammed into and down the entry to the fall area, which area was "outby the last open crosscut." See Government Exhibits No. 1 and 2.

I therefore conclude that a violation of 30 C.F.R. § 75.507-1(a) has been established.

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

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained its interpretation of the term "significant and substantial" 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

While it is true that no active coal mining was taking place and no methane was detected at the time the miner was being moved, it is also true that the 1 North Section is the gassiest section in the Martinka No. 1 Mine and has been known to liberate methane in the explosive range. Furthermore, I take administrative notice that methane can be liberated at any time.

The safety hazard contributed to by the violation was an explosion. The nonpermissible miner was a potential ignition source for any methane that would have been present in the return entry. Because of the three openings in the junction boxes, methane could enter those electrical compartments and any spark or electrical arc could become an ignition source. Given these facts and circumstances, it was reasonably likely that an ignition or explosion would occur. In the event that an ignition or explosion did occur, it was reasonably likely that there would have been at least serious injury, such as smoke inhalation, burns, cuts, and/or lacerations.

I therefore conclude that the violation was "significant and substantial" and serious.

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply with the mandatory standard, and I agree.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). And most recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997 (1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

In this case, foreman Premo knew of the impermissible condition of the miner, yet ordered it taken into the No. 2 return entry in violation of the mandatory standard. This action demonstrates aggravated conduct that is clearly imputable to the operator. Accordingly, I conclude and find that this violation resulted from gross negligence and this is reflected in the civil penalty assessed by me for this violation.

In assessing a civil penalty in this case, I have also considered the foregoing findings and conclusions and the requirements of section 110(i) of the Act, including the fact that the operator is large in size and has a substantial history of violations. Under these circumstances, I find that a civil penalty of \$1,000, as proposed, is appropriate.

ORDER

Order No. 2699493 IS AFFIRMED, and Southern Ohio Coal Company is hereby directed to pay a civil penalty of \$1,000 within 30 days of the date of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

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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 15 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 85-63-M
Petitioner : A.C. No. 44-00704-5513
v. : Cherokee Mine
TENNESSEE CHEMICAL, INC., :
Respondent :

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petitioner;
Ronald G. Ingham, Esq., Clements, Ingham &
Trumpeter, Chattanooga, TN, for Respondent.

Before: Judge Fauver

This civil penalty petition by the Secretary of Labor charges a violation of a safety standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

On September 14, 1984, a roof fall at Respondent's copper mine killed one miner and severely injured another. The men were at the controls of a drilling machine under unsupported roof, drilling blasting holes into the face, when a large rock fell upon them. The Secretary's citation, as amended, charges a violation of 30 C.F.R. § 57.3-20 (now § 57.3020), which provides:

Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an underground copper mine near Copperhill, Tennessee, where it employed about 200 miners working three 8-hour shifts per day, seven days a week. Copper and iron sulfide ore was mined using the sublevel stoping method. The ore was drilled, blasted, loaded and transported to a skip pocket raise where it was crushed, loaded into skips and hoisted up a shaft to storage bins on the mine surface.

2. For development work, that is, excavating tunnels for haulageways and travelways, Respondent grouped miners in six-man development crews, who drilled blast holes into the tunnel face and roof, set charges, blasted the rock, scaled the roof, removed the rock ("mucking" out the blast area), and repeated this cycle. They were paid a crew incentive rate based on the number of feet they advanced the tunnel.

3. The development crews used a Jumbo-type, three-boom, pneumatic drill. The drilling pattern was a standard burn cut, drilling 36 2 1/4-inch diameter holes to a depth of 12 feet. Holes were also drilled and blasted on close centers in the roof to provide a smooth wall extending about 20 feet from the face. Split set and hydraulic cement cartridge rock bolts were installed in the roof on an "as needed" basis. Under the supervision of a development foreman, each development crew was to examine and scale the roof in its own work places, and to do roof bolting depending on the amount of bolting involved. If a large area were to be bolted, a separate roof bolting crew would be brought in.

4. On the day of the accident, September 14, 1984, Steve Dillard and Joshua Waters, development drillers, and Frank Wright, development loader, made up one-half of a six-man development crew (on the evening shift) that was tunneling in the 14 North 33 drift, to develop a large truck haulage road 16 x 18 feet. The development foreman for their shift was Cleaston Morrow. The other half of the crew worked the previous shift (day shift) on September 14.

5. Dillard, Waters and Wright reported to work at 3:00 p.m., and received their work assignments from the development foreman, Cleaston Morrow. Their assignment was to continue development in the 14 N 33 drift.

6. Dillard, Waters, and Wright, all members of the development crew, and Hayden Stiles, equipment operator, arrived at the 14 N 33 drift and found that the heading had to be mucked

out (removing blasted rock). The heading had been blasted by the other half of the development crew at the end of the prior shift.

7. Dillard, Waters, and Stiles started to scale the roof in the blast area while Wright went to the 18 level to get a loader to muck out the blasted rock. The regular practice was to have the development drillers examine and scale the roof after each blast. When they finished this task, they would tell the loader the area was ready to be mucked and the loader would move in a loading machine and remove the blasted rock. After the area was mucked, the drillers would move in the Jumbo drill, drill the face and roof, set the charges, set off the blast and the crew would repeat the above cycle.

8. When Wright returned, Dillard told him they had finished scaling and the area was ready to be mucked. Dillard and Waters left, and Wright and Stiles started mucking. They had most of the blasted rock removed when a rock fell from the roof in front of Wright's loader, inby the last row of roof bolts. The rock fall was very near the place where a rock later fell upon Dillard and Waters. (See Exh. P-22 and Tr. 212.) The rock was about two feet wide and three to four feet long. The rock fall frightened Wright because he had been driving back and forth under that spot and the rock could have fallen on him and killed him. Also, he was startled and angered by the fall because Dillard had said the roof had been scaled.

9. After the rock fell, Wright backed his loader into the N 28 crosscut and waited for Stiles to return in the loader Stiles was operating. When Stiles returned, Wright told him about the rock fall and stood in the dipper of Stiles' loader so he could reach the roof with a scaling bar. He and Stiles then scaled down "quite a bit" of loose roof. When Wright and Stiles were through scaling, they finished mucking out the blasted rock and Wright went to the office/lunchroom. There he saw Dillard, Waters, and the foreman, Cleaston Morrow. Wright confronted and criticized Dillard because Dillard had said the roof had been scaled but a rock had fallen near his loader and Wright found a lot of loose roof. He warned Dillard that some roof had "blowed up"^{1/} (Exh. P-21, p. 10) and that the roof still needed to be checked (Id.; Tr. 172, 174).

^{1/} "Blowing" is an adverse roof condition that signals danger of a potential roof fall. "Blowing" may include popping noises, cracking or the falling of small pieces ("fines" or "scales"). Exh. P-21 p. 11.

10. Cleaston Morrow, the development foreman, was the supervisor of Dillard, Waters, Wright, and Stiles and was responsible for examining the roof conditions in the 14 N 33 drift to ensure that proper roof testing and roof control practices were being followed. Morrow did not go to the 14 N 33 drift after hearing Wright's warning about the roof and had not examined the face area before then on September 14. He did not instruct Dillard and Waters to check the roof, to install roof support, or to delay drilling in order to have additional bolting done by the pinning crew. Morrow knew that when Dillard and Waters left the lunchroom they were going to the face area where they would be drilling the face and roof while working under unsupported roof.

11. Dillard and Waters returned to the drift, did some scaling of the tunnel floor, but not the roof, moved in the Jumbo drill, and started drilling holes into the tunnel face. While they were at the operating controls, under unsupported roof, and drilling the face, a rock fell on them, killing Dillard and permanently disabling Waters. The rock was about six feet eight inches long, four feet ten inches wide and four to five inches thick.

12. The rock that killed Dillard and injured Waters fell from unsupported roof seven and one-half feet in by the last row of roof bolts. The heading where they were working had just been blasted near the end of the prior shift on September 14.

13. Shortly before the fatality on September 14, the 14 N 33 drift had been down for eight shifts because of adverse roof conditions. In that period, 198 roof bolts were installed up to the edge of a "smooth wall." A "smooth wall" is a lip or brow that is intentionally left in the roof after an explosion. This is illustrated in Exh. R-2. The roof bolting work was completed on September 13. The roof bolter, Mark Richards, testified that when he was installing the roof bolts he backed up and installed an extra row of roof bolts at one place because he heard popping noises in the roof and saw small bits of rock, which he called "fines," falling from the roof. His supervisor, Laddie Hicks, later criticized him for using an extra row of roof bolts. Richards told Hicks about the dangerous roof conditions he had encountered.

14. On September 13, Mark Richards completed the roof bolting referred to above. He roof bolted around a small bore hole 14 N 33 drift and bolted the drift roof in by from there up to the smooth wall lip or brow left by the last blast of the face. That smooth wall was later shot down in the blast on September 14. Gary Williams, general mine foreman, had ordered the area around the small bore hole roof bolted because of dangerous roof

conditions he observed in the area. This was within 15 feet of the place where Dillard was killed.

15. Wright, Richards and Thomas Mason, the development driller on the day shift who had "taken the heading" on the afternoon of the 14th, all testified at the hearing about bad roof conditions they had experienced in the 14 N 33 drift before the roof fall that killed Dillard.

16. Dr. Ross Hammett, a mining engineer consultant to Respondent, had advised the Respondent in a written report in July, 1984, that the requirement for roof support should be determined by continuing to observe "local geological conditions."

17. Anthony Edey, Respondent's manager of mining and milling at the time, and Dr. Hammett both testified that noise in the roof, fretting or the falling of small rocks from the roof, larger rocks falling from the roof, and the necessity for installing roof bolts in a particular area all make up a part of a mine's operating experience.

Prior Fatality

18. On January 27, 1984, Ted B. Ledford, a development driller, had been doing the same kind of work as that done by Dillard and Waters on September 14, 1984. When he was operating a Jumbo drill in a different drift, also under an unsupported roof and also drilling blasting holes into the face, a large rock fell from the roof and killed him.

19. Following an investigation of the Ledford fatality, MSHA made the following recommendations to Respondent:

1. Supervisors should review with each miner the proper ground control procedures.
2. Overhead protection should be provided on all mobile equipment where feasible.
3. A continued surveillance of day-to-day ground conditions is required by both supervisors and miners to avoid ground fall injuries. Scaling of the back [roof] and ribs must be a continual process in order to prevent rock fall accidents.

20. The MSHA accident investigation team in the Ledford case found the following "Cause of Accident":

The cause of the accident was the failure of management and employees to detect loose ground. Contributing causes may have been that vibrations from the drilling operation may have affected the ground conditions above the area by loosening unstable ground.

21. After the Ledford fatality, Respondent continued its practice of not installing canopies on the Jumbo drills. If Respondent had installed a canopy over the operating controls compartment of the Jumbo drill operated by Dillard and Waters, in all reasonable probability the canopy would have protected them from injury from the rock fall on September 14.

22. If Respondent had extended its rows of roof bolts to support the roof above the Jumbo drill, in all reasonable probability the rock would not have fallen upon Dillard and Waters on September 14, 1984.

The MSHA Investigation of the Dillard/Waters Accident

23. When the MSHA accident investigators and their supervisor inspected the Dillard/Waters accident scene, they observed unbolted loose rocks in the roof near the area where the rock had fallen on Dillard and Waters and elsewhere in the roof. They determined from their investigation and observation that the loose rocks were probably there and visible before the rock fall. In their accident investigation report, they found the following "Cause of Accident":

The cause of the accident was the failure of management and employees to scale down and/or adequately support loose ground. Contributing causes may have been the failure of management and employees to detect loose ground and that vibrations from the drilling operation may have affected the ground conditions above the drill area by loosening unstable ground.

25. The MSHA investigation report made the following recommendations to Respondent:

1. Supervisors should review with each miner the proper ground control procedures and practices.
2. Overhead protection (canopies) should be provided on all mobile equipment, where feasible.
3. A continued surveillance of day-to-day ground conditions is required by both supervisors and

miners to avoid ground fall fatalities and injuries. Scaling of the back and ribs must be a continual process throughout the mining cycle in order to prevent rock fall accidents.

4. Where it is necessary for ground support, the bolting plan should include rock bolting up to and as near the face as possible to keep the drill crew at a minimum of exposure.

DISCUSSION WITH FURTHER FINDINGS

Title 30 C.F.R. § 57.3-20 states:

Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining methods used.

This regulation has not been frequently interpreted by the Commission or its judges. In White Pine Copper Division, Copper Range Company, 5 FMSHRC 825 (1983), the Commission expressed the following guidelines:

. . . [I]n view of the fact that section 57.3-20 is intended to protect miners against roof falls, we conclude that a mine's "operating experience" broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary.

* * *

While we do not in this case define the term "operating experience," we conclude that the operating experience of a mine requires the use of roof support if, in a given situation, the mining conditions are such that roof support is necessary. This determination takes into account the operating history of the mine (i.e., its past mining practice), geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from a potential roof fall. [5 FMSHRC 836,838.]

The Commission also considered the common usage of the term "experience" in interpreting the standard (at Fn. 23):

. . . [W]e turn to the dictionary for the common usage of that term. There, the key word "experience" is defined:

2: direct observation of or participation in events: an encountering, undergoing, or living through things in general as they take place in the course of time...4: knowledge, skill, or practice derived from direct observation or participation in events: practical wisdom resulting from what one has encountered, undergone, or lived through ...5a: the sum total of the conscious events that make up an individual life ... 6: something personally encountered, undergone, or lived through

Webster's Third New International Dictionary
(Unabridged 1971) (Emphasis the Commission's).

In Amax Chemical Company, 8 FMSHRC 1146 (1986), the Commission interpreted § 57.3-20's companion section, § 57.3-22.2/ The Commission stated:

Unlike the regulatory scheme that obtains with respect to underground coal mines, approved roof control plans are not required in underground metal-nonmetal mining operations. Rather, '[g]round support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required.'

2/ This mandatory ground control safety standard, which applies to metal-nonmetal underground mines, provides:

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

30 C.F.R. § 57.3-22 (1984). In 1985, this provision was renumbered as 30 C.F.R. § 57.3022 but its wording was not changed.

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(30 C.F.R. § 57.3020 (1985) (formerly numbered as 30 C.F.R. § 57.3-20 (1984)). See generally, White Pine Copper Range Co., 5 FMSHRC 825, 835-37 (May, 1983). (Of course, the standard involved in the present case also imposes the continuing duty to examine ground conditions in such mines and to take down or adequately support any loose ground.)

* * *

We hold that in evaluating ground conditions and the adequacy of support under this standard [§ 57.3-22], all relevant factors and circumstances must be taken into account.

* * *

Visible fractures, sloughed material, "popping" and "snapping" sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas, are also relevant factors to be considered. Cf. White Pine, supra, 5 FMSHRC at 833-37.

Use of the term "indicates" in § 57.3-20 denotes something less than a requirement of certainty before roof support is required to protect miners against roof falls. This interpretation is consistent with the Commission's interpretation of § 57.3-22 in the Amax case, where it stated (in Fn. 5):

We reject any suggestion that the ground control measures required by the standard apply only when ground is in immediate danger of falling.

It is also consistent with the Commission's statement in White Pine that the purpose of § 57.3-20 is "to protect the miners from a potential roof fall" (5 FMSHRC 838, emphasis added).

I construe § 57.3-20 as meaning that "operating experience" sufficient to indicate the need for roof support does not have to be at the point of an immediate danger of a roof falling, but includes danger of a potential roof fall.

The "operating experience" of Respondent's mine included, besides those conditions described in the Findings of Fact, above, the conditions and incidents described by personnel who worked in the 14 N 33 drift on a daily basis. The import of the testimony of the miners and MSHA witnesses, which I credit, is

that the 14 N 33 drift had a bad roof, it was dangerous, and it needed roof support where Dillard and Waters were working.

Frank Clay Wright

As stated above, Wright was the development loader on the same shift with Dillard and Waters. His testimony about roof problems in the 14 N 33 drift on the night Dillard was killed has been partially recounted above.

Wright testified that the roof in the 14 N 33 drift was bad and that, after the drift was driven through the N 28 crosscut the roof conditions became worse (Tr. 185-186) and loose ground conditions were "all over. On the ribs, back [roof] everything" (Tr. 203-204).

Mark Richards

A portion of Richards' testimony has also been recounted above. As noted, on September 13 he installed an extra row of roof bolts because of popping noises in the roof and because the roof was dropping "fines."

He corroborated Gary Williams' statements about the bad roof around the bore hole, within 15 feet of the place where Dillard and Waters were struck by the roof fall.

Richards testified that he bolted the roof up to the smooth wall on September 13. The smooth wall was shot down on the afternoon of the 14th of September, exposing the area from which the rock fell that killed Dillard.

Richards, like Wright, described the roof conditions in the 14 N 33 drift as being "bad":

Q. Had you observed the roof conditions along the 33 drift?

A. It's bad. It's bad from day one.

Q. When you say day one what?

A. Well, I'm talking about from where they broke it off all the way up.

(Tr. p. 319).

Richards testified that he believed the whole drift needed pinning (Tr. 7324), that he told his supervisor, Laddie Hicks, that there was a roof area in the 14 N 33 drift that still needed

pinning and thereafter, to his knowledge, that roof area was not pinned (Tr. 324-326).

Richards regarded the 14 N 33 roof as dangerous and testified that he would not have wanted to work anywhere in the 14 N 33 drift unless it was pinned (Tr. 344).

Thomas J. Mason

Mason was the day shift development driller who shot the heading in the 14 N 33 drift shortly before Dillard, Waters, and Wright began their shift on September 14. He had worked in that drift from the time it was begun. Referring to the roof, he testified that in his 16 years in development work:

A. I've never seen one no worser. I've never seen one that bad. I mean as far as the roof and top and all.

Q. Okay. You're referring then to 14 N 33?

A. If we're talking about going in -- the drift where Mr. Dillard got killed at. It was rough on us all the way. I'm saying it was ground we had -- we had ground all the way there.

(Tr. 281).

Mason described a number of adverse ground conditions he experienced in the 14 N 33 drift before the Dillard fatality: The roof was bad "all the way" (Tr. 273, 277); about 30 feet from the N 28 crosscut in the 14 N 33 drift, a rib caved in, "just gave way" (Tr. 275), and almost struck his drill buddy (Tr. 274); later, between N 28 and the face where Dillard and Waters were struck by a roof fall, a rib "jumped out" on Mason and his drill buddy (Tr. 277); after the tunnel advanced beyond the bore hole, a large rock fell from the roof and hit his Jumbo drill and broke a jack (Tr. 278-279); after that roof fall, his foreman, Glenn Morrow, helped the miners move the rock from his drill (another incident of a foreman's knowledge of adverse roof conditions in the 14 N 33 drift) (Tr. 299-300).

Mason worked in the 14 N 33 drift from the time it was opened until after the Dillard fatality. He saw many falls of roof or rib and in each case the fallen rocks had been unsupported. He never saw a roof fall where the roof was supported by roof bolts.

MSHA'S Accident Investigation

Frank Holiday and Eugene Mouser, MSHA inspectors, inspected the accident scene on the morning following the fatality. They interviewed mine officials and employees and inspected the 14 N 33 drift. On the 15th they decided to issue a citation, which was put into written form on Monday, September 17, 1984. On that date, the inspectors' supervisor, M. P. Turner, visited the mine and the 14 N 33 drift. Turner was accompanied by his supervisor, Fred Juopperi. 3/

MSHA's findings are, in part, set out in its investigation report dated October 12, 1984, and entitled "Report of Fatal Fall-Of-Ground Accident," which was admitted into evidence as Exh. P-4. The report concluded that:

The cause of the accident was the failure of management and employees to scale down and/or adequately support loose ground. Contributing causes may have been the failure of management and employees to detect loose ground and that vibrations from the drilling operation may have affected the ground conditions above the drill area by loosening unstable ground.

(Exh. P-4, p. 4).

Inspector Mouser issued Citation 2247782 charging a violation of 57.3-22 (quoted in Fn. 2, supra). The citation was modified by Turner on August 18, 1986, to cite § 57.3-20 instead of § 57.3-22 (Exh. P-3). In the body of the citation (which was not modified) Inspector Mouser identified the condition or practice as follows:

One miner was fatally injured and one seriously injured as a result of a rock fall. The men were operating a drill Jumbo under unsupported back in the 14 N 33 drift. The men were approximately 7 1/2 feet beyond the last supported roof.

3/ In the transcript Juopperi's name is misspelled "Dupress."

At the hearing Turner and Holiway were called by the Secretary to testify. Respondent called Mouser.

Turner, who has a mining engineer's degree and 30 years experience in the mining field, testified that he believed the areas of loose roof he observed on the 17th of September (loose rocks in the roof near the accident site and in other areas of the roof (Tr. 118)) were not caused by the fall of the rock that struck Dillard and Waters but existed before the fall (Tr. 94-96, 118, and 142). I credit his testimony on this point.

Holiway testified that he decided to issue the citation (in consultation with Mouser) because of loose rocks which he observed in the roof on September 15 (Tr. pp. 362-363) -- "a man...was killed and a man seriously injured, and there were still loose rocks hanging in the drift...(Tr. 362)."

Mouser fundamentally agreed with Turner and Holiway. At one point in the questioning by counsel for the Respondent, he testified as follows:

Q. You couldn't say that the ground fall was a surprise?

A. Because they knew there was some loose rock there.

Q. You're, again, referring to the Frank Wright comment?

A. Right.

* * *

Q. If I were to tell you, Mr. Mouser, that Frank Wright was talking about a piece of rock that was pinned, rock bolted, would that changed entirely your opinion of whether or not a citation should have issued?

A. I don't think so, from the evidence I saw when we went in the drift, because there was loose ground, and a rock fell and killed a miner.

Q. Yeah. But that loose ground could have occurred as a result of stress that occurred after Mr. Wright left the area; could it not?

A. That's a possibility; but I don't believe it did.

Q. On what basis do you draw the conclusion that it did not?

A. Well, from the condition the ground was in when we saw it, when we went in there.

(Tr. 4141-415.)

Respondent contends that, at the time of the fatality, roof control at the Cherokee Mine was founded upon a "layered system" of three levels of responsibility to monitor and control the roof: the miners, the front line supervisors, and upper management.

I find that a preponderance of the credible evidence shows that the system failed at all three levels and, as a consequence, roof that should have been supported was not. The result was an accident that killed one miner and permanently disabled another.

Miners' Level

Respondent contends that the roof in the 14 N 33 drift was adequately examined and scaled by the miners who began work there at 3:00 p.m. on September 14, 1984, and that the roof fall was a "surprise" for which Respondent is not accountable under the Act.

The development crew on that shift consisted of Steve Dillard and Joshua Waters, development drillers, and Frank Wright, development loader. It was assisted on that particular evening by Hayden Stiles, who was normally a truck driver. They were all under the supervision of the development foreman, Cleaston Morrow.

Respondent contends that Dillard and Waters scaled the drift before and after Wright and Stiles mucked it out. I find, however, as Waters testified, that he and Dillard had scaled only about 30 feet back from the face (Tr. 563, 568) and they did not scale the roof further after Wright and Stiles were through mucking (Tr. 566). Based upon the measurements made by Respondent after the fatality, and adopted by the MSHA investigation team, the distance of scaling stated by Waters may have missed the area where the rock fell that killed Dillard and injured Waters. Inspector Mouser testified that it was 37 feet from the last row of bolts to the face and that Dillard and Waters were struck approximately seven and one-half feet in by the last row of roof bolts (Tr. 439). The rock that fell was six feet and eight inches long, four feet and ten inches wide (Exh.

P-4). Given the measured distances involved and the fact that Waters could only estimate the distance he and Dillard scaled, I find that Waters and Dillard may well have missed loose roof in the part of the roof that fell. I credit the testimony of the MSHA witnesses who observed loose, unbolted rocks in the roof near the area where the rock had fallen and elsewhere and their opinions as experts that the loose rocks were probably there and visible before the rock fall.

The roof area that the third member of the crew, Frank Wright, expected to have been scaled by Dillard and Waters was very different from the area they actually covered. Wright testified about his anger when he was nearly struck by a rock fall after Dillard told him the area was ready to be mucked. After being assured by Dillard--whom he met on the way into the drift--that they (Dillard and Waters) had finished scaling, a rock approximately 2 x 3 feet fell in front of Wright's loader (Tr. 167). When this happened Wright stopped mucking and, with the assistance of Hayden Stiles, pulled down what Wright described as "quite a bit" of loose rock from the roof (Tr. 170).

After Wright completed this additional scaling and finished mucking out the area, he confronted Dillard in the lunchroom and complained to him about his (Dillard's) failure to scale the area where he (Wright) had been mucking (Tr. 171-172).

The testimony of Waters and of Wright shows that there was a breakdown in communication among the development crew about what areas of the roof were to be scaled. When Wright asked Dillard whether the area was ready to be mucked, he (Wright) assumed that the scaling had included--at a minimum--the area back to N 28 in the 14 N 33 drift but Dillard and Waters apparently viewed the area necessary to be scaled as only from the face extending back as far as their estimate of where the Jumbo drill would be when it was moved in for drilling. This represents a substantial disparity as to the roof areas to be scaled.

Further evidence of a communication breakdown at the miner level is the fact that, after Wright told Dillard about adverse roof conditions in the drift and warned him that the roof still needed to be checked, Dillard did not pass this information on to Waters (Tr. 571) and Dillard and Waters did not enlarge the area where they scaled the roof (Tr. 563, 566).

Visibility and audibility in the 14 N 33 drift were poor, because of dust and machinery noises. These conditions made it difficult to conduct proper examinations of the roof and to listen for sounds that could help one to keep a careful check on the roof. Also, the roof was 18 feet high. Wright, Waters, Dillard and Stiles could not be reasonably sure that they had not

missed some areas of the roof that were loose or making slight noises that would give signs of danger. Indeed, Dillard and Waters missed "quite a bit" of loose roof and after they said the roof was scaled there was a rock fall that nearly hit Wright. After that, Wright scaled the roof but acknowledged that, "maybe I missed a piece of [loose] ground. I don't know." (Tr. 241.) It is likely that Wright did miss some loose roof because after he scaled the roof there was a fatal roof fall and when the MSHA investigation team examined the scene they observed loose unbolted rocks in the roof near the rock fall and elsewhere. Based upon their years of experience they believed that the loose rocks were probably there and visible before the roof fall. I credit the testimony and expert opinions of the MSHA witnesses on these points.

Front Line Supervisor Level

When Wright returned to the lunchroom after he completed scaling and mucking, he complained to Dillard about his (Dillard's) failure to scale the roof adequately and warned Dillard about the roof conditions in the area where Dillard and Waters would be working (Tr. 172). Cleaston Morrow, the development foreman, was responsible for the 14 N 33 drift and the safety of the miners working on his shift. As a supervisor, he had mandatory safety duties under 30 C.F.R. § 3-22, which provides, inter alia, that "Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. * * * Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." Morrow's deposition was admitted into evidence as Exh. P-21. He testified that he heard Wright say to Dillard that, "there had been some ground that had blowed up down there on the face ... to watch the ground, make sure they check it good (Exh. P-21, p. 10)."
Morrow defined ground "blowing" to include popping or cracking and little pieces of "scale" falling (Exh. P-21, p. 11). Although Morrow heard Wright tell Dillard that there were adverse roof conditions in 14 N 33, he did not go there to examine the unsupported roof and had not gone to the face area on that shift before then. He knew that when Dillard and Waters left the lunchroom they would be drilling into the face and roof while working under unsupported roof.

When Gary Williams, the general mine foreman, was interviewed by Eugene Mouser, an MSHA investigator, on September 15, 1984--the day following the fatality--Williams stated that adverse roof conditions had been reported to Morrow by the development crew (Tr. 420-421). Gary Williams' deposition was admitted into evidence as Exh. P-20. He testified that it was

Cleaston Morrow's responsibility as the crew foreman to inspect the face area (Id. p. 75).

Mark Richards, a roof bolter, testified that the last row of roof bolts was at a point which he measured to be seven and one-half feet outby the place where the rock fell upon Dillard and Waters on September 14 (Tr. p. 309). He described adverse roof conditions that had caused him to install an extra row of bolts in the area between the bore hole and the place where the rock fell that killed Dillard (Tr. 315):

I did feel the ground, it popped real loud overhead, you know, and that's what we call in the mines taking weight. I backed the jimbo up from under it and put another row of pins in.

And it was -- I was setting there in the driver's seat when it did pop, and I backed up and I put another row of pins in for my own satisfaction. I didn't want to get hurt and I didn't want nobody else to get hurt.

Richards testified that he was criticized by his supervisor, Laddie Hicks, for installing an extra row of bolts. Richards informed Hicks that he had put the extra bolts in the roof because he had heard the roof pop and because of the fall of some "fines" from the roof (Tr. 318-319, 330-332). Laddie Hicks was the supervisor of stoping and rock bolting. He was made aware of adverse roof conditions by Mark Richards but seemed to be more concerned with the extra cost of the roof bolts than with the conditions that gave rise to their installation. Hicks was not called as a witness to dispute or rebut the testimony of Mark Richards.

Thus, two front line supervisors, Laddie Hicks on September 13, and Cleaston Morrow on September 14, were told of adverse roof conditions near the area where Dillard and Waters would be working. Yet neither of these supervisors took any action to inspect and provide roof support above the place where Dillard and Waters would be operating a drill drilling blasting holes into the face and roof.

Upper Management Level

Gary Williams, the general mine foreman, testified that he had ordered roof bolting of an area around the bore hole within 40-45 feet of the face where Dillard and Waters were later struck by a rock fall in the 14 N 33 drift (Exh. P-20 p. 39). He ordered the roof bolting because of adverse roof conditions he personally observed. That means that the bad roof he observed

was within 15 feet of the Dillard/Waters accident site, because the rock fell about 30 feet from the face. He testified that "I didn't like the looks of it. I didn't like what I was afraid it might turn into... (Exh. P-20, p. 56)." He also testified that underneath the bore hole he could see "some cracks in the separation of the rock" and that "when you see a bore hole flaking with little small flakes, you know that your're getting -- a little something is trying to squeeze there." (Id., pp. 56-57.) Despite these conditions, he did not order roof support for the area where Dillard and Waters would be operating the Jumbo drill.

Respondent contracted with Dr. Ross D. Hammett of Golden Associates, a mining consulting firm, for, among other things, advice on "the need for support and the stability of development excavations." (Exh. P-26 p. 14.) Dr. Hammett testified that in May, 1984, he visited the mine and in July, 1984, filed a written report with Respondent, the narrative portion of which was admitted as Exh. P-27. At page 10 of the report, entitled "Local Stability of Development Openings," he stated:

With the high stress levels evident at deep depths in the mine and the increased stress concentrations from adjacent mining, more detailed consideration will need to be given in the future to the support of development openings in the mine.

* * *

It is difficult to recommend optimum support designs based on observations from one or two underground inspections but the following are general guidelines which will assist in developing a support strategy:

- (1) Development openings (including drilling drives and drilling chambers) should be of minimum practical size. (Under some circumstances, narrow openings may attract [sic] higher stresses than wide openings and so minimim [sic] size openings will not prevent stress fracturing. However, stress fracturing is much easier to control and provide adequate support than instabilities associated with wide openings).
- (2) It is not felt that routine systematic bolting of openings of 16 ft to 18 ft span or less is presently required, it may ultimately be necessary to adopt this approach. Decisions on the areas to be supported will depend primarily on local geological conditions. It is recommended that spans greater than 16 ft to 18 ft be systematically bolted with bolts at least 6 ft long for

narrower spans, and up to at least 8 ft for wider spans. It is not recommended that spans be designed for more than 25 ft. [Emphasis added.]

The 14 N 33 tunnel did not exceed the dimensions at which Dr. Hammett recommended systematic roof bolting, but it was at this limit and after his report there were numerous incidents of adverse roof conditions in that tunnel before the fatality on September 14. After the fatality, another development miner was injured by a rock fall and management finally acknowledged that "we could not reasonably predict where further rock falls would take place" (Exh. P-25, p. 43); it therefore adopted a policy of systematic roof bolting up to the face in development drifts. This policy was implemented by a new safety rule: "No person shall enter an active development heading until ground support has been installed up to the face" (Exh. R-4).

I find that, before the September 14 fatality, Respondent's operating experience indicated the need for this kind of safety rule or some other adequate method of roof support above the drillers in the 14 N 33 drift. At least as early as the Ledford fatality in January, 1984, Respondent was put on notice that operation of the Jumbo drill in a development drift, drilling blasting holes into the face or roof while being under unsupported roof, presented a serious hazard of a potential roof fall. MSHA warned Respondent that "the drilling operation may have affected the ground conditions above the [drilling machine] area by loosening unstable ground." (The MSHA investigation team repeated this same warning in its report on the Dillard/Waters roof fall. This expert opinion was corroborated by the firsthand experience of Frank Wright, who worked in the 14 N 33 tunnel from the beginning and testified that the vibrations of the drill would cause "anything loose" in the roof to fall (Tr. 217).) After the warning in the Ledford case, in another development drift (14 N 33) where the same kind of drilling and blasting was being done, there were numerous incidents of adverse roof conditions, including popping noises, cracking, loose rocks, falling rocks and falling "fines" or "scales," before the September 14 fatality, to show a clear danger of a potential roof fall presented by drilling the face or roof while being under unsupported roof. Despite this clear evidence of risk to the development drillers, Respondent assigned Dillard and Waters to drill blasting holes into the face and roof while being under unsupported roof.

I find that Respondent violated 30 C.F.R. § 57-3-20 by failing to provide roof support at the place where the rock fell on Dillard and Waters on September 14, 1984. In light of the abundant operating experience showing the need for roof support in this area before the fatality, I find that Respondent's

failure to provide roof support to protect Dillard and Waters from a potential roof fall constituted gross negligence.

The degree of gravity of the violation was very high, because of the risk of death and severe, permanently disabling injuries involved in a roof fall.

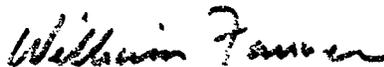
Respondent is a medium to large sized operator. Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a penalty of \$7,500 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. § 57.3-20 (now § 57.3020) as charged in Citation 2247782 as amended.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above penalty of \$7,500 within 30 days of this Decision.



William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 15 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 87-21
Petitioner	:	A.C. No. 15-05407-03501 M75
	:	
v.	:	Docket No. KENT 87-23
	:	A.C. No. 15-08382-03501 M75
TRIPLE B CORPORATION,	:	
Respondent	:	No. 1 Surface Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petitioner;
Gary A. Branham, President, Triple B Corporation,
Prestonsburg, KY, for Respondent.

Before: Judge Fauver

These consolidated proceedings were brought by the Secretary of Labor for civil penalties for alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent was an independent contractor at the Southside Surface No. 1 Mine in Pilgrim, Martin County, Kentucky, and at the No. 1 Surface Mine in Lovely, Martin County, Kentucky, both of those coal mines being subject to the Act.

KENT 87-21

2. Respondent was an independent contractor engaged by Daniels Construction Company, Lovely, Kentucky, to construct a portion of roadway that led into an underground coal mine area of the No. 1 Surface Mine.

Citation 2783877

3. MSHA Inspector Andrew Reed issued Citation 2783877 to Respondent, charging a violation of 30 C.F.R. § 77.1605(k), because it had failed to provide a berm or guard to the outer bank of the roadway, which was elevated 20 to 50 feet above the adjacent terrain and had a grade of about eight percent.

4. About six months before the issuance of the above citation, Inspector Reed had issued a citation to Daniels Construction Company for a violation of the same standard on this roadway within one-quarter mile of the area for which the citation was issued to Respondent.

5. On April 29, 1985, MSHA Inspector R.C. Hatter had issued a citation to Respondent for a violation of § 77.1605(k) at No. 1 Surface Mine.

KENT 87-23

6. Respondent was engaged as an independent contractor doing reclamation work for Martin County Coal Corporation at the latter's Southside Surface Mine No. 1 in Martin County, Kentucky.

7. The reclamation work by Respondent included the use of bulldozers, trucks, and other equipment for grading, sloping, seeding, and mulching areas of Martin County Coal Corporation's strip mines that were required by federal and state law to be reclaimed.

8. Respondent used the overburden (i.e. rocks and dirt) that had been removed by Martin County Coal Corporation during its mining cycle to carry out grading, sloping, and backfilling work in reclaiming the surface of the mine.

9. Martin County Coal Corporation was actively strip mining coal at the mine site where the Respondent was doing reclamation work.

Citation 2784979

10. A D65E Komatsu bulldozer used in reclamation work, as described above, was not equipped with a fire extinguisher.

Citation 2784980

11. Another D65E Komatsu bulldozer used in reclamation work was not equipped with a fire extinguisher.

Citation 277626

12. The D65E Komatsu bulldozer for which Inspector Reed issued Citation 2784980 for the lack of a fire extinguisher also did not have a reverse alarm.

Citation 2776262

13. A hydroseeding truck used by Respondent for reclamation work at Martin County Coal Corporation's mine site was used to spray water, mulch, grass seed, and fertilizer to promote the growth of vegetation in the areas being reclaimed.

14. The hydroseeding truck did not have operative headlights, tail lights, brake lights, or turn signals. In addition, it was missing a muffler and heat shield around the exhaust pipe on the passenger's side. The rear steps used to mount the back of the truck and the right side hand hold were also missing.

Citation 2776263

15. The above hydroseeding truck did not have a fire extinguisher.

Citation 2776264

16. The above hydroseeding truck did not have a reverse alarm.

DISCUSSION WITH FURTHER FINDINGS

KENT 87-21

In this case Respondent filed the following answer to the petition for civil penalties:

We contest the above violation for the following reasons. We were hired as a contractor to construct a length of road for Daniels Construction Company, Lovely, Kentucky. It was our understanding that the road was to be used for employee travel to their assigned work areas. We were employed on a hourly basis and worked at their direction. The work was in a construct phase with no through traffic permitted. We feel the violation is in error against our company and should be dismissed.

Respondent offered no proof at the hearing to rebut the Government's evidence of the violation charged, nor did it offer any proof that the road construction was not covered by the Act. The Act and regulations allow the Secretary to cite an independent contractor for violation of a safety standard under the Act. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986).

The allegations of Citation 2783877 as to a the violation, negligence and gravity were proved by a preponderance of the credible evidence.

KENT 87-23

In this case, Respondent filed the following answer:

We contest the above violations for the following reasons. We were contracted for reclamation work at the above mine. There was no active mining at the locations. Therefore, we were not subject to MSHA jurisdiction, therefore, these violations are in error.

The following definitions are relevant to this case (30 U.S.C. § 802):

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in or to be used in or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making

a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of subchapters II, III, and IV, of of this chapter "coal mines" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

[Emphasis Added.]

Respondent meets the definition of an operator under the above definitions. It was performing services at Martin County Coal Corporation's mine to reclaim land conditions that "resulted from" coal mining. Respondent provided a significant and continuing service to Martin County Coal Corporation which was required by its (Martin County's) need to comply with federal and state laws regarding reclamation.

Respondent's employees were using bulldozers and large trucks identical to or similar to those used in day-to-day strip mining operations. The services supplied by Respondent could not be considered incidental or tenuous but were an important part of Martin County's mining operation and, therefore, constituted activities covered by the Act.

Civil Penalties

The allegations of the following citations as to the violations, negligence, and gravity were proved by a preponderance of the credible evidence. Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that the following civil penalties are appropriate:

<u>Citation</u>	<u>Civil Penalty</u>
2783877	\$98
2776261	68
2776262	39

2784979	39
2784980	39
2776263	39
2776264	68
	<u>68</u>
	\$390

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.
2. Respondent violated the mine safety standards as charged in the above citations.

ORDER

WHEREFORE IT IS ORDERED that Respondent pay the above civil penalties in the total amount of \$390 within 30 days of this Decision.



William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 16 1988

PEABODY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 87-263-R
: Order No. 2956024; 5/29/87
SECRETARY OF LABOR :
MINE SAFETY AND HEALTH : Robin Hood No. 9 Mine
ADMINISTRATION (MSHA), :
Respondent : Mine ID 46-02143
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-26
Petitioner : A.C. No. 46-02143-03567
v. :
: Robin Hood No. 9 Mine
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: Thomas Clark, Esq., Charleston, West Virginia for Peabody Coal Company;
Ronald E. Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Secretary of Labor.

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 Withdrawal Order No. 2956024 issued by the Secretary of Labor under section 104(d)(2) of the Act and for review of civil penalties proposed by the Secretary for the violation alleged therein.^{1/}

^{1/} Section 104(d)(2) of the Act provides as follows:

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

Order No. 2956024, as amended at hearing, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.303(a) and charges as follows:

[a] preshift examination was not made in 1 right section and air used to ventilate 1 right section faces and air passing by openings at mouth 1 right section was used to ventilate the active working faces in 1 North section and continuous miner was loading coal in No. 5 face 1 North. Chemical smoke was used to check air movement.

There is no dispute in this case that preshift examinations were not being conducted in accordance with the regulatory standard at 30 C.F.R. § 75.303(a) in the 1 Right area when the order was written on May 29, 1987. That standard provides in relevant part as follows:

Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require....

The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel". 30 C.F.R. § 75.2 (g)(4).

In her "Final Argument" set forth in a post hearing brief, the Secretary argues that the 1 Right area at issue was "considered to be an integral part of the 1 North working section" and since the 1 North area was admittedly within the "active workings" of the subject mine on May 29, 1987, then the 1 Right area must also be within the "active workings" and likewise subject to the preshift examination requirements of section 75.303(a).^{2/} Peabody Coal Company (Peabody) disagrees and maintains that the 1 Right area was then in a separate and distinct area of "idle workings" and was therefore subject only to the weekly inspections required by the standard at 30 C.F.R § 75.305.

It is not disputed that Peabody began producing coal in the area designated as "1 Right" at the Robin Hood No. 9 Mine in April of 1987. Production continued in this area until May 21, 1987, when the mining equipment was moved from that area into the adjacent 1 North area. Weekly examinations for hazardous conditions were then scheduled to be performed in the 1 Right area and pursuant to that schedule a weekly examination was in fact performed on May 26, 1987. Coal production in the 1 Right area did not resume until September 1987.

On May 29, 1987, an inspector for the Federal Mine Safety and Health Administration (MSHA), Clinton Lewis, arrived at the No. 9 Mine to investigate an unrelated matter. Lewis observed that coal was then being produced in the 1 North area but not in the 1 Right area. Moreover he found no mining equipment in the 1 Right area and found that no miners were working in the 1 Right area and no miners were scheduled to work in the 1 Right area. In fact Lewis concluded that the 1 Right area had been "abandoned". Based on this undisputed evidence it is clear that on May 29, 1987, the 1 Right Section was not "active workings" as defined in the regulations. See Vesta Mining Co. v. Secretary of Labor, 6 FMSHRC 1547 (Judge Fauver, 1984) and Secretary of Labor and UMWA v. Jones and Laughlin Steel Corp. and Vesta Mining Co., 8 FMSHRC 1058 (1986).

^{2/}The Secretary had maintained until the date of hearing that the 1 Right area was an "abandoned area" and had argued at hearing, alternatively, that the 1 Right area was a "worked-out area of active workings". The Secretary also produced evidence at hearing that the 1 Right area was an abandoned area and not "active workings". These contentions have apparently now been completely abandoned.

The Secretary nevertheless argues that a notation on a ventilation map current for May 1, 1987, and an entry on the record of a weekly examination of the "1 North Panel" on May 26, 1987, show that Peabody itself considered the 1 Right area to be "active workings". While the determination of whether an area is "active workings" as defined in 30 C.F.R. § 75.2(g)(4) depends on the underlying facts, the Secretary's evidence is in any event irrelevant to the date at issue, i.e. May 29, 1987. Indeed Peabody does not dispute that the 1 Right area was an "active working" until May 21, 1987. The Secretary's argument is accordingly devoid of merit.

Finally, the Secretary argues that whether or not the 1 Right area was within the "active workings" of the mine, it was nevertheless subject to preshift examinations under the provisions of 30 C.F.R. § 75.303-1. She argues that since a split of air which passes through the 1 Right area was used to ventilate the working places of the 1 North section (admittedly active workings) a preshift exam of the 1 Right area should have been made in order to determine whether the air in each split" is traveling in its proper course, normal volume and velocity" under 30 C.F.R. § 75.303-1.^{3/}

The short answer to this argument is that no violation of the regulatory standard at 30 C.F.R. § 75.303-1 has been charged in this case. Indeed this allegation was made for the first time well after the conclusion of hearings and in the Secretary's post-hearing brief. Section 104(a) of the Act requires that "each citation shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated." Section 104(d)(2) of the Act may be regarded in pari materia with Section 104(a) and orders issued under Section 104(d)(2) would therefore be expected to conform to the same notice requirements. In this case the operator was charged (after amendment on the date of hearing) only under the general provisions of 30 C.F.R. § 303(a). To now charge posthearing that section 75.303-1 was violated denies the operator an opportunity to properly defend and denies the trial judge an opportunity to make appropriate inquiry. See Secretary v. B.B. & W Coal Co., 1 FMSHRC 1479 (1979) affirming the decision of Judge Michels reported at 1 MSHC 2238.

^{3/} 30 C.F.R. § 75.303-1 provides as follows:

To determine whether the air in each split is traveling in its proper course and in normal volume and velocity, the mine examiner shall use an anemometer or other device approved by the Secretary to measure the velocity and determine the volume of air at the following locations:

- (a) The last open crosscut of each pair or set of developing entries;
- (b) The last open crosscut of each pair or set of rooms,
- (c) The intake end of each pillar line.

Notice of the specific regulation charged is particularly important in this case where the cited regulatory language is ambiguous and subject to several interpretations and the mine operator has been denied the opportunity to present expert testimony on relevant industry experience and practices and on the "reasonably prudent person" test relating specifically to section 75.303-1. See Alabama By-Products, 4 FMSHRC 2128, 2129 (1982). Here for example Peabody argues in its response brief that the Secretary's proposed interpretation, of section 75.303-1 "would require mine operators to preshift each split of air which is used to ventilate a working place and would require mine operators to examine intake airways that may be thousands of feet long between the working places and the ventilation fan, even though such airways or splits of air are never traveled by miners other than certified persons who do this only for the purpose of conducting weekly examinations or performing functions that are otherwise required by law."

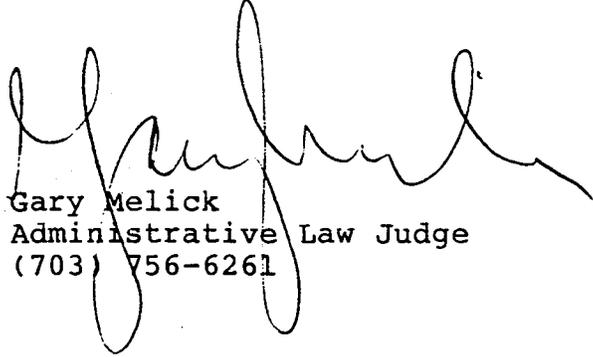
In any event based on the limited record before me I find that the Secretary has misconstrued her regulations. The specific inspection requirements under section 75.303-1 must reasonably be limited to areas in which a preshift examination is required by the first sentence of section 75.303(a), i.e. to the "active workings". Otherwise the mine operator would indeed be required to preshift intake airways from the working places all the way to the ventilation fan even though such airways are not in "active workings" and may never be traveled by miners except those conducting weekly examinations. There is an insufficient record to warrant the sweeping construction the Secretary here urges.

Finally, even assuming arguendo, that section 75.303.1 was violated, it would have been a violation of improperly performing a pre-shift examination of the 1 North section. Peabody is here charged with failing to perform a pre-shift exam of the 1 Right section. Thus not only has the Secretary failed to cite the specific regulation alleged to have been violated, as required by the Act and due process standards, she has also failed to state in the order the factual allegations necessary to constitute a violation of the regulation she failed to cite. For this additional reason the Secretary's charge is deficient.

Under the circumstances Order No. 2956024 must be vacated.

ORDER

Order No. 2956024 is vacated. Civil Penalty Proceeding Docket No. WEVA 88-26 is dismissed and Contest Proceeding Docket No. WEVA 87-263-R is granted.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

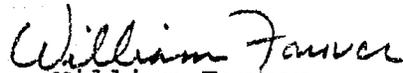
MAR 21 1988

JEFF MCQUEEN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-162-D
: BARB CD 87-26
FELOSI & FELOSI TRUCKING, :
Respondent : Belmon No. 10 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

I have reviewed the settlement agreement of the parties and find that it is consistent with the purposes of § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Accordingly the joint motion to dismiss the proceeding based upon the settlement is GRANTED and this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Mr. Jeff McQueen, P.O. Box 104, Bledsoe, KY 40810 (Certified Mail)

Tony Opegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 24 1988

GREEN RIVER COAL COMPANY, : CONTEST PROCEEDING
INC., :
Contestant :
v. : Docket No. KENT 87-167-R
: Citation No. 2835650; 4/28/87
: :
SECRETARY OF LABOR, : No. 9 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, :
Petitioner : Docket No. KENT 87-227
v. : A. C. No. 15-13469-03612
: :
GREEN RIVER COAL COMPANY, : No. 9 Mine
INC. :
Respondent :

DECISION

Appearances: Flem Gordon, Esq., Gordon, Gordon, and Taylor,
Owensboro, Kentucky for Green River Coal Company,
Inc.;
Mary Sue Ray, Esq., Office of the Solicitor, U. S.
Department of Labor, Nashville, Tennessee for the
Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me 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 five citations issued by the
Secretary of Labor against the Green River Coal Company, Inc.
(Green River) and for review of civil penalties proposed by the
Secretary for the violations alleged therein.

Citation No. 2835668 alleges a "significant and substantial"
violation of the regulatory standard at 30 C.F.R. § 75.302(b) and
charges that "[a] violation was observed on the No. 7 unit
section ID 007 in that the space between the line brattice and
rib in the No. 1 entry was not large enough to permit the flow of
a sufficient volume and velocity of air to keep the working face

clear of flammable, explosive, and noxious gases, dust and explosive fumes."

The cited standard requires that "the space between the line brattice or other approved device and the rib shall be large enough to permit the flow of a sufficient volume and velocity of air to keep the working face clear of flammable, explosive, and noxious gases, dust and explosives fumes."

Citation No. 2835669 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R § 75.301 and charges that "the air current reaching the face of the No. 1 entry on the No. 7 unit ID 007 was not sufficient to dilute, render harmless, gases and dust, and smoke and explosive fumes."

The cited standard provides in relevant part that "all active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious and harmful gases and dust and smoke and explosive fumes." The standard also requires that "the minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute."

The essential facts supporting the cited violations are not in dispute. Ronald Oglesby, an inspector for the Federal Mine Safety and Health Administration (MSHA), reported to the Green River No. 9 mine on April 7, 1987, at about 7:15 a.m. to investigate an alleged ignition and mine fire. After interviewing employees outside the mine Oglesby proceeded underground to the scene of the accident. Arriving on the No. 7 Unit at the No. 1 Entry Oglesby observed "slack coal" piled to within 18 inches of the mine roof in the space between the brattice and rib. He also found that the right tire of the cutting machine in the No. 1 Entry was pushed into the line curtain thereby further restricting the flow of air. (See Secretary's Exhibit No. 2).

Oglesby then recreated conditions as they reportedly existed at the time of the accident by removing an extension to the brattice curtain. Under these conditions Oglesby was unable to detect any movement of air upon testing with a calibrated anemometer. Even with the added curtain replaced Oglesby detected only 1,260 cubic feet of air per minute (C.F.M.) 4 feet in by the end of the line curtain. Near the right tire of the cutting machine where the curtain was pushed over he still found only 1,600 C.F.M. Once the slack coal had been removed and the

curtain again extended Oglesby found legally sufficient air ventilating the face of the No. 1 Entry i.e. at least 3000 C.F.M. Within this framework of undisputed evidence both violations are clearly proven as charged.

Inspector Oglesby also considered the violations to be quite serious and "significant and substantial". Based on his interviews with Dwayne Oldham, the unit cutter operator, and Kathy Lambert, the shot fireman, Oglesby opined that the mine fire on the No. 7 unit earlier that day had been caused by a methane ignition further igniting hydraulic oil leaking from the cutting machine. Oldham reportedly told Oglesby that a sudden flash came over the cutting machine as he was beginning to cut. Kathy Lambert had also seen an orange flame on the back side of the curtain. The fire was located below the cutter bar at a location Oldham could not see from the operator's compartment. The fire had been extinguished with no injuries or property damage.

Green River Safety Director Grover Fischbeck was "hesitant to believe" that there had been a methane ignition, favoring the view that the hydraulic oil had been ignited directly by sparks from the cutting bar striking rock. However, regardless of the source of the fire it would be reasonably likely to expect, in the absence of adequate ventilation in a working section of a mine having an undisputed history of methane ignitions and recent overall methane liberation of 1.9 million cubic feet in 24 hours, that methane ignitions would occur. Indeed it is undisputed that the cutter machine had earlier on the shift twice "gassed-out" because of excess methane i.e. the methane detector on the equipment automatically shut the machine down because of high levels of methane. Under the circumstances it is reasonably likely that a methane ignition would occur with resulting serious burn injuries and fatalities. The violations were accordingly serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I also find that the violations were the result of operator negligence. There is no dispute that face boss Robert Sandidge was on the unit at the time of the accident. Sandidge also testified that there was adequate ventilation at the No. 1 Face at the time of his preshift examination (which commenced at 5:50 a.m. on April 7) and that he found only .4 percent methane 30 minutes before the cutting machine entered the No. 1 Entry. However the fact that the cutting machine had twice before the accident "gassed-out" because of excess methane should have placed Sandidge on notice of a methane problem requiring extraordinary care in maintaining adequate ventilation. Moreover the mine operator was already under a higher duty of care because of the history of methane ignitions at this mine and because of

the overall high liberation of methane. The recent history of similar violations in this mine for inadequate ventilation and the failure to maintain adequate brattice curtains constitute patterns that may also be considered in finding operator negligence in this case.

Citation No. 2837677 alleges a "significant and substantial" violation of the operator's ventilation system, methane and dust control plan under the standard at 30 C.F.R. § 75.316. More particularly Green River is charged with failing to have "the back-up curtain between No. 6 and 7 entry ... in place." It is not disputed that there was indeed no back-up curtain in position between the No. 6 and 7 entries as alleged and that such a curtain was required by the operator's ventilation plan (Secretary's Exhibit No. 6 page 4). The violation is accordingly proven as charged. It is also undisputed that the absence of this back-up curtain would have reduced the ventilation on the working sections. Considering the history of methane liberation, ignitions, and recent violations of ventilation requirements it is apparent that this violation also was serious and "significant and substantial". Mathies Coal Company, Supra.

In evaluating operator negligence I have given considerable weight to the credible testimony of Face Boss Robert Sandidge that the backup curtain was in position at the time of his preshift examination at 5:50 that morning. In addition I accept the testimony of Safety Director David Harper that a check curtain of the proper size was lying on the ground in an open position below where it should have been hung. I nevertheless find that the operator was negligent because a high degree of care was required in this section. There was a history of high methane concentrations and the methane detector on the cutter machine had already "gassed-out" the machine twice before on same shift. Under the circumstances management was on notice that methane levels were approaching dangerous concentrations and it therefore should have been on particular notice to maintain its check curtains to maintain adequate ventilation.

Citation No. 2837678 also charges a violation of the ventilation plan under the standard at 30 C.F.R. § 75.316 in that "a permanent stopping had not been constructed in the third open crosscut from the face in the stopping line."

It is not disputed that a permanent stopping had not been constructed in the third open crosscut from the face in the stopping line. Green River maintains however that a permanent stopping was not required and that in any event the back-up curtain being used was adequate. Whether there was a violation in this instance depends on the applicable definition of "open crosscut". According to Inspector Newlin the definition of "open

crosscut" that had been uniformly applied to Green River on prior occasions included a crosscut where air could pass through or a crosscut that was clean and travelable (i.e. supported). According to Safety Director David Harper the cited area was not an "open crosscut" because it had not been completely bolted and cleaned.

I find that the definition adopted by Green River is the more persuasive. It meets the "reasonably prudent person" standard. Alabama By-Products, 4 FMSHRC 2128 (1982); United States Steel Corp., 5 FMSHRC3 (1983). Inspector Newlin acknowledged that his definition was not accepted by some other inspectors and it is undisputed that MSHA approved a modification to the ventilation plan shortly after this citation which allowed a check curtain to be used in the cited crosscut instead of a permanent stopping. MSHA thus, in effect, acknowledged that there was no hazard in Green River's prior practice of utilizing a check curtain instead of a permanent stopping in the third open crosscut from the face. Under these circumstances it cannot be said that a reasonably prudent person, familiar with the facts, would have recognized a hazard in the practice here followed by Green River. Accordingly there was no violation and the citation must be vacated.

Citation No. 2835650, issued under section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 75.301 and charges as follows:^{1/}

The quantity of air reaching the end of the line curtain in the No. 2 Entry on 7 Unit was 1,320 cfm CH 4.7. The loader was loading coal in this entry.

^{1/} Section 104(d)(1) reads in part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

As previously noted, the standard at 30 C.F.R. § 75.301 provides that "the minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute." It is undisputed that there was only 1,320 C.F.M. of air at the end of the line curtain in the No. 2 Entry on the No. 7 Unit. Indeed, Green River now admits the violation, does not deny that it was "significant and substantial" and challenges only the "unwarrantable failure" findings.

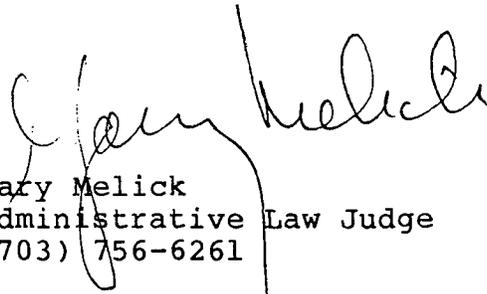
The Secretary maintains that the violation was due to the "unwarrantable failure" of the operator to comply with the standard because "of the history of ventilation problems at this mine, and the apparent lack of concern by the operator while [Inspector Newlin] was on the unit". Newlin had found several other violations for inadequate ventilation shortly before discovering the instant violation (see Secretary's Exhibits Nos. 9 and 10). Indeed Newlin observed that 15 to 20 minutes had elapsed while the operator abated a prior citation (No. 2835649) and before he had moved on to discover the instant violation. During this time miners were continuing to load coal. Newlin also observed that it took only six minutes to improve the ventilation and to abate the instant violation.

It was apparently Newlin's position that Green River should have, upon the issuance of Citation No. 2835649 for deficient ventilation in the No. 1 Entry, not only abated that violation but also stopped all mining activity on the unit and checked the No. 2 Entry for sufficient ventilation. Newlin acknowledges however that after observing the abatement of the violation in the No. 1 Entry and as he proceeded to the No. 2 Entry he in fact did see two or three miners working to improve the ventilation affecting the No. 2 Entry even before he cited inadequate ventilation in the No. 2 Entry. In light of this evidence that Green River had commenced abatement even before the violation was cited I cannot find that the violation was the result of inexcusable aggravated conduct constituting more than ordinary negligence. Emery Mining Company v. Secretary 9 FMSHRC 1997, (1987). The violation was therefore not the result of "unwarrantable failure" and the 104(d)(1) citation must be modified to a citation under Section 104(a) of the Act. In light of the recent history of ventilation violations on this unit and the presence of high levels of methane I do find however that Green River was negligent. Under these circumstances it was under a heightened duty of care to maintain proper ventilation.

In determining appropriate civil penalties in this case I have also considered that the operator is of moderate size, has a moderate history of violations and abated the violative conditions cited herein as prescribed by the Secretary.

ORDER

Green River Coal Company, Inc. is directed to pay the following civil penalties within 30 days of the date of this decision: Citation No. 2835668 - \$600, Citation No. 2835669 - \$750, Citation No. 2837677 - \$600, Citation No. 2837678 - (vacated), Citation No. 2835650 - \$400. Contest Proceeding Docket No. KENT 87-167-R is granted to the extent that Citation No. 2835650 is modified to a citation under section 104(a) of the Act.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Flem Gordon, Esq., Gordon, Gordon, & Taylor, P. O. Box 390, Owensboro, KY 42302-0390 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 24 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 87-123-M
Petitioner : A. C. No. 31-01799-05501
v. :
: Lee Mine
MELLOTT TRUCKING AND SUPPLY, :
COMPANY, INC., :
Respondent :

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,
U. S. Department of Labor, Atlanta, Georgia for
Petitioner;
Calvin A. Mellott, Carrboro, North Carolina for
Respondent.

Before: Judge Melick

This case is before me upon the petition for civil
penalty filed by the Secretary of Labor pursuant to section
105(d) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. §801 et. seq., the "Act," charging Mellott Trucking
and Supply Company, Inc., (Mellott) with two violations of
regulatory standards.

Preliminary Issues:

Respondent raises several preliminary issues that could
be dispositive of these proceedings. He first claims that
the area of land owned by he and his wife, from which sand
was being removed and on which it was being processed, was
not a "mine" within the meaning of the Act since it was
merely a land reclamation project adjunct to his alleged
primary business of farming.

Section 3(h)(1) of the Act reads in part as follows:

"coal or other mine" means (A) an area of land from
which minerals are extracted in nonliquid form
... (B) private ways and roads appurtenant to such
area, and (C) lands excavations, underground
passageways, shafts, slopes, tunnels and workings,

structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, ... or to be used in, the milling of such minerals, or the work of preparing coal or other minerals ...

There is no dispute that on the date these citations were issued Mellott was extracting minerals (sand) in non-liquid form from the cited area. Moreover Mellott's power screen and stacker are within the scope of structures "used in, or to be used in, the milling of such minerals, or the work of preparing ... minerals". Under the circumstances it is clear that Respondent was operating a "mine" within the meaning of the Act. It is immaterial that land may have also been reclaimed as a result of the mining activity.

Respondent next contends that he was not engaged in interstate commerce and therefore this Commission is without jurisdiction over his activities. Section 4 of the Act provides that "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act." "commerce" is defined in Section 3(b) of the Act as follows: "trade, traffic, commerce, transportation or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof."

The evidence in this case is that Mellott was using machinery and equipment in its mining business that was manufactured outside of its home state of North Carolina. It is undisputed that its front-end loader was made in Illinois, and the power screen in Kentucky. Use of equipment that has moved in interstate commerce affects commerce. See United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975). In addition, although the evidence shows that the sand extracted, processed and sold by the Mellott facility was used only intrastate, it may reasonably be inferred that such use of the mine product would necessarily impact upon the interstate market. See Fry v. United States, 421 U.S. 542, 547 (1975). Under the circumstances it is clear that the operations and products of Mellott affect commerce and that its operation is therefore under the coverage of the Act.

Mellott next maintains that the warrantless inspection of its operation by employees of the Federal Mine Safety and Health Administration (MSHA) on April 16, 1987, which led to the citations at bar was in violation of the provisions against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. In Donovan v. Dewey, 452 U.S. 594 (1981), the Supreme Court held however that warrantless inspections of mines authorized by section 103(a) of the Act do not violate the Fourth Amendment. The court found that an exception to the warrant requirement was permissible in these cases because there is a substantial Federal interest in improving mine safety and health and because the certainty and regularity of inspection programs under the Act provide a constitutionally adequate substitute for a warrant. Mellott's contention herein is accordingly contrary to the prevailing law.

Finally, Mellott maintains that it was denied its constitutional right under the Seventh Amendment to the United States Constitution to a trial by jury. In Atlas Roofing Co. Inc. v. OSHRC, 430 U.S. 442 (1977), the Supreme Court held that under the Seventh Amendment jury trials are required only in suits at common law and that the Seventh Amendment did not purport to require a jury trial where none was required before. Within this legal framework it is clear that these statutorily created proceedings do not require a trial by jury. It is noted that this civil penalty proceeding is similar to the penalty proceeding at issue in the Atlas case before the Occupational Safety and Health Review Commission.

The Merits:

The general issues before me on the merits are whether Mellott violated the cited regulatory standards as alleged, and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation 2859882 alleges a violation of the standard at 30 C.F.R. § 31-01799 and charges as follows:

The automatic reverse signal alarm was not operating on the Cat 950 B loader working in the

pit area. There was an obstructed view to the rear.

The cited standard 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.

The testimony of MSHA Inspector Thel Hill in support of this violation is largely undisputed. According to Hill the only worker at the mine site on April 16, 1987, a Mr. Bruell, represented himself to be the foreman. Bruell was operating the Catapillar Model 950B front-end loader removing sand from the pit area and transporting it to the processing equipment. Hill observed the front-end loader in action and saw that the backup alarm was not functioning. Bruell conceded that the backup alarm had not been operating for several days. There was no observer to signal when it was safe for the equipment to back up. Hill found that the engine on the equipment obstructed the view to the rear for some 2 to 3 feet on level ground so that persons as tall as 5 foot 6 inches could not be seen in that obstructed area. The exhaust arrangement (muffler) also interfered with rear vision.

Hill felt that the violation was not "significant and substantial" because of only limited exposure to danger. There were no other employees on site and he concluded that the truck drivers remained in their trucks while being loaded.

Calvin Mellott, Respondent's president, did not dispute that the back-up alarm was not functioning and that there was at least a partially obstructed view to the rear of the loader. Mellott maintained however that it was Bruell's responsibility to bring such problems to his attention and that back up alarms were in stock. Mellott suggested that Bruell may have been sabotaging his operations because Bruell later purportedly worked for a competitor. The credible evidence does not however support this contention.

Within this framework of evidence it is clear that the violation is proven as charged. I accept Inspector Hill's testimony however that the violation was not serious because of the limited exposure to the hazard I must accept that finding. I conclude that the violation was caused by

operator negligence since the condition was known to have existed for several days. Moreover, proper inspection of the equipment on a daily basis should have led to discovery of the violative condition.

Citation No. 2859883 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14001 and charges that "the tail pulley on the sand stacker was not guarded."

The cited standard provides that "[g]ears; 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.

Inspector Hill observed that the sand stacker conveyed materials from the screen to the stockpile and that its height could be adjusted. At the time of the alleged violation a 4 to 4 1/2 foot build-up of spillage was found at the tail pulley. Thus the pulley would be located at arm level to an individual passing nearby. The pulley was not guarded and there was nothing to prevent a person from contacting it. The pulley was in operation at this time and Hill believed that fatal injuries were likely. In reaching this conclusion Hill observed that Bruell admitted that he greased the tail pulley while it was in motion (because it would be easier to grease) and acknowledged that he passed nearby the pulley several times a day as he was performing the duties of both plant operator and loader operator.

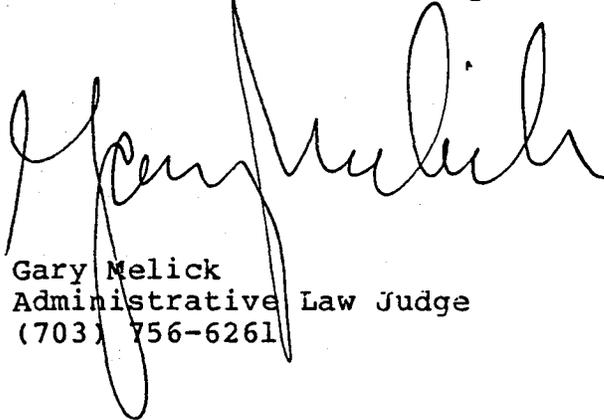
Calvin Mellott admitted that the tail pulley was not protected but disagreed that there was any danger of contact. I find the testimony of Inspector Hill to be more credible in this regard. Indeed Bruell admitted that he greased the tail pulley while it was moving and that he passed in close proximity to the pulley during his workshift. It is therefore reasonable to infer that there was a reasonable likelihood of contact and injury and that such injuries would be serious or fatal. Accordingly I find that the violation is proven as charged and was "significant and substantial" and serious. See Secretary v. Thompson Brothers Coal Company, Inc. 6 FMSHRC 2094, (1984); Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I also find that the violation was the result of operator negligence. It is apparent that company president Calvin Mellott knew the tail pulley was not guarded and he should have known of Bruell's practice of greasing that tail pulley while it was in motion.

In assessing civil penalties in this case I have also considered that the operator is small in size and has no reported history of violations. I have also considered that the violations were abated promptly. Under the circumstances I find that the following civil penalties are appropriate; Citation No. 2859882 - \$20; Citation No. 2859883 - \$68.

ORDER

Mellott Trucking and Supply Company, Inc., is hereby directed to pay civil penalties of \$88 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Ken S. Welsch, Esq., Office of the Solicitor, U. S.
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C. A. Mellott, President, Mellott Trucking & Supply Company,
Inc., P. O. Drawer 336, Carrboro, NC 27510 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

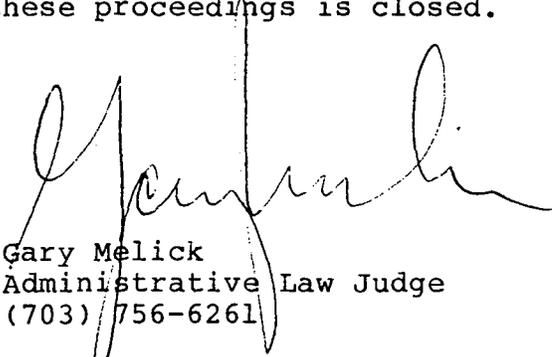
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MAR 24 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. SE 87-123-M
v. : A. C. No. 31-01799-05501
: Lee Mine
MELLOTT TRUCKING AND SUPPLY, :
COMPANY, INC., :
Respondent :

ORDER CLOSING RECORD

At hearing in this case held January 5, 1988, the Respondent was given the opportunity to file a brief within three weeks after the Petitioner filed her brief. Petitioner filed her brief on February 26, 1988, and, accordingly, Respondent's brief was due on or before March 18, 1988. Respondent has not filed a brief as of this date and accordingly the record of these proceedings is closed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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C. A. Mellott, President, Mellott Trucking & Supply Company,
Inc., P. O. Drawer 336, Carrboro, NC 27510 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 29 1988

CHARLES CONATSER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-168-D
: MSHA Case No. PIKE CD 87-04
RED FLAME COAL COMPANY, INC., :
Respondent : No. 2 Surface

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for the Complainant;
Ronald G. Polly, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the Complainant, Charles Conatser, against the respondent Red Flame Coal Company pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), on January 26, 1987. After completion of an investigation of the complaint, MSHA advised the complainant by letter dated May 22, 1987, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, on June 8, 1987, the complainant filed a pro se complaint with the Commission, but subsequently retained counsel to represent him.

The complainant, who was employed by the respondent as an endloader operator at its No. 2 Surface Mine, alleged that he was discharged by mine foreman Zachary Mullins on January 26, 1987, after refusing the foreman's order to drive a rock truck. The complainant asserted that his refusal to drive the truck was based on the fact that there was 11 to 12 inches of snow on the ground; that he did not know how to operate the truck;

and that his prior experience driving such a truck was limited to "a few days" during the summer months when he operated a truck on level ground under dry weather conditions. The complainant asserted further that his lack of truck driving experience, coupled with the prevailing adverse weather conditions, presented a possible safety hazard. The complainant has alleged that his discharge because of his refusal to drive the truck was in violation of section 105(c)(1) of the Act.

The complainant subsequently amended his complaint to include an allegation of an additional violation of the Act. In this regard, the complaint alleged that the respondent's refusal to reinstate him after it had received a copy of his complaint and had been informed of the safety reasons for his work refusal during a meeting with him on February 27, 1987, further violated section 105(c)(1) of the Act.

In its answer to the complaint, the respondent admitted that the complainant refused the request of his foreman to operate the rock truck in question. However, the respondent asserted that the respondent quit his job; that his actions in refusing the foreman's request were not justified; that the equipment, prevailing conditions, and request by the foreman for the work were reasonably safe; and that the complainant had had previous experience in the operation of a rock truck under similar circumstances.

Issues Presented

- (1) Whether the complainant was fired or quit his job.
- (2) Whether the complainant was engaged in protected activity on January 26, 1987, when he refused his foreman's request to operate the rock truck in question, and whether his work refusal was reasonable and justified in the circumstances.
- (3) Whether the complainant communicated his alleged safety concerns and reasons for refusing to drive the truck to the respondent.
- (4) Whether the respondent's subsequent refusal to reinstate the complainant was discriminatory and in violation of the Act.

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.

Procedural Rulings

The following rulings were made by me in the adjudication of this matter:

1. The complainant's motion to amend his complaint was granted (Tr. 6, 44).
2. Respondent's motions for summary decision in its favor on the basis of the complainant's prehearing deposition was denied (Tr. 154).
3. Respondent's motion for a summary decision in its favor at the close of the complainant's case at the hearing was denied (Tr. 269).
4. Complainant's request for the admission of certain training records, exhibit C-5, was granted (Tr. 264-265).
5. Respondent's motion to quash the complainant's prehearing request to take the depositions of several of its witnesses was granted. However, the complainant's counsel was afforded the opportunity to interview these individuals before the taking of any testimony at the hearing (Tr. 10-11, 34).
6. Complainant's request for the introduction of a written statement executed by MSHA Inspector Avon Pratt during the course of MSHA's investigation of the complaint was denied, and the statement (exhibit C-4) was rejected (Tr. 528).

7. Complainant's request to take the depositions of two witnesses posthearing was granted, and the respondent's objections were denied (Tr. 528). However, the respondent was granted an opportunity to take and file any posthearing rebuttal depositions (Tr. 533).

8. The parties were subsequently afforded an opportunity to take and file additional posthearing depositions.

Complainant's Testimony and Evidence

Complainant Charles Conatser testified that he worked at Red Flame Coal Company from June, 1986, until his last day of work on January 26, 1987. Prior to that time, he worked at No. 8 Ltd. of Virginia from 1978 until August, 1985, and again from January to June, 1986. During his employment with No. 8 Ltd. he was a coal and rock endloader operator. He also operated a rock truck "a few times," but was never assigned as a permanent rock truck driver. When he operated a truck "it was always fair weather conditions, dry roads, hills, just in places where the foreman knew I could handle the truck." His foreman at that time was Bill Meade, and he would assign him to drive a rock truck when he was short-handed. Mr. Conatser stated that he was never given any task training in the operation of a rock truck, and would never drive in bad weather, and that "my whole desire is to be a loader operator" (Tr. 55-62).

Mr. Conatser stated that during his second term of employment with No. 8 Ltd., he was employed as a utility man loading drill holes, and that "I remember two times that I was on a rock truck" (Tr. 63). He also began operating a rock loader again. He recalled one occasion when Mr. Meade assigned him to fill in for another driver on a Saturday, and he drove an 85-ton 777 rock truck that day hauling rock from the pit to the dump on level ground. On another occasion, Mr. Meade assigned him to haul some stockpile coal in a 50-ton 773-A rock truck along "fairly level ground" to the parking lot, and there were no steep hills (Tr. 63-68). During this period of time at No. 8 Ltd., he received no training or task training in the operation of a rock truck (Tr. 70).

Mr. Conatser stated that during the year prior to his discharge, he drove a rock truck two times. Prior to that time he drove one "five other times," and in his entire career "in heavy equipment," he has only driven a rock truck "maybe seven times" (Tr. 68-69). He was never trained in any way to

drive a rock truck while at Red Flame. His job was a rock and coal endloader operator. He also operated a sweeper or farm tractor a few times sweeping up coal dust, and has also operated a dozer pushing dirt over a hill at the dump, but he does not consider himself to be a qualified dozer operator. He also operated a road grader during 1978-1985 grading roads out of the pit, but does not consider himself to be a qualified grader operator (Tr. 72).

Mr. Conatser stated that upon his arrival at work on the morning of January 26, 1987, he observed dozers "over the hill working on the road." His foreman Zack Mullins informed him that his loader was down, and assigned him to assist the mechanic to help start and prepare some equipment. Mr. Mullins called later on the CB radio and instructed the mechanic to start up a WABCO 85-ton rock truck, and when he arrived at the truck he motioned him (Conatser) to the truck and informed him that he wanted him to drive the truck. Mr. Conatser explained what transpired next at (Tr. 75-77):

* * * I told him I couldn't drive a rock truck. And, he said that he had two or three other people that was learning how to drive a rock truck and if they could do it you could do it too, and if you didn't want to do it you could get your stuff and take your ass to the house.

Q. What did you say after he said that?

A. I was just in shock. I didn't know what to say. I just stood there for a few minutes looking at him and then turned around and, as I was getting ready to walk off, I told him you are making me go to the house. And, I went over to get in my jeep and remembered my safety toes that was in the endloader I used to run. I asked him if he would get my shoes for me and he said he never had time, that I could get them on my way out. So, I left.

Q. Okay. Why did you refuse to drive the rock truck?

A. Because it was unsafe for me to drive the rock truck. I hadn't been trained to operate

on any kind of hills or any kind of slick conditions and I wasn't qualified to drive it.

* * * * *

THE WITNESS: Because I hadn't been trained to drive the truck and I am afraid to drive a truck in any kind of slick conditions. I thought it was going to be hazardous to my health. I thought I might have a chance to kill myself. So, I never went.

Mr. Conatser stated that there was 10 to 12 inches of snow, and that the roadway where he was expected to drive the truck was up and down hills from the pit to the hollow dump, a distance of approximately 200 yards, three-fourths of which was on a steep grade. While employed at Red Flame, he has observed rock trucks on that particular hill, and when it is raining or snowing, trucks will slide down the hill, and during the times he did drive a rock truck at No. 8 Ltd., he never drove one down a hill as steep as the one at Red Flame. He also observed trucks sliding down hills at No. 8 Ltd., and he generally was afraid of rock trucks because they cannot be controlled when they are going to stop and he does not know what to do to control one in a slide, and does not believe that he has the ability to control a truck in a slide (Tr. 78-79).

Mr. Conatser stated that he believed Mr. Mullins wanted him to drive the 85-ton WABCO because he had previously instructed him to start it up and it was the only truck in the parking lot. Even if Mr. Mullins had asked him to drive a 777 Caterpillar truck, he would still not drive it because "I haven't got the experience to drive one. I am afraid of them and I just don't think I could handle one on a hill. If I went into a slide, I honestly don't think I can" (Tr. 81).

Mr. Conatser stated that after he left the mine on January 26, he went straight home, which was 3 miles away, and that it took him no longer than 5 minutes to get there. He was crying, and when he arrived home he told his mother and father that "they fired me for not driving a rock truck, that I wasn't qualified to drive a rock truck I thought" (Tr. 82). His father then called his brother who advised him to go to MSHA to file a report. He then went to MSHA and filed his discrimination complaint.

Mr. Conatser stated that prior to his father telling him that his uncle was of the opinion that the Federal mine safety

laws gives surface miners the right to refuse to do something if they think it is unsafe, he was unaware of this, and that he was also unaware of it at the time he told Mr. Mullins that he would not drive the truck. Mr. Conatser stated "I just thought I was fired and that was going to be the end of it" (Tr. 84).

Mr. Conatser stated that after his discharge, he called Wesley Burke, the president of No. 8 Ltd., the parent company that owns Red Flame, and asked to speak with him about getting his job back. Mr. Burke invited him to come in and speak with him on February 27, a Friday, and he then met with Mr. Burke and superintendent Cruce Davis on that day (Tr. 86). Mr. Conatser stated that during the meeting, he told Mr. Burke and Mr. Davis that "I was afraid to drive a rock truck and that I didn't think I was qualified to drive a rock truck and that I feared for my life." Mr. Burke then advised him that "he would get back to me" (Tr. 87). He heard nothing further from Mr. Burke, and called him a week later, and Mr. Burke informed him that he would not be rehired. Mr. Conatser asked Mr. Burke if he "wanted to make any other kind of settlement" and that Mr. Burke informed him that he had no authority to do this (Tr. 88).

Mr. Conatser confirmed that MSHA investigator South suggested that "it wouldn't hurt to go back and ask for my job back, and so I did" (Tr. 88). Mr. Conatser also confirmed that since his discharge, he has not had any coal mining employment, but has looked for work, and he explained his attempts to find work. He did receive \$50 a week for taking care of his girlfriend's house, and limited unemployment benefits (Tr. 53, 88-90).

On cross-examination, Mr. Conatser confirmed that he quit his first job at No. 8 Ltd., after a dispute with Mr. Meade, and he left because he was mad at Mr. Meade (Tr. 94). Mr. Conatser could not recall the dates that he drove the rock truck while at No. 8 Ltd., during 1978 to 1985. It could have been five times, but he could not recall, and he reiterated that he has driven a rock truck for a total of seven times during his 12 years of employment as a surface miner (Tr. 96). He would never get into a truck in any kind of "slick weather" and he is afraid of the truck. He stated that he agreed to drive a rock truck "because I was asked to and I knew the conditions I would be running in," but that he would prefer to drive a loader because "that's what I chose to do" (Tr. 97).

Mr. Conatser testified as to a prior statement he made to the Kentucky Department of Employment Services in connection

with his unemployment claim in which he states that "I had probably one months experience in 12 years driving a rock truck" (Tr. 101, Exhibit R-1). He acknowledged signing the statement, but claimed that he never read it before signing it, and stated that he told the interviewer that he had "possibly a month but it is probably less" experience as a truck driver (Tr. 102).

Mr. Conatser confirmed that when he drove a rock truck at No. 8 Ltd., from January to June, 1986, he drove one truck for an 8-hour shift in March, 1986, and a second one for half a day in April, 1986 (Tr. 106). He confirmed that on January 26, 1987, he wanted to operate the loader (Tr. 107). He confirmed that when it snowed and rained at the No. 8 Ltd. site, graders or dozers were used on the haulroads, and the trucks were operated over the roads after they were scraped (Tr. 109). He confirmed that Mr. Mullins and Mr. Davis always had the roads scraped, and he had no reason to believe that they did not comply with safety regulations (Tr. 109-110).

Mr. Conatser stated that while there was 11 to 12 inches of snow on the ground on the day of his discharge, it had just quit snowing and the haul roads were being graded, but "after you grade the snow off, you still got all that mud" (Tr. 111). He drove to work that day in his four-wheel drive vehicle and the roads were "sloppy" and he had no problem getting to work (Tr. 111). He also drove up the mountain, which is a steep grade, and parked his vehicle on the parking lot (Tr. 112). He confirmed that he knew how to operate the brakes on the rock truck, but denied that he knew what gear to put it in while "driving off the mountain," and he then proceeded to explain how to "gear down" the truck (Tr. 113-114).

Mr. Conatser stated that prior to January 26, 1987, he never told Mr. Mullins or Mr. Davis that he did not know how to drive a rock truck because they never asked him and he had no reason to tell them. He stated that he told Mr. Meade that he was not a qualified rock truck driver, and that Mr. Meade "knows what I can do in a rock truck and what I can't," and that "he never put me in any place that I thought was unsafe for me to operate it" (Tr. 114). He also stated that Mr. Meade always put him in places where he was not afraid to drive the truck "just hauling around the top of the hill and mainly in level areas" (Tr. 115).

With regard to his conversation with Mullins on January 26, 1987, Mr. Conatser stated as follows at (Tr. 116-119):

A. I told him I couldn't drive the rock truck and he said he had two or three other people that were training to learn how to drive a rock truck and that if they could do it that you could do it too, either drive the rock truck or get your ass to the house. Then, when I turned around and left, when I was walking toward my jeep, I turned around and said that you are forcing me to go to the house or you are making me to go to the house.

* * * * *

Q. You never said anything to Zack about the weather or the steepness of the grade?

A. No.

Q. You never said anything to Zack about it being unsafe?

A. No.

Q. Did you use the words I don't know how to drive a truck?

A. No.

Q. Did you request any task training with Zack Mullins that morning?

A. No.

Q. Did you mention anything to him about putting somebody in the truck with you while you were driving there about anything that you might not feel comfortable about?

A. No.

Mr. Conatser denied that he refused to drive the truck because other drivers were available, or that he was upset because Mr. Mullins would not assign someone else to drive. He insisted that the only reason he left was because he could not drive the truck, and he assumed that Mr. Mullins knew that he did not know how to drive (Tr. 119).

With regard to his prior statement in connection with his unemployment claim, Mr. Conatser stated as follows (Tr. 121):

Q. Does that statement say, and I quote, "There was a rock truck driver operating another endloader and I felt he could have driven the truck and the foreman could have let me operate the endloader as that was my regular job."; does it say that?

A. Yes, but this was two weeks after it happened. By that time, I had had time to think about it and I thought there was a possibility that somebody else could have drove the truck.

Q. Did you make that statement at that time?

A. This statement right here.

Q. Yes.

A. Yes, sir.

Mr. Conatser confirmed that he never said anything to Mr. Mullins about assigning any of the available truck drivers who were operating loaders to drive the rock truck in question. He also confirmed that he and the mechanic were discussing the truck assignment as he observed Mr. Mullins approaching, and he suspected that Mr. Mullins would select him to drive the truck, and that he mentioned this to the mechanic. Mr. Conatser stated that "the only thing I was thinking about when he said that was whether I could drive the truck, and I come to the conclusion that I couldn't drive it" and that it never crossed his mind to suggest any alternative to Mr. Mullins. In response to a hypothetical question as to whether he would have refused to drive the truck if Mr. Mullins had asked him to do so during the summertime, Mr. Conatser responded "If it was on a hill, I would have refused because I couldn't--well, unless he would have trained me" (Tr. 124).

Mr. Conatser confirmed that his refusal of January 26, 1987, was the only time he had refused to do anything, and that this was the first time that Mr. Mullins ever asked him to drive a truck (Tr. 125-126). In response to questions concerning his knowledge of a rock truck, Mr. Conatser stated as follows (Tr. 125-126):

JUDGE KOUTRAS: Now, on the trucks you operated previously, you knew where to put the ignition

key, know where the brakes are, know where the gear systems are, know where the headlights are, and all the other equipment, right?

THE WITNESS: Right.

JUDGE KOUTRAS: So, you know how to operate a truck.

THE WITNESS: I know how to operate a truck on level ground.

JUDGE KOUTRAS: Well, let's leave the level ground out of it for a moment.

THE WITNESS: Okay.

JUDGE KOUTRAS: Do you know how to operate a rock truck?

THE WITNESS: I know how to operate a rock truck.

JUDGE KOUTRAS: So, when you told Mr. Mullins on the day of January the 25th that you didn't know how to operate a rock truck, what did you have in mind when you told him that?

THE WITNESS: That I couldn't operate a rock truck in any kind of conditions like that.

JUDGE KOUTRAS: But you didn't tell him that, did you?

THE WITNESS: I just figured it would be common.

JUDGE KOUTRAS: You figured that he would --

THE WITNESS: I figured he would know.

JUDGE KOUTRAS: You assumed that he would know that.

THE WITNESS: Yes, I assumed that he would know that.

Mr. Conatser denied that he ever offered to operate a rock truck in the presence of Tommy Dotson while employed at

Red Flame. He also denied that he had already made his mind up not to drive the truck before being asked by Mr. Mullins and while speaking with the mechanic (Tr. 128). He stated that his offer of settlement made to Mr. Burke was his own idea (Tr. 132-133). He also stated that he did not know whether he offered any explanation as to his prior statement in connection with his unemployment claim at the time of his October 20, 1987 deposition, and respondent's counsel confirmed that he did not (Tr. 136). Mr. Conatser also confirmed that since his deposition, he has seen the statement in his counsel's office when they discussed it, but the explanations that he was now offering are his own (Tr. 134, 137-138).

Mr. Conatser confirmed his prior statement of February 2, 1987, to MSHA Investigator South during his investigation of his complaint (Exhibit C-3, pg. 6-60), during which he stated "I did not have an opportunity to tell Mullins that I feared for my safety that day but that was what I was thinking and what I was implying as well as my lack of experience at operating a rock truck." Mr. Conatser confirmed that Mr. South asked him whether he had communicated a safety complaint (Tr. 139). He also confirmed that Mr. South asked him whether he had said anything to Mr. Mullins about being afraid or scared, and that he informed Mr. South that he never said anything to Mr. Mullins, but that "I told him that in my mind at that time was my fear for my life driving that truck" (Tr. 140-142).

Mr. Conatser stated that he had spoken to Mr. Mullins on many occasions, and although he indicated that Mr. Mullins "wasn't waiting around for no long-term explanations. He was ready to go," on the morning of January 26, Mr. Conatser confirmed that Mr. Mullins did not prevent him from saying anything (Tr. 143).

In response to further questions, Mr. Conatser confirmed that his unemployment claim statement previously referred to was not in his handwriting, and that it was reduced to writing by the person who interviewed him (Tr. 146), and that his statement with regard to the availability of other drivers was in response to a question put to him by the interviewer (Tr. 146-147). With regard to his prior statement that he had no opportunity to explain to Mr. Mullins about his safety concerns, Mr. Conatser stated that everything happened so fast and that he was shocked and did not know what to say. He also stated that Mr. Mullins did not ask him for any reasons as to why he could not drive the truck, and said nothing about ever observing him drive a truck or that he was qualified to drive one (Tr. 149). Mr. Conatser confirmed that the statement he

gave to Mr. South and signed was in Mr. South's handwriting (Tr. 153).

Elmer Conatser, father of the complainant, testified that he is a retired underground mine foreman, and that on the day his son lost his job he came home crying and upset and stated that "they told me to drive a rock truck and I told them that I couldn't and then he told them that he was afraid to under them conditions, and he said the foreman fired him and told him to get his things and go home" (Tr. 158). Mr. Conatser stated that he telephoned his brother, a retired Bureau of Mines employee, and his brother advised him to "get an investigator over there as quick as possible and not willy around with it" (Tr. 160).

Mr. Conatser stated that his son told him that although he drove a rock truck one or two times on level, rather than steep ground, he was not experienced, and said that he never drove one "under no conditions like that" (Tr. 160).

On cross-examination, Mr. Conatser stated that he told his son to go to the MSHA office, but that he did not go with him. He stated that his son told him that he had informed his foreman that "he was inexperienced on the rock truck, and the bad weather, that he had never drove under them conditions, and he was afraid." His son did not tell him that he had informed the foreman that the grade was too steep, or that it was too slick, and "the only thing he said was that the snow and weather was so bad that he was afraid to drive it," and that he had so informed his foreman (Tr. 166-168).

Mr. Conatser stated that his son talked to his uncle later and that "all that I heard them talk about was the conditions." He had no knowledge that his brother had spoken with anyone at MSHA, and simply advised his son to go and talk to the MSHA people (Tr. 170).

Cyrus Boggs, rock truck driver, Red Flame Coal Company, testified that he worked with Mr. Conatser at Red Flame from October, 1986, until the end of January, 1987, and at the No. 8 Ltd. strip site for approximately 3 years before that time. He never observed Mr. Conatser drive a rock truck at Red Flame, and Mr. Conatser operated a rock and coal loader during this time. He recalled that Mr. Conatser drove a rock truck at No. 8 Ltd., 3 years ago while stockpiling coal, but he could not state how many times he drove a truck, nor could he recall any details (Tr. 171-176, 180). Mr. Boggs did not consider Mr. Conatser to be a truck driver, and stated that his job was mostly a coal loader (Tr. 181).

Mr. Boggs confirmed that he drove a rock truck on Mr. Conatser's last day of work on January 26, 1987, and he recalled that there was snow and that he drove on the same hill road that Mr. Conatser would have driven down that day had he driven a rock truck. Mr. Boggs described the road as "wet and slick," and he confirmed that the road was being scraped. He drove down the road after it was scraped, and while he could not remember its condition after it was scraped, he recalled that it was wet. He could not remember whether he slipped on it, and stated that it was not unusual for a truck to slide on a wet road (Tr. 183).

Mr. Boggs was of the opinion that while the road in question is bermed, an inexperienced driver would not know how to handle a truck that went into a slide. If he had never driven a rock truck before and someone asked him to drive down the hill on the day in question, he would not have done it because "that's a big piece of equipment and you don't know how it is going to act." He explained that once a truck starts to slide "I don't know if you would know to pull the retarder and give it fuel or hold the brakes and give it fuel and keep the wheels from sliding" (Tr. 186). He confirmed that his father-in-law, who is an experienced driver, flipped a truck backwards once, and he has heard of trucks tipping over while going down hills (Tr. 187). He did not believe that any snow was on the roadway in question after it was scraped (Tr. 188).

On cross-examination, Mr. Boggs stated that at the time he observed Mr. Conatser drive a truck 3 years ago, he appeared to be able to handle it, and in his opinion, one had to drive a truck for 6 or 7 months to be considered "experienced." Mr. Boggs learned to drive a rock truck in 3 hours after someone showed him how, and he believed that one should know how to handle it in a couple of weeks, and that "if the weather conditions come up in those few weeks, I guess he would have to learn" (Tr. 192). Based on his observation of Mr. Conatser driving a rock truck, he had no reason to believe that he could not drive it under different weather conditions (Tr. 193).

Mr. Boggs confirmed that during his employment under the supervision of Mr. Davis and Mr. Mullins, they always reacted favorably to any of his requests for rocking or scraping the roads, and he could recall no problems in this regard (Tr. 194). He confirmed that the extent of his training as a rock truck driver consisted of 3 hours, and that he had never driven one before this time. He also confirmed that while there is a difference in driving a truck on level ground and

going up and down hills, he believed that an inexperienced driver "would just take a few loads to get used to driving on a wet hill" (Tr. 195).

When asked whether anyone who can drive a pick-up can also drive an 85-ton rock truck, Mr. Boggs replied "they are more or less the same except for the size and just the judging" (Tr. 197). He stated that he would not want anyone who had not driven such a truck to start driving up and down hills by themselves if they did not know how. He stated that he would want to drive with that person first to show him a few things, and would want to "haul a few loads with him" (Tr. 198). If his foreman asks him, he would accompany anyone who was asked to drive a truck on a hill even if that person had never driven a truck before (Tr. 199-201). He later clarified his answer and stated that he would go with such a person as long as he were able to show him how to drive, and in Mr. Conatser's case, he would have ridden with him on the day in question because he had seen him operate a truck in the past (Tr. 206).

Mr. Boggs confirmed that although it had snowed, the roads were scraped and had no snow on them, but that the trucks driving up and down would force the water out of the ground, and the roads would not be dusty (Tr. 207). He believed that "a little bit of training" is necessary to drive on a hill, and he would have trusted anyone to drive down the hill on the day in question as long as he was seated next to them to be prepared to control the truck (Tr. 208-209).

Mr. Boggs stated that the Red Flame haulroads are approximately 40 feet wide, enough for trucks to pass, and that the average speed of the trucks, filled and empty, is 10 miles an hour. He was not aware of any haul truck accidents or fatalities at Red Flame or No. 8 Ltd. (Tr. 212). When asked for an opinion as to whether or not Mr. Conatser could have driven a rock truck down the hill in question because he had driven one in the past on level ground, Mr. Boggs responded "I guess he could have tried" (Tr. 222). He stated that if he were the foreman, he would not want anyone to operate any equipment if they were afraid of it (Tr. 223).

Russell Akers, coal and rock loader, No. 8 Ltd., testified that he worked with Mr. Conatser at Red Flame Coal Company for 6 months until the spring of 1987, when he moved back to his present job. On January 26, 1987, he was working as a rock truck driver at Red Flame, and he has 3-1/2 years of experience driving 50 and 85 ton trucks. He never observed

Mr. Conatser drive a rock truck while working at Red Flame or at No. 8 Ltd. (Tr. 224-249).

Mr. Akers stated that he could not remember the weather conditions on January 26, 1987, but did recall that the haulroad was "pretty slick" and that Mr. Mullins instructed the men not to go down the hill until it was cleared and dried up. Mr. Akers was not sure whether he actually drove a truck that day, but confirmed that no one drove up and down the hill in question until the roadway was cleared up. If he were an inexperienced driver, he would be afraid to drive down the hill if it were wet because driving down a "slick little slope would be sort of scary like" (Tr. 232). He has observed trucks slide down wet hills, and he has slid but has been able to control the truck (Tr. 233). He has never heard Mr. Conatser offer to "trade out" with any truck driver (Tr. 234).

On cross-examination, Mr. Akers stated that one should know how to drive a rock truck after "one or two trips." He confirmed that on January 26, 1987, the hill was dried up before any trucks were allowed to go down, and that Mr. Davis and Mr. Mullins never refused any of his safety requests. Mr. Mullins instructed him not to go down the hill until it was cleared, and has never attempted to put him in any danger (Tr. 235). Mr. Akers was of the opinion that 7 days was long enough for one to learn to drive a rock truck, and that in 30 days, "you ought to be good at it" (Tr. 236).

Mr. Akers stated further that once the snow is scraped from the roadway, it should remain dry the rest of the day, and he estimated that scraping 3 inches deep would render the roadway dry (Tr. 237). He also estimated that it took 15 or 20 minutes to scrape the snow off the hill on January 26, and that the roadway was about 500 to 600 feet long, bermed, and trucks could pass on it. The roadway was not slick after it was scraped (Tr. 240).

Lloyd Day, Jr., dozer operator, No. 8 Ltd., testified that he worked at the Red Flame site for approximately 10 months starting in the spring of 1986. He was working at Red Flame on January 26, 1987, and there was snow on the ground. He recalled that the hill haulroad from the pit to the hollow field was "pretty rough" before he and Jerry Sturgill scraped the snow off with a dozer and a grader. He observed trucks driving up and down the hill and "imagined" that he saw some of them sliding down the hill because "they slide anyway, whether it is wet or dry" (Tr. 245). The roadway was slick until it dried off, but it was still "a little

wet and slick after you get the snow off," because it would have to be cut 6 to 8 inches deep to get it dry, and it was still wet after the snow was scraped off (Tr. 246).

Mr. Day stated that he never observed Mr. Conatser drive a rock truck while at the Red Flame site, but did observe him drive one "a couple of times" while at No. 8 Ltd. (Tr. 247). The day that he observed him, he was working alone loading and hauling coal in the fall, under dry conditions. He has never heard Mr. Conatser offer to "trade out onto a rock truck." Mr. Day did not consider Mr. Conatser to be an experienced rock truck driver because "the only thing that I have ever known Chuck Conatser done was run an endloader" (Tr. 250). Although Mr. Day stated that he could drive a rock truck, he did not consider himself to be an experienced truck driver. If his foreman had asked him to drive a rock truck on January 26, he would have done so "because he asked me to," and that he may or may not have had problems with the truck. He confirmed that he has "filled in" as a rock truck driver at Red Flame (Tr. 248-252).

On cross-examination, Mr. Day stated that when the road was scraped on January 26, "we went down beyond the snow," but he could not recall how deep they penetrated the roadway surface. Once the roadway was cut, the trucks started hauling, and the more they hauled the roadway conditions improved. In his opinion, the roadway was cut sufficiently enough for the trucks to operate safely (Tr. 257). He could not recall the number of hours Mr. Conatser drove a truck on the two occasions he observed him at No. 8 Ltd. (Tr. 258). Mr. Akers confirmed that he has driven a rock truck on the job up and down hills, but compared to other drivers who do this every day, he did not consider himself to be an experienced rock truck driver (Tr. 259). He confirmed that he received no training when he began driving a rock truck, but that he had driven coal trucks and tractor trailers prior to that, and that is why he could simply get into a rock truck and drive it (Tr. 260).

Wesley Burke, testified by deposition that he serves as the president of the No. 8 Ltd. of Virginia and the Red Flame Coal Company mines, both of which are incorporated under the laws of Virginia, and authorized to mine in the State of Kentucky. He confirmed that both companies conduct strip mining operations, and that No. 8 Ltd. owns the Coaland Corporation, which in turn owns the Red Flame Coal Company (Tr. 1-5).

Mr. Burke confirmed that when Mr. Conatser was discharged on January 26, 1987, he (Burke) was president of Red Flame.

He also confirmed that the training of miners is under the authority of mine superintendent Cruce Davis, and he believed that the designated health safety official is foreman Zack Mullins (Tr. 15-16).

Mr. Burke stated that he learned of Mr. Conatser's discharge late in the morning on the day of his discharge, and that Mr. Davis informed him that Mr. Conatser had been discharged or quit his job for refusing to operate a rock truck (hauler). Mr. Burke stated that Mr. Davis told him that Mr. Mullins had informed him that he (Mullins) gave Mr. Conatser the option of driving the truck or going home, and that Mr. Conatser had chosen to go home (Tr. 17-18). Mr. Burke confirmed that later that same day, he discussed the matter with Mr. Davis and Mr. Mullins, and he explained what transpired as follows (Tr. 19-21):

Q. Okay, and tell me what was said at that conversation?

A. Again, exact words I can't remember, I just remember the situation. Chuck was gone and we were trying to find out the details why, and Zack was the foreman on the job and had been involved in it so we went and talked to him. And, basically, he told us that they'd had some trouble getting the men lined out, they didn't have enough men to do what he wanted to do, so he had to change plans. And that he'd asked Chuck to run the hauler, and Chuck had refused. He'd told Chuck to either run the hauler or go home, and he said that Chuck got his dinner bucket and his shoes and went home.

Q. Did Zack say which rock truck - that's what you're referring to as a hauler, right?

A. Right.

* * * * *

Q. Did you ask Mr. Mullins which truck he had instructed Conatser to operate?

A. I can't remember. All I know is it was a discussion over a hauler, and I might have asked him and I might not have. I don't know.

Q. Was there any discussion with Zack Mullins about the condition of the hill that Mr. Conatser would have had to drive down had he driven the rock truck?

A. No. The only thing that, along those lines that I can remember, is I asked him if there was any certain reason why Chuck wouldn't have wanted to have run it, and he said no, none that I know of.

Q. You asked Zack Mullins if he knew of any certain reason why Chuck wouldn't have wanted to drive the rock truck, and he said no?

A. Uh-huh.

Mr. Burke stated that the weather was cold, and he could not recall whether there was a foot of snow on the ground, and that when he arrived at the mine "if there was a foot of snow it had melted when I got there" (Tr. 21). He could not remember whether he asked Mr. Mullins whether or not Mr. Conatser was qualified to drive a truck, and he assumed that Mr. Davis had discussed this with Mr. Mullins before he arrived at the mine. Mr. Burke could not recall Mr. Mullins telling him that Mr. Conatser informed him that he could not drive the truck, and "The way it was posed to me was that Zack had given Chuck the option to either run the truck or go home. That's the way I understood it" (Tr. 23).

Mr. Burke confirmed that he received a copy of Mr. Conatser's complaint in the mail, and vaguely remembered Mr. Conatser's claim that he was not qualified or experienced enough to drive the rock truck on the day in question. Mr. Burke stated that he did not at that time check any company training records to see if Mr. Conatser had the training to qualify him as a rock truck driver, but that he did ask Mr. Davis about it, and Mr. Davis informed him that Mr. Conatser could drive the truck. Mr. Burke stated that he had no personal knowledge as to whether Mr. Conatser was qualified to drive the truck, and stated that "the way I envision it is if somebody can run one piece of heavy equipment they can run another" (Tr. 24). He explained that the fact that a person can operate one piece of equipment does not qualify him automatically to operate another one if they were not trained, and that "given proper training and opportunity, I would think a person would be able to pick it up" (Tr. 25).

Mr. Burke confirmed that after Mr. Conatser's discharge, Mr. Conatser telephoned him at his office, and that "the main topic of the conversation was Chuck getting his job back, or reaching some type of settlement" (Tr. 25). Mr. Burke confirmed that he later met with Mr. Conatser and Mr. Davis in his office, and he explained what transpired as follows (Tr. 26-28):

A. Well, again Chuck came in and wanted to get his job back or get some kind of settlement. He said he had some payments that he needed to make and he was out of a job.

Q. Okay, what else was said?

A. Well, I can't remember exactly. I remember Cruce asking him why he refused to run the hauler.

Q. What did Chuck say?

A. I don't remember his explanation. It was something to the fact that he didn't think that he could do it, and Cruce being the superintendent, and in more charge of the situation, I felt like that that was wrong, that he could, in fact, do it.

Q. Do you remember Chuck telling you and Cruce that he didn't feel it was safe to operate the truck because he hadn't been trained, or he wasn't qualified?

A. I remember generally there was some discussion about that, but exactly what was said I can't tell you.

Q. At this point, when you met with Chuck and with Cruce to talk about the situation, you knew that Chuck was saying it would have been unsafe for him to drive the truck on the day in question?

A. I'm saying that I assumed that he felt like he had a reason for doing that, yeah.

Q. But I'm talking about a safety reason for refusing to drive the truck.

A. Safety reasons, no I wouldn't say safety. I'm assuming - I was assuming when he came in that he had a legitimate reason for doing that. And that's what the discussion was to be about, and that's why Cruce was there. And like I said, Cruce is much more in tune with the situation than I am, and he and Chuck just didn't see eye to eye on it.

Respondent's Testimony and Evidence

Shawn Sturgill, dozer operator, confirmed that he went to work at the Red Flame Strip operation in June, 1986, with Mr. Conatser, and that prior to that time worked at the No. 8 Ltd. Strip operation from 1982 or 1983 until going to Red Flame. Mr. Sturgill confirmed that he operated a 773-B 50-ton rock truck at Red Flame and at No. 8 Ltd., and that he first learned to drive the truck at No. 8 when his father rode around with him one Saturday during the summer, and when he later drove around one or two times with another driver until he learned to drive the truck. He did not know whether the respondent ever filed a training certificate on his behalf confirming that he had received task training in the operation of a rock truck.

Mr. Sturgill confirmed that while at the No. 8 Ltd. operation, he observed Mr. Conatser driving a rock truck "maybe 10 times," but he could not recall whether he did so during the winter, and that it may have been late summer or early fall, but he was not sure.

Mr. Sturgill confirmed that he was out of town on the day Mr. Conatser was discharged. Mr. Sturgill also confirmed that he has driven the rock truck down the haul road at Red Flame, and that the road has a curve in it which requires the braking of the truck. He described the length of the road as less than a football field, and confirmed that it was bermed. He also confirmed that any snow on the road would be scraped off, and that foreman Mullins and superintendent Davis never hesitated in responding to any requests to remove any snow on the road.

Mr. Sturgill confirmed that when he observed Mr. Conatser driving the rock truck at No. 8 Ltd., he would pass him on the roadway or see him at the pit area, and he observed nothing unusual about his operation of the truck. Mr. Sturgill was of the opinion that there were no differences in operating a rock truck at Red Flame or No. 8 Ltd. "if you have driven one long enough" (Tr. 269-281).

On cross-examination, Mr. Sturgill stated that he never observed Mr. Conatser drive a rock truck at Red Flame during the period he was there from June, 1986 until the day Mr. Conatser was fired. He also confirmed that he worked with Mr. Conatser for 4 to 5 years at No. 8 Ltd., and observed him driving a rock truck there "maybe 10 times." He denied that he ever told Mr. Conatser that he had not seen him drive a rock truck for 5 years. He confirmed that when he observed Mr. Conatser driving the truck, it was always on level ground at the No. 8 Ltd. site.

Mr. Sturgill stated that his training on the rock truck consisted of driving once with his father, and five or six trips consisting of an hour and a half with a mechanic who showed him how to operate the truck.

Mr. Sturgill stated that a slick roadway would make a difference to an inexperienced truck driver, and in his opinion it would not be safe for such a driver to drive a truck down a slick hill. He would not want an inexperienced driver to be "the first one down the hill."

When asked for his opinion as to whether a truck driver with 7 days of experience driving a rock truck would be considered inexperienced, Mr. Sturgill stated that it would depend on the individual, and that each person is different. However, he would consider anyone with a month of driving experience to be an experienced driver.

Mr. Sturgill confirmed that he has observed trucks sliding on the haulroad in question at Red Flame, and that he has himself done this when encountering small patches of ice, when the road was watered down, or when it rained. However, he was able to control the truck, and if the snow was scraped off the road, it was "o.k." (Tr. 281-294).

Mr. Sturgill confirmed that he has observed trucks sliding down hills, and that he too has slid down a hill. He believed that if an inexperienced driver slid down a hill, it might present problems for him (Tr. 297). Sliding would occur when its raining and the road is wet, but he can control a slide. He would not expect any sliding if the road was scraped (Tr. 298).

Robert Yeary, rock truck operator, confirmed that he has worked for the respondent for a year and a half, and has operated a rock truck for 7 to 8 months. He stated that he first learned how to drive the truck after informing his foreman

that he wanted to learn. He accompanied another rock truck driver on four or five trips during the fall season, and considered himself to be trained. He could not recall that the respondent ever filled out any papers certifying that he was trained as a rock truck driver.

Mr. Yeary confirmed that at the time Mr. Conatser was fired in January, 1987, he (Yeary) was working as a parts runner and did not work at the Red Flame operation "on the hill." Mr. Yeary stated that he has driven a rock truck on the Red Flame haulroad in question and had no particular problem doing so when it rained and the road was slick. He confirmed that when it snowed, the snow was always trammed off the roadway down to the mud or dirt. In his opinion, if someone had previously driven a rock truck, it would be "o.k." for him to drive on the roadway in question. Mr. Yearly confirmed that he never observed Mr. Conatser drive a rock truck at any-time prior to his discharge (Tr. 298-304).

On cross-examination, Mr. Yeary confirmed that his initial rock truck training consisted of four to five trips with another driver for a total of 40 to 45 minutes, and he was shown how to operate the brakes and retarder before driving the truck himself. This training was on level ground during normal production time, and before Mr. Conatser's discharge.

Mr. Yeary was of the opinion that there are differences in operating a rock truck down a hill under wet road conditions, and on level, dry ground. One has to be more cautious going down hill. When asked whether he considered 45 minutes to be sufficient training to operate a rock truck, Mr. Yeary stated that he could not say, and he pointed out that he had volunteered to learn how to drive the truck and that the respondent did not suggest that he do so.

Mr. Yeary confirmed that he has observed trucks sliding down the Red Flame haul road, and that this would occur if one were driving on the wet road or applied the brakes. He never observed a truck flip over. Mr. Yeary could not state whether it was safe for an inexperienced driver to drive down the roadway when it was wet, but he believed that such a driver would need to take several trips down the road in order "to be shown the ropes."

Mr. Yeary was of the opinion that a driver with 7 days experience at driving a rock truck should be able to drive down the Red Flame haul road after 11 to 12 inches of snow had been scraped from the roadway. The same was true in the case

of a driver with 10 to 30 days of driving experience (Tr. 304-312).

Roy Porter confirmed that he has worked for the respondent for 3 years. He started work at the No. 8 Ltd. strip mine operation, and for the last year has worked at the Red Flame strip. His duties included shooting coal, operating a drill, and operating a rock truck.

Mr. Porter stated that he learned how to drive a rock truck after Cyrus Boggs showed him how to operate the brakes and controls, and after "a few trips down the hill." Mr. Porter believed that learning how to operate a rock truck was a simple matter, and that most of his fellow workers could readily learn how to drive one.

Mr. Porter confirmed that he has worked with Mr. Conatser at the No. 8 and Red Flame operations and that he never observed him driving a rock truck. Mr. Porter stated that he was familiar with the haulage road at the Red Flame operation where Mr. Conatser was expected to drive the rock truck, and he confirmed that it was always kept in good shape, and that mine foreman Zack Mullins and mine superintendent Cruce Davis always kept the road scraped of snow and otherwise addressed and took care of any safety concerns of the men.

Mr. Porter was of the opinion that with 7 days of experience at driving a rock truck, Mr. Conatser should be experienced enough to drive it down the haul road in question, while others may not. Mr. Porter stated that none of the other men who worked at Red Flame and who drove a rock truck ever took as long as 7 days to learn how to drive the truck (Tr. 313-323).

On cross-examination, Mr. Porter stated that as far as he personally was concerned, there was no difference in driving a rock truck down a hill or on level ground, and that this would pose no problem for him. He confirmed that when he first learned to drive a rock truck, he did it on the rainy haulroad in question, and although the truck slid, it did not bother him. He confirmed that he has observed rock trucks sliding on the roadway in question while going downhill, and he believed that this was normal.

Mr. Porter confirmed that he received his rock truck driving training before Mr. Conatser was fired, and that when he was first trained by Mr. Boggs, he had never previously driven any trucks other than a powder truck, and that his initial training was over the wet haul road (Tr. 323).

Robert Terry Boggs, stated that he has been employed by No. 8 Ltd. since 1980, and has only visited the Red Flame job site on two occasions, but has never worked there. Mr. Boggs stated that he is a rock truck driver, and that he has operated a dozer, loader, and grader. Mr. Boggs stated that he learned how to drive a rock truck by "getting in it and driving it." He had someone ride with him one day to show him how to drive the truck, and this was during snow and icy weather. He stated that when he first learned to drive the truck, he was asked to drive it to fill in for a regular driver who was off, or if his own equipment was down. He has since driven a rock truck on a regular basis for at least 5 years.

Mr. Boggs stated that he worked with Mr. Conatser at the No. 8 Ltd. job site for approximately 5 to 6 years, and observed him driving a rock truck 2 to 4 years ago hauling coal from the pit up and down a hill. He also observed him driving a smaller rock truck on another occasion back and forth over a haul road for a distance of one-half a mile one-way, and that on both occasions the weather conditions were dry. He also observed him on another occasion hauling from under a back hoe, and indicated that Mr. Conatser had filled in on other days for the regular 777 rock truck driver. Mr. Boggs could not state the number of times he observed Mr. Conatser driving a rock truck, and indicated that on some days he may have hauled one truck load, and on others, four truck loads. The weather conditions were always dry, and Mr. Conatser's travels would take him to the pit.

Mr. Boggs stated that when he observed Mr. Conatser driving he appeared to be "O.K.," but that he was afraid to back up the truck close to the dumping area, and would dump his load 10 to 15 feet from the dump area. Mr. Boggs stated that he never observed anything which would lead him to believe that Mr. Conatser was not qualified to drive a rock truck.

Mr. Boggs believed that he last saw Mr. Conatser drive a rock truck in June, 1986. When asked whether driving a truck 7 days would qualify one to drive a rock truck, Mr. Boggs replied that "it would depend on the individual," and that he would have to ride with the person to observe him driving before he could conclude that he was a qualified driver. However, based on his observations of Mr. Conatser while he was driving rock trucks, Mr. Boggs believed that he was a qualified driver.

Mr. Boggs stated that he would have no problem driving a rock truck in snow, ice, or mud, and he confirmed that snow

was always scraped from the haul roads. He also confirmed that he has accompanied new drivers while training and showing them the operator's controls and otherwise instructing them in the operation of the truck.

Mr. Boggs confirmed that Mr. Mullins has always responded to any of his safety concerns and always assigns people to clear the haul roads of any rocks or snow. Mr. Boggs also confirmed that he has never known Mr. Mullins or superintendent Davis to ever ask anyone to do anything which was unsafe (Tr. 334-359).

On cross-examination, Mr. Boggs confirmed that he never observed the haul road at the Red Flame job site. He stated that wet roads are more hazardous than dry ones, and that he has observed experienced truck drivers slide on hills. Although he has heard of rock trucks turning over, he has never seen one.

Mr. Boggs stated that before learning to drive a rock truck, he had 5 years of prior experience driving coal trucks, including driving in snow conditions. He also indicated that even though snow may be scraped off a haul road, it may still be wet because of freezing and thawing.

Mr. Boggs confirmed that some of his fellow miners have expressed a desire not to drive rock trucks because they find it boring, or would rather operate their own equipment. He has never known of anyone refusing to drive a truck because of any safety reasons. He also confirmed that he did not speak with Mr. Conatser about his refusal to operate the rock truck in question, and that he observed Mr. Conatser operate up and down the pit area at No. 8 Ltd. on two occasions (Tr. 359-375).

Tommy Roger Dotson, confirmed that he is employed by No. 8 Ltd., as a loader operator, but is assigned to work at the Red Flame job site. He has been so employed since July, 1986, and he worked with Mr. Conatser until his discharge in January, 1987. Mr. Dotson confirmed that he can operate a rock truck, and that he learned to drive it by observing other operators, and familiarizing himself with it by riding and taking four or five loads. He learned how to drive on his first day on the truck.

Mr. Dotson stated that he observed Mr. Conatser operate a rock truck at Red Flame only once when he got into a 50-ton truck on the parking lot and backed it up for some 30 to 40 feet. He stopped the truck and reparked it after a foreman

indicated that the truck was not needed and would not be used. Mr. Dotson confirmed that he was at work with Mr. Conatser on the day of his discharge and that he was working on a scraper to clear the haul road of snow (Tr. 376-381).

On cross-examination, Mr. Dotson confirmed that he worked with Mr. Conatser on a regular basis, and with the exception of the one instance when he observed him backing up his truck, he has never observed him driving a rock truck. At the time Mr. Conatser backed up the truck, Mr. Dotson believed that Mr. Conatser was going to load and haul coal from a pile near the parking lot to a storage pit at the other end, a distance of no more than 100 feet over fairly level ground (Tr. 381-383).

Zachary J. Mullins, testified that he was the foreman at Red Flame from April, 1985 to July, 1987, and that he is currently working at the No. 8 Ltd. site. He confirmed that Mr. Conatser worked for him at Red Flame from July 14, 1985 to January 26, 1987, and that he would also be assigned to the No. 8 Ltd. site to load coal. He stated that Mr. Conatser operated the loader while at Red Flame, but that on one occasion, he observed him driving a rock truck "coming off down in the hollow field," during the summer, but did not know how many trips he made. He assumed that Mr. Conatser had "switched off" that day with another operator, but he was not sure. Since Mr. Conatser did not seek his permission to switch with the truck driver, and since he observed him in the truck, he assumed that he could drive it, and he observed nothing that would indicate otherwise (Tr. 383-397, 409).

Mr. Mullins confirmed that there was 10-12 inches of snow on the ground on January 26, 1987, but that the clearing of the haulroads began before anyone arrived for work. His usual practice was to clear the roads before any trucks used them. Mr. Mullins stated that he assigned one of the truck drivers to operate a drill that day, and since Mr. Conatser's loader was down for repairs, he asked Mr. Conatser to drive the rock truck and "he said no. So, I told him he could drive the hauler or go to the house" (Tr. 398). Mr. Mullins stated that Mr. Conatser gave him no explanation for refusing to drive the truck, and simply asked him to retrieve his hard-toed shoes from the loader, and "I told him he could get his hard-toes on his way out" (Tr. 399).

Mr. Mullins stated that Mr. Conatser did not state that he could not drive the rock truck, and simply told him "no"

twice. Mr. Mullins explained that "to me, he was just refusing to drive the hauler, period, I felt like that he felt like that he just considered himself to be nothing but a loader operator" (Tr. 399). Mr. Conatser made no requests other than to retrieve his shoes, and had he asked for someone to accompany him in the truck, or informed him that he was incapable of driving it, Mr. Mullins would have assigned someone to go with him, or he would have personally gone with him to show him how (Tr. 400). Mr. Mullins did not ask Mr. Conatser for his reasons for refusing to drive the truck because he believed it was incumbent on Mr. Conatser to voice any doubts to him (Tr. 402).

Mr. Mullins stated that he was satisfied that Mr. Conatser was qualified to drive the rock truck, and that this conclusion on his part was based on the fact that he had previously observed him drive a rock truck one time down to the hollow fill, and the fact that he had a "general reputation" of being capable of driving a rock truck (Tr. 409). He also vaguely recalled one other occasion at Red Flame where Mr. Conatser backed up a rock truck for 15 feet. In view of the fact that Mr. Conatser took it upon himself to drive the truck, Mr. Mullins assumed he could drive it. Mr. Mullins confirmed that when Mr. Conatser refused to drive the truck he said nothing to him about the weather conditions, or that driving the truck would be unsafe, and he made no statements that he was not qualified to drive the truck (Tr. 412). Mr. Mullins stated "if he felt like it was unsafe that he would have told me that it was unsafe instead of telling me to get his hard-toes" (Tr. 414). He explained further as follows at (Tr. 415-417):

At that point I had never told him he was fired. At that point I felt like that he knowed he was going to go to the house one way or the other, whether it would be quitting or me firing him, and was the reason that he asked me to get his shoes.

JUDGE KOUTRAS: When he told you twice no, no, and you told him to get on to the house, that meant he was fired, didn't it?

THE WITNESS: When he told me no, I said, well, you can drive the hauler or go to the house.

JUDGE KOUTRAS: You gave him a choice?

THE WITNESS: Yes. I said Larry and all them other boys, I said they drove them and there is no reason you can't. And, he said no again.

* * * * *

JUDGE KOUTRAS: Well, if you tell a fellow to go on to the house, what does that mean in normal modern talk? That means a man is fired, right?

THE WITNESS: Well, it --

JUDGE KOUTRAS: You gave him a choice. You claim you gave him a choice, to either operate the truck or go on to the house, right? So, he opted to go on to the house.

THE WITNESS: No, it don't necessarily mean you are fired.

JUDGE KOUTRAS: What does that mean, take the day off, go home, and then come back tomorrow?

THE WITNESS: At times that's what you do.

JUDGE KOUTRAS: How about this time?

THE WITNESS: This time I meant that he was fired.

Mr. Mullins explained his procedure for teaching someone to drive a rock truck as follows (Tr. 420-421):

A. You show them everything about one. You tell them the hazards of it. You show them how to keep it maintained as far as engine, you know, and the lubricant system of it. That's the first thing you show them before they climb in it. Basically there is two seats in a hauler. It is the only piece of equipment on the job that two can ride. The driver will more than likely sit in the passenger seat and show whoever is learning everything about it and ride with him.

Q. How long does it normally take?

A. Probably one or two trips and it will give you the basic idea about driving one. You learn something every day. I would say it would basically be the person.

Q. Would seven days be enough?

A. Yes.

On cross-examination, Mr. Mullins confirmed that he discharged Mr. Conatser on January 26, 1987, and that the only basis that he had to conclude that he was qualified to drive the rock truck in question was his observation the one time he drove it down the hollow fill at Red Flame, and the "talk" among the miners that Mr. Conatser drove a truck at No. 8 Ltd. before he came to work at Red Flame. Mr. Mullins confirmed that Mr. Conatser had not previously informed him that he could drive a rock truck (Tr. 423-424). Mr. Mullins stated the one time that he saw Mr. Conatser drive at Red Flame was when he drove a 50-ton 773 rock truck, and that he "thought" and "assumed" that Mr. Conatser had traded off with Maynard Harris (Tr. 428-429).

Mr. Mullins confirmed that when he discharged Mr. Conatser, he did not ask him whether he was qualified to drive the truck, nor did he offer to train him because "he give me no reason to." He insisted that Mr. Conatser simply told him "no" when he asked him to drive the truck, and "if he had told me he can't drive a rock truck, I would ask him why" (Tr. 429). He did not recall Mr. Conatser stating "I can't drive the truck" (Tr. 423). Mr. Conatser did not tell him that he should only have to operate the loader, and at no time did he tell him that he was only a loader operator (Tr. 433).

Mr. Mullins confirmed that he never gave Mr. Conatser any task training in driving a rock truck at Red Flame, and that when he worked at No. 8 Ltd., Mr. Mullins assumed that Mr. Conatser had received such training (Tr. 432). He also confirmed that Mr. Conatser had never previously refused to operate any equipment or stated that he was only going to operate an endloader (Tr. 434).

Mr. Mullins stated that on the day of the discharge no coal was hauled "because the coal trucks couldn't get to it," and that no haulage at all was done "in the hollow field," and that "we hauled to the level." He could not recall "if we had made it to the pit with them or not" (Tr. 437). He confirmed that he did not check his training records to determine

whether Mr. Conatser was qualified to drive a rock truck because "I had seen him driving a hauler" (Tr. 439).

Mr. Mullins stated that if Mr. Conatser had told him anything but "no," or given him a reason for not driving the truck, or felt that it was endangering his life or safety, he would not have required him to drive the truck (Tr. 442). Mr. Mullins confirmed that he did not ask Mr. Harris whether or not Mr. Conatser had switched out with him, nor did he actually observe Mr. Conatser backup a rock truck (Tr. 443).

Mr. Mullins stated that after the discharge, neither Mr. Davis or anyone else from management asked him whether or not Mr. Conatser was qualified to drive a rock truck. Mr. Davis and Mr. Burke never asked him to check the training records to determine whether or not Mr. Conatser had been trained to operate the truck. Mr. Mullins could not recall whether Mr. Burke ever asked him about the condition of the hill on the day of the discharge (Tr. 449-450). He confirmed that the decision not to rehire Mr. Conatser was made "because basically we all three felt like he was qualified to do it and he just flat out refused to do it," and "we thought he was qualified" (Tr. 451, 453). Mr. Mullins also confirmed that when he met with Mr. Burke and Mr. Davis, he knew that Mr. Conatser had filed a discrimination complaint and that another reason for not reinstating him was because he surmised that Mr. Conatser did not have a case, and the respondent did (Tr. 454).

Mr. Mullins stated that when the decision was made not to rehire Mr. Conatser, no one checked the respondent's training records to determine whether he had been trained to drive a rock truck because "if someone gets on something or other and drives it, you assume that they know what they are doing, especially when they have been on a job for 12 years or whatever" (Tr. 455). He also stated that "I assumed he had enough ambition to go down the hill" (Tr. 456). Mr. Mullins confirmed that he never previously fired anyone for refusing to do a job that he knew he was qualified to do (Tr. 457).

Cruce Davis, Superintendent, No. 8 Ltd. and Red Flame, testified that he has observed Mr. Conatser driving a rock truck on three different occasions at the No. 8 Ltd. site during March, 1986, and he described what Mr. Conatser did as follows (Tr. 474):

He took the endloader, as he said the other day, around the hill to a pit of coal that we needed to stockpile. He loaded it himself. If

I am not mistaken, that was sometime during March. To the best of my knowledge, it was good weather, dry. The terrain, there was -- well, it wasn't completely level. The road around the bench had a dip in it and you go down a little hill and up another hill. There was a curve in it and he went up a pretty steep grade on the bench and loaded the truck and then came back off and dumped it in the stockpile.

Mr. Davis stated that Mr. Conatser hauled coal for 3 days, but he was not sure whether he did it for full days. He hauled along a road grade of approximately 150 feet long, and it was "quite a bit steeper than the road over at Red Flame." Based on his observations of Mr. Conatser driving the rock truck on these occasions, Mr. Davis had no reason to believe that Mr. Conatser had any problems driving the truck, and he was of the opinion that he was qualified to drive it (Tr. 475). Mr. Davis confirmed that he first learned of Mr. Conatser's claim that he was not qualified to drive a rock truck after he was discharged, and he did not believe him (Tr. 477).

Mr. Davis stated that when he spoke with Mr. Mullins on the morning when Mr. Conatser was discharged, Mr. Mullins informed him that he had asked Mr. Conatser to drive the rock truck and "he told him no, that he couldn't" (Tr. 479). Mr. Davis was of the opinion that Mr. Conatser's refusal to drive the truck was based on the fact "that he just didn't want to drive the truck that day" and that "I feel like he looked at himself as being a loader man, strictly a loader man. He didn't want to do anything else but run a loader." Mr. Davis stated further that "he felt like Zack should have taken some of the other truck drivers that had been driving trucks from time to time and put them on the truck and let him run the loader" (Tr. 480).

Mr. Davis confirmed that he and Mr. Burke met with Mr. Conatser after he was discharged, and the decision not to rehire Mr. Conatser was based on the fact that he refused to do something he was qualified to do, and that "we don't tolerate that" (Tr. 481). Mr. Davis also stated that Mr. Conatser had a "terrible work record" and missed a lot of work, but he confirmed that this had nothing to do with his discharge. Mr. Davis was of the opinion that Mr. Mullins acted reasonably in discharging Mr. Conatser, and while he had never observed Mr. Conatser drive a rock truck at Red Flame he believed that

"if you can drive a hauler on one job you can drive it on another job" (Tr. 484).

Mr. Davis stated that there was no unusually steep hills at the Red Flame site, and that the hill where Mr. Conatser was expected to drive the truck had a grade of approximately 11-to-12 percent, and while it did snow, he did not believe that this was unusual inclement weather for the wintertime (Tr. 487). Mr. Davis stated that had Mr. Conatser informed Mr. Mullins that he was afraid to drive the truck, Mr. Mullins would either have assigned someone to show him how, or would have assigned Mr. Conatser to a loader and put someone else in the truck. Mr. Davis did not believe that Mr. Mullins would ever endanger anyone in a piece of equipment, and if he did, he would fire Mr. Mullins (Tr. 488).

On cross-examination, Mr. Davis stated that while he did not know exactly how many hours Mr. Conatser operated the truck on the 3 days that he observed him at the No. 8 Ltd. site, he did observe him coming and going 12 to 20 times during those 3 days while driving the 50-ton 773 rock truck. Mr. Davis confirmed that he had previously stated in his pretrial deposition that he "thought" that Mr. Conatser had operated a rock truck at Red Flame after swapping out with Maynard Harris, but that he did not actually know that for a fact, and never observed him driving a truck. He also confirmed that he never asked Mr. Harris whether he and Mr. Conatser had "swapped out" (Tr. 490-494).

Mr. Davis confirmed that Mr. Mullins told him that Mr. Conatser stated "no, I can't" when he asked him to drive the truck. He also confirmed that while he has been the superintendent at Red Flame and No. 8 Ltd., Mr. Conatser has received no rock truck driving task training, and that Mr. Conatser never told him that he would not operate any equipment other than an endloader. Mr. Davis stated that if anyone told him "I can't drive a rock truck," this would mean "that I would train him" (Tr. 497-501).

Complainant's Rebuttal

Maynard Harris, loader operator, Red Flame Coal Company, confirmed that he has been so employed since May, 1986, and that he worked with Mr. Conatser from that time until his discharge in January, 1987. He stated that he never observed Mr. Conatser operating a rock truck. Mr. Harris also confirmed that while he is a loader operator, he has driven a rock truck, and he denied that he has ever "traded out" with

Mr. Conatser so that he could drive his rock truck. He confirmed that he knows of no one else who has "traded out" with Mr. Conatser (Tr. 507-511).

Mr. Conatser testified that his previous rock truck driving experience has always been on level ground, and that he has never been trained on a rock truck, and knew nothing about the retarder or what gear to put the truck in while going down hills (Tr. 513-517, 521). He denied that he ever backed up a rock truck while working at Red Flame (Tr. 519). Although he knew how to operate the rock truck foot brakes, steering wheel, and lights, he was "always scared" of the truck, but was not afraid to drive one on level ground because "it's just there ain't no danger of anything happening to you there" (Tr. 520). He denied that he ever operated a truck on a hill (Tr. 522).

Mr. Conatser admitted that he never said anything to Mr. Mullins about his safety concerns at the time of his refusal to drive the truck because "I was just in shock" and "never thought to" and "I didn't know I had to." He also admitted that before Mr. Mullins asked him to drive the truck, he discussed with the mechanic the probability that Mr. Mullins would ask him to do so, and that he would have to drive it down the haulroad (Tr. 522-525). Mr. Conatser confirmed that he learned that telling Mr. Mullins about his fear of driving the rock truck was critical to his case after he talked with MSHA Inspector South, and that "he said that you had to tell them that you were in fear for your life" (Tr. 525). When asked whether he was aware of the fact that he was supposed to bring any safety concerns to the attention of his supervisors, Mr. Conatser responded "I guess so" (Tr. 527).

Complainant's Posthearing Depositions

Bill Meade, self-employed long-distance trucker, testified that he worked for No. 8 Ltd. from 1975 through September, 1986, as a mechanic foreman, and that from the Spring of 1983 until he quit in September, 1986, he was the foreman of the No. 8 Ltd. strip mining site. He confirmed that Mr. Conatser worked for him at the No. 8 Ltd. site for 6 to 7 years, and that he was his supervisor during that time. Mr. Conatser's job was an endloader operator, and he loaded some rock, but mostly coal. Mr. Meade stated that Mr. Conatser was one of his best endloader operators, and that he would hire him if he were in business.

Mr. Meade stated that he was an experienced rock truck driver, and has driven trucks on level and steep ground, and

in wet and dry conditions. He considers a rock truck to be the most dangerous piece of equipment on a strip job, and depending on the conditions under which it is operated, and if one is not trained in all of its controls, "it is very dangerous because it can get away from you at the bat of an eye" (Tr. 11). Mr. Meade described the controls of different models of rock trucks used at the No. 8 Ltd. site, including the braking systems, and the skills required to operate the trucks on hills, steep ground, and under wet conditions. He indicated that the vehicle manual that comes with the Model 777 or 773 rock truck states "do not operate this machine on steep ground during wet or slick conditions" (Tr. 12-18).

Mr. Meade confirmed that he has observed rock trucks sliding down hills in wet conditions, and that this is a common occurrence. He also confirmed that while he was employed at the No. 8 Ltd. site, he was aware of rock truck accidents. He stated that Cyrus Boggs, an experienced driver, put an 85-ton 777 truck into a ditch while driving down a slick road, and bent the fenders. Mr. Boggs also had another problem coming up a slick hill, but it did not damage the truck. Jerry Sturgill wrecked a 773-B truck, and it had to be pulled out with a dozer. Robert Yearly, an inexperienced driver, damaged a 777 truck engine when the truck got away from him on a steep hill, and Roy Porter, who was also inexperienced, recently damaged a 777 truck at Red Flame's operation when he backed it into the pit and damaged the bumper. Shawn Sturgill, an inexperienced driver, bent the drive shaft on a 773-B truck when it got away from him at the No. 8 Ltd. site and went into the hollow fill. Mr. Boggs was also involved in two or three incidents with a 3311 Terex, 85-ton truck, and a 40 ton 3307 Terex truck on slick ground (Tr. 19-27). Mr. Meade described some of the problems that a rock truck driver could encounter driving down hills in wet conditions (Tr. 27-30).

Mr. Meade confirmed that Mr. Conatser operated a 773-A rock truck at the No. 8 Ltd. strip site, and during the 6 years he was there he drove it five to six times in level areas during the spring of 1986. He did not drive the truck into the hollow fill. On one day, Mr. Conatser filled in for another driver, and he operated a 777 model while hauling rock over a flat and level area 300 to 500 feet wide, and over a distance of a few hundred yards. He hauled rock in and out of a level pit area (Tr. 30-35).

Mr. Meade was of the opinion that Mr. Conatser was not qualified to drive a rock truck up and down hills in wet conditions because he had no experience at all and was not capable

of hauling in any steep or dangerous territory (Tr. 39). Mr. Meade was not aware that Mr. Conatser ever drove a truck while stockpiling coal over 3 consecutive days, and the longest time that he ever drove a truck was for 8 hours when he filled in for the driver previously mentioned. Mr. Meade believed that Mr. Conatser probably drove a truck for a total of 3 full days during all of the time he was employed at the No. 8 Ltd. site (Tr. 40).

Mr. Meade believed that Mr. Conatser went to work at the Red Flame site in June, 1986, and he stated that the steepness of the hollow fill hill at Red Flame did not compare with the pits at No. 8 Ltd. where Mr. Conatser drove a truck. The hill at Red Flame was 18 degrees in some places, and the areas at No. 8 Ltd. were level, and at no time while he was there were the roads as steep as at Red Flame (Tr. 43).

Mr. Meade confirmed that when he was foreman at the No. 8 Ltd. site, it was his practice to use alternative level dumping sites and to never go down hills when it snowed or rained (Tr. 45). He stated that roads which are scraped after a 12-inch snow in 25-30 degree weather would be muddy after scraping, and that the snow would be melting all day and the roads would not freeze unless the temperature was "in the teens." He was of the opinion that the road would have to be cut 3 to 4 inches deep to reach dry ground, but that melting snow on the roads would prevent them from staying dry (Tr. 47).

Mr. Meade was of the opinion that anyone who had driven a rock truck only on level ground would have to be task trained if he were assigned to drive the truck up and down hills because "it's a complete different operation" (Tr. 48). He confirmed that while he was foreman at No. 8 Ltd., if anyone told him that they did not want to operate a piece of equipment, he would assign someone else in their place. If anyone told him that they were afraid, or could not operate the equipment, he would find someone else because he did not believe in assigning anyone work which they did not normally do on a daily basis because they would endanger themselves and others (Tr. 48-50). In his opinion, Mr. Conatser was a qualified endloader operator, and although he has seen him operate a dozer, he did not believe he was a qualified dozer operator (Tr. 51).

On cross-examination, Mr. Meade confirmed that as a supervisor and foreman, he has trained employees to operate a rock truck, and he explained how this was done. He also confirmed that he trained Mr. Conatser to drive a rock truck on level

ground during the spring of 1986, and this consisted of riding with him "a trip or two" (Tr. 55). Mr. Meade also confirmed that since Mr. Conatser was not hired as a rock truck driver, his training was limited to operating the truck on level ground, and he was not aware of any other training received by Mr. Conatser at No. 8 Ltd. prior to 1986 (Tr. 56).

Mr. Meade stated that during the time Mr. Conatser worked for him at No. 8 Ltd. from 1978 to 1985, he had no knowledge that he ever operated a rock truck, and he never assigned him to drive a truck. He also was unaware of Mr. Conatser ever offering to "swap out" with a rock truck driver, and he indicated that this was against company policy because it was dangerous and expensive (Tr. 60). In those instances where he assigned someone to work in someone's place during their absence, he always made sure that the replacement was certified or trained to do the work (Tr. 61).

Mr. Meade stated that Mr. Conatser was trained every year that he worked at No. 8 Ltd., but that his training was limited to his job as an endloader operator. He also stated that the miners were not trained to operate every piece of equipment, and switching jobs was not practiced, unless he personally selected someone to replace another and was assured that he was trained to do a particular job (Tr. 63-64). He never permitted any of his truck drivers to go up and down hills when it was wet or slick, and if it was snowing and 25 degrees or above (Tr. 71). Mr. Meade confirmed that while he was foreman at No. 8 Ltd., task training was only given to those men who were moved from one piece of equipment to another, and that initial training was given to those men hired to drive rock trucks (Tr. 77).

Mr. Meade confirmed that he observed Mr. Conatser drive a rock truck five to seven times during the 6-month period from January to June, 1986 (Tr. 72). Mr. Conatser's total hours of driving a rock truck would have amounted to 1 day for the two or three times he drove, and 6-1/2 hours when he replaced a driver, and 2 to 3 hours on the other occasions that he drove (Tr. 74-75). He estimated that Mr. Conatser's total rock truck driving experience was approximately 3 working days (Tr. 95), and he explained further as follows (Tr. 100):

Q. When you worked at the #8 strip site, did Chuck Conatser have a reputation as being a rock truck driver or a hauler operator?

A. Chuck Conatser was a loader man. That's all that Chuck - everybody that knows Chuck

Conatser knows that he's a loader man. And, I mean, it's a known fact that's all he does. Chuck started out as a loader man, and that's all he ever wanted to be. And to me that's the only reputation he had with me, was he was my loader man.

Q. Okay.

A. As a matter of fact, he resented everytime I would try to get him haul that stuff because he told me that he was afraid.

Q. The times that you assigned him to operate the hauler he didn't like it?

A. Yeah, he didn't really like it, no. But, you know, he would go along if it was in a safe condition.

Mr. Conatser denied that he had ever offered to swap out with Mr. Maynard Harris so that he could drive Mr. Harris' truck while Mr. Harris operated his loader. With regard to Mr. Meade's testimony that he operated a rock truck five to seven times at No. 8 Ltd. during the spring of 1986, Mr. Conatser stated that he only operated a rock truck on two occasions as he testified to at the hearing in this case.

Respondent's Posthearing Depositions

Cruce Davis testified as to certain task training certificates which he located for various equipment, and he was unable to locate any other certificates covering the period prior to his employment at No. 8 Ltd. in February, 1986. Approximately 24 to 28 equipment operators were employed at the No. 8 Ltd. site, and while he believed that no one would be allowed to operate equipment unless they were trained, he did not believe that any training certificates were filled out for these employees. In his opinion, the dozer would be the most dangerous piece of equipment to operate since it would be pushing materials over the hill at high elevations. The Caterpillar 777 rock trucks do not have right and left steering brakes because they were disconnected or not there when he came to the site, and the retarders would only be used when the trucks are driven on hills or under wet conditions.

Mr. Davis stated that the dozers and graders make the hills safe to operate on during wet or slick conditions, and sometimes the trucks are placed elsewhere to operate under

such conditions. On January 26, 1987, the roads were made safe for the trucks after they were scraped, and the trucks have enough braking power to operate on the hills. He had no knowledge that Cyrus Boggs, Jerry Sturgill, Robert Yeary, Roy Porter, Shawn Sturgill, or Terry Boggs ever wrecked a rock truck, and if they did, he would be aware of it. Although he has observed rock truck wheels sliding, he never saw them go "in the wrong direction," but given the right conditions such as an "awful slick" road, this was possible. Although there were no hollow fills at the No. 8 Ltd. site when he worked there during the spring of 1986, there were some "small hills" at a 9 to 10 percent grade coming out of the pit. He was not aware that Red Flame was in "any trouble" due to the steepness of the hill going to the hollow fill. He was unaware of any truck collisions at the sites.

Mr. Davis stated that while anyone can operate a rock truck on level ground, this is not true on hills, and one "has to be used to it." He would not put just anyone on a rock truck on level ground, and just "turn him loose," but that if one "gets used to the truck controls" on level ground, after 15 to 20 minutes, he should be able to drive the truck downhill. Task training is given to those who are newly hired, those who have never operated a piece of equipment before, and those who go from one piece of equipment to another. He knows of no one who has operated a rock truck on level ground being task trained to operate a truck on hills. He was aware of some employees refusing to operate a dozer after being asked, and after stating that they were unable to operate it. However, those who were known to be able to operate equipment have never refused, and if anyone expressed any fear in operating equipment, they would not be assigned to do so. Mr. Meade threatened him over some differences between them, and he has also threatened to shut the Red Flame job down several times. These threats were made over the C.B. radio, and Mr. Davis recognized Mr. Meade's voice. Mr. Davis conceded that rock trucks could have wrecked at the No. 8 Ltd. site before he worked there and that he may not have heard about it.

Cyrus Boggs denied ever wrecking a rock truck, but recalled that he may have slid on the wrong side of the road and "put one into a ditch on the level," but not on a hill. One can slide backwards on slick road going uphill until the road is scraped, and he regularly operated rock trucks at No. 8 Ltd. up and down hills when it was raining, wet, or snowing, and "you would have to try."

Shawn Sturgill denied that he ever wrecked a rock truck at No. 8 Ltd. or Red Flame, but did get stuck in the mud and fill one time, but did not damage the truck and was in no danger. He has operated trucks at No. 8 Ltd. or Red Flame when the roads were wet or when it snowed, but the roads were scraped or cut.

Terry Boggs denied that he had ever wrecked a rock truck or been hurt in one. He has had mechanical and transmission problems. The roads are scraped or rock is dispersed on the road in order to dry them out. He has operated trucks on hills when they are wet, and in the rain or snow, but the roads are always "fixed" before going up hills. On one occasion, he rolled backwards on a hill about 50 feet into "a little valley" when the truck "kicked out of gear" after he experienced transmission problems, and the truck gears have "kicked out" many times. He knew of one driver at No. 8 Ltd. who mired his truck into the spoil while turning and dumping, and he had to be pulled out with a dozer. Shawn Sturgill also got stuck in the mud with a truck while backing out of a dump.

Roy Porter denied that he ever wrecked a rock truck at No. 8 Ltd. or at Red Flame, but did recall that a wheel fell over once while he was turning on top of a shot. Dozers are used to drag the roads, and he has driven trucks in snow and rain. He has a total of 3 weeks of experience at driving a rock truck, and stated that "I can drive it." He is sometimes used to drive a truck when substituting for someone who is sick.

Robert Yeary confirmed that on one occasion while driving down the hollow fill road at Red Flame, a wheel fell off his rock truck and the front-end was damaged and parts had to be replaced. The incident was unexplained, and he was driving at normal speed in dry weather, and he was not hurt. He is unaware of any truck accidents while working at Red Flame. He has a year of truck driving experience, and drove one on one night shift at No. 8 Ltd., but Mr. Meade never observed him driving.

Maynard Harris testified that during July, 1986, at Red Flame, he was operating an old rock truck which was not air conditioned, and Mr. Conatser was operating an air conditioned loader. Mr. Conatser called him over the radio and offered to swap jobs with him. Mr. Harris was operating the truck "out of the pit down into the hollow fill," and the road was steep. The first hill would have been as steep as it was on January 26, 1987, and had the swap occurred, Mr. Conatser would have driven on that road. However, they did not swap.

Findings and Conclusions

In this case, Mr. Conatser's employment with the respondent terminated on the morning of January 26, 1987, after he refused his foreman's (Mullins) request to operate a rock truck. Although the respondent initially took the position that Mr. Conatser quit his job, it subsequently abandoned this position and it is clear from the testimony of Cruce Davis, and Zachary Mullins' own admissions that he discharged Mr. Conatser for refusing his request to drive the rock truck.

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 of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (October 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 (April 1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (August 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 a 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. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corporation, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Complainant's Termination

It seems clear to me from the record in this case that the complainant was discharged from his job by foreman Mullins on January 26, 1987, for refusing the request by Mr. Mullins that he drive a rock truck, and Mr. Mullins admitted that this was

the case. Consequently, the respondent's initial assertion that Mr. Conatser quit his job is rejected, and I conclude and find that he was in fact discharged.

Complainant's Work Refusal

A miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that his continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469, 472-73 (11th Cir. 1985). However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous conditions exists. Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034, 1038-40 (July 1986); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Mr. Conatser asserts that his refusal to drive the rock truck in question was based on his fear for his safety because he had not previously driven a rock truck on hills or in wet conditions, and he did not feel that he was qualified to drive the truck on the Red Flame haul road to its hollow fill. Mr. Conatser further asserts that due to his extremely limited experience driving rock trucks, which was confined to level terrain in dry conditions, his safety concerns on January 26, 1987, were clearly reasonable, and that his refusal to drive the truck was made in good faith.

The hollow fill road over which Mr. Conatser was expected to drive was described as "steep" by several witnesses. The evidence establishes that the roadway was approximately 40 feet wide, 100 to 600 feet long, and that trucks could pass each other on the roadway. The average truck speed was estimated at 10 miles per hour, and while there were incidents of mechanical break-downs and trucks being bogged down, there is no probative evidence of any truck collision accidents or injuries. The roadway was bermed, and the truck that Mr. Conatser was asked to drive was in good operating condition.

The evidence establishes that the respondent generally made it a practice to scrape and clear the roadways when it

snowed, "rocked" them to prevent sliding under wet and rainy conditions, and watered them down under dry conditions to keep the dust down. The evidence also establishes that foreman Mullins and superintendent Davis consistently addressed the safety concerns of drivers with respect to road conditions, and took appropriate action to insure that the roads were safe before permitting any trucks to operate over the roads. Drivers were instructed not to operate their equipment until the roads were made safe.

With regard to the road conditions on the morning of January 26, 1987, while it had snowed and there was 10-12 inches of snow on the ground, the evidence establishes that the hollow fill road in question was bermed and cleared of snow before any trucks were permitted to operate. However, truck driver Cyrus Boggs, who drove a truck on the hill that day, testified that the road was wet after it was scraped, and that it was not unusual for a truck to slide on a wet road surface. Dozer operator Lloyd Day, who worked on the road on the day in question, described the road as "pretty rough" before it was scraped, and he confirmed that it was still wet after the snow was scraped off. Although he believed that the road was safe after it was scraped, he also believed that trucks will slide on a hill regardless of whether the conditions are wet or dry. Truck driver Robert Boggs testified that once snow is removed from a roadway, the roadway is still wet and that "it ain't no more than water in the road" (Tr. 353). Former mine foreman Meade testified that in 25 to 30 degree weather, once snow is removed from a roadway, the roadway remains "wet and muddy" and that "it's gonna lay there and melt and run all day long" (Deposition pgs. 45-47).

Roy Porter confirmed that he had previously driven a rock truck over the roadway in question under rainy and wet conditions, and that the truck would slide. Shawn Sturgill testified that he has observed rock trucks sliding on the roadway, and that while operating trucks on that very same roadway, he has experienced a slide while encountering small patches of ice under wet conditions. Foreman Mullins confirmed that he has observed trucks sliding on the roadway in question when the road was slick, and he agreed that a sliding truck indicates that its not braking properly. Rock truck driver Robert Yeary confirmed that he has observed trucks sliding on the road in question and that this would occur when the road was wet or when the driver applied the brakes. Mr. Conatser testified that prior to his discharge, he observed rock trucks operating on the hill road on a daily basis, and that when it snowed or rained, or when the road froze and thawed, it was impossible to take a trip without sliding.

Although one can conclude that the roadway in question was made reasonably safe after the snow was removed, and some drivers experienced no difficulty in driving on the roadway, I conclude and find from the credible testimony of the aforementioned witnesses that the roadway was wet, and probably muddy, after the snow was removed, and that given these conditions, it presented a possible sliding and slipping hazards for the trucks which were scheduled to operate on the morning of January 26, 1987. As a matter of fact, foreman Mullins stated that the roadway was not used at all that day because "the coal trucks couldn't get to it" and "we hauled to the level" (Tr. 437).

With regard to Mr. Conatser's ability to drive a rock truck, a distinction must be made as to whether he is totally incapable of driving a truck, or whether, as he contends, he lacks the necessary experience and training to drive it under inclement weather conditions on a steep inclined road. On the basis of the evidence presented in this case, I conclude and find that Mr. Conatser can basically operate and drive a rock truck, and his denials to the contrary are rejected. The evidence establishes that prior to his discharge, Mr. Conatser drove a rock truck at the No. 8 Ltd. site, and he admitted that he knows how to operate a rock truck, on level ground, but denied that he knew how to "gear it down" on a hill (Tr. 113-114; 125-126).

With regard to Mr. Conatser's actual rock truck driving experience, his former supervisor at No. 8 Ltd., Bill Meade, testified that during the 6 or 7 years that Mr. Conatser was employed at that site, when the occasion arose for Mr. Conatser to drive a rock truck, he always drove it on level ground in an environment that posed no hazard to him. Cyrus Boggs confirmed that while he observed Mr. Conatser drive a truck while stockpiling coal at the No. 8 Ltd. site 3 years ago, he had no recollection of the particular details, and he did not consider Mr. Conatser to be a truck driver. Shawn Sturgill testified that when he observed Mr. Conatser driving a rock truck at No. 8 Ltd., he always drove it on level ground, and Mr. Sturgill was not certain as to the weather conditions. Tommy Dotson testified that the only time he observed Mr. Conatser in a rock truck was one time when he backed it up on the level Red Flame parking lot for a distance of 30 to 40 feet. Robert T. Boggs confirmed that when he observed Mr. Conatser driving a truck at the No. 8 Ltd. site 2 to 4 years ago, he was hauling coal from the pit up and down hills, but under dry road conditions. Superintendent Davis confirmed that he never observed Mr. Conatser drive a rock truck at Red Flame, and while he

observed him driving a truck on three occasions while at the No. 8 Ltd. site during March, 1986, the weather was clear and dry, and the road was not completely level, and included "a dip," "a little hill," and a "steep grade on the bench."

Mr. Mullins' testimony that he had previously observed Mr. Conatser driving a rock truck on the Red Flame hill in question during the summer of 1986 prior to his discharge is rejected as less than credible. I have carefully reviewed Mr. Mullins' testimony in this regard, and find that his purported observation of Mr. Conatser was based on his assumption that Mr. Conatser had swapped out with rock truck driver Maynard Harris. During the hearing, Mr. Harris denied under oath that he had ever swapped out with Mr. Conatser, and he said nothing about any offer by Mr. Conatser to drive his truck. Later, during his posthearing deposition, Mr. Harris stated that Mr. Conatser offered to swap out with him, but given the lack of time, the swap never occurred. Weighed against the credible testimony of all of the other witnesses who testified that they never observed Mr. Conatser drive a rock truck at Red Flame, and were unaware of any offers on his part to swap out with other equipment operators, I simply do not believe Mr. Harris' testimony concerning the purported offer by Mr. Conatser. As for Mr. Mullins, I take note of the fact that in his pretrial deposition, he made a statement that Mr. Conatser had switched out with Mr. Harris and drove the rock truck for one day, making three or four trips down the hill in question (Pgs. 34-35). However, at the hearing, Mr. Mullins completely contradicted himself and testified that he only "thought" and "assumed" that Mr. Conatser had switched with Mr. Harris (Tr. 428-429).

While it is true that several witnesses were of the opinion that Mr. Conatser's prior driving experienced qualified him to drive a rock truck, some of these same witnesses expressed reservations over an inexperienced driver operating a rock truck on a hill under wet road conditions. Drivers Cyrus Boggs and Shawn Sturgill testified that an inexperienced driver would not know how to handle a truck in a slide and would have problems, and Mr. Sturgill believed that it was unsafe for such a driver to operate a truck on a slick hill. Mr. Conatser's former foreman at No. 8 Ltd., Bill Meade, opined that Mr. Conatser was not qualified to operate a rock truck on a hill on wet roads because of his total lack of experience in driving under such conditions. Mr. Meade stated that driving on hills "is a completely different operation" from driving on the level, and that a driver whose experience was limited to driving on level ground would need to be task trained to drive on hills.

Drivers Robert Yeary, Cyrus Boggs, and Russell Akers confirmed that there were differences in driving on hills and on the level, and Mr. Akers confirmed that if he were an inexperienced driver, he would be afraid to drive on a wet hill road because it would be "scary." Superintendent Davis agreed that while anyone could drive a rock truck on level ground, this would not be true on hills, and that a driver would have to get used to driving on hills if he had not done so in the past. Cyrus Boggs believed that some training was required in order to learn how to drive a rock truck on a hill. Robert T. Boggs opined that wet roads are more hazardous than dry ones, and that he has observed experienced drivers sliding on hills.

The evidence in this case clearly establishes that Mr. Conatser's principal job with the respondent was that of an endloader operator, and except for the possibility that he may have on one occasion backed up a rock truck for a very short distance on the parking lot, there is no credible evidence that he otherwise drove a rock truck during the 7 or 8 months that he worked at the Red Flame site. Mr. Conatser's principal job at the No. 8 Ltd. site during his 7 years of employment was other than that of a truck driver, and the credible evidence establishes that at best, Mr. Conatser drove a rock truck for at least 3 consecutive days at the No. 8 Ltd. site, with three or four additional sporadic days of driving at that location. The evidence also establishes that Mr. Conatser's rather limited truck driving experience was confined to driving on level ground under clear and dry weather conditions, and that he has had no experience at driving on wet or steep roadways, and never received any truck driving training during his entire employment tenure with Red Flame and No. 8 Ltd., except for riding with Mr. Meade for one or two trips.

Given all of the aforementioned circumstances, including the fact that Mr. Conatser was an inexperienced rock truck driver, had never driven a rock truck on a wet hill or roadway, had never been trained to operate a truck under those conditions, and the potentially hazardous nature of the wet roadway over which Mr. Conatser was expected to drive at the time he was requested to drive the rock truck in question, I conclude and find that his refusal to drive the truck was reasonable.

The respondent has suggested that Mr. Conatser's refusal to drive the rock truck was based on his desire to operate only an endloader, and his belief that foreman Mullins should have assigned other available drivers to drive the truck in question. In support of this conclusion, respondent relies on a statement given by Mr. Conatser to the State unemployment office in which

he indicated that another available driver should have been assigned to drive the rock truck in question.

Apart from the statement relied on by the respondent, the record is devoid of any other evidence that Mr. Conatser has ever taken the position that Mr. Mullins should have assigned someone else to drive the truck. Mr. Conatser made no such assertion in his initial complaint to MSHA, and the respondent has conceded that Mr. Conatser had never previously declined to operate any equipment other than his loader when asked to do so. Further, at the time of his work refusal, Mr. Conatser said nothing which would have lead Mr. Mullins to believe that his refusal was based on his desire to operate only an endloader, or that Mr. Mullins should have selected someone else for this job. The same is true at the time Mr. Conatser met with Mr. Burke and Mr. Davis after his discharge. Indeed, during his entire working career at No. 8 Ltd. and Red Flame, a period in excess of 8 years, Mr. Conatser had never taken the position that he "was only an endloader operator" and would not operate any other equipment. The record here establishes that Mr. Conatser has operated a dozer, a scraper, and a rock truck, in addition to his usual job as an endloader, and there is no evidence to show that he did so other than willingly.

Although Mr. Conatser's statement to the state unemployment office raises an inference that his refusal to drive the truck was made for reasons other than his safety concerns, and is therefore "tainted," I cannot conclude that this isolated statement, made after the work refusal, is sufficiently probative, standing alone, to support a conclusion that Mr. Conatser's work refusal on January 26, 1987, was made in bad faith. Accordingly, respondent's argument in this regard is rejected.

Complainant's Safety Communication to the Respondent

The crucial and difficult determinative issue in this case is whether or not the complainant communicated his safety concerns to the respondent prior to or reasonably soon after his work refusal, and if not, whether unusual circumstances excused his failure to do so. In Secretary/Dunmire and Estle v. Northern Coal Company, supra, at 4 FMSHRC 133, the Commission formulated the rule as follows:

Where reasonably possible, a miner refusing to work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. 'Reasonably

possibility' may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, 'ordinarily' in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

In Secretary of Labor ex rel. Paul Sedgmer et al., v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986), the Commission affirmed a Judge's decision dismissing a discrimination complaint brought by several equipment operators who were suspended for refusing to operate heavy mobile equipment at speeds which they considered to be unsafe. With regard to the failure of the miners to communicate their safety concerns to mine management, the Commission stated as follows at 8 FMSHRC 309: "* * * While such communications are not only expected, in ordinary course, in work refusal situations, their absence also lends weight to the conclusion that the disagreement here as to the operating speed did not have a sound basis in safety concerns."

In Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982), the Court affirmed the dismissal of a discrimination complaint filed by a section foreman who was discharged after refusing to start up a longwall miner on the grounds that he was incapable of operating it; that he was unfamiliar with the control panel; and that in order to start the machine, it would have been necessary to short out its methane detector. Although the foreman felt that this would be in violation of safety laws, he did not immediately communicate his safety concerns to mine management, but waited until later in his work shift to do so, and only after the mine manager telephoned him. The Court noted as follows at 687 F.2d 196:

The specific requirement of promptly reporting the hazard to the employer which the Commission has read into the Act is not only a natural corollary to the general requirement that the work stoppage be reasonable but also a device well suited to promoting the Act's fundamental objective of promoting mine safety and health. It gives the worker an incentive to bring a safety hazard to his employer's attention, for

by doing so he gains the protection of the Act against retaliation (provided that his belief that there is a hazard is reasonable). The requirement also serves an evidentiary purpose: it helps the Commission distinguish between genuine and spurious invocations of the Act's protections. The worker who does not promptly report an alleged hazard to his employer is less likely to be sincere in his belief that there is a hazard than the worker who does. * * *

In Simpson v. Kenta Energy, Inc., supra, Judge Broderick upheld the discrimination complaint of a miner who left his job out of concern over the lack of a foreman on the job and the failure to conduct preshift and onshift examinations. With regard to the safety communication issue, although Judge Broderick found that the miner had not communicated these safety concerns to his foreman (Jackson), he nonetheless concluded that the communication was not necessary because the foreman was deemed to have known about these conditions and the communication would have been futile. Judge Broderick stated "I do not consider that it is necessary in order to invoke the protection of Section 105(c), that it be shown that the operator was specifically aware of the reason for a miner's work refusal, if the operator was aware of the hazardous conditions which prompted the refusal . . ." 6 FMSHRC at 1462.

The Commission reversed, and while it agreed that Simpson had valid and reasonable safety concerns in leaving his job, it found that Simpson had not communicated his safety concerns to his foreman, thus negating the foreman's opportunity to address them. In this regard, the Commission stated as follows at 8 FMSHRC 1040: "Even assuming, as the Judge did, that Jackson was aware of the absence of a foreman and the failure to conduct the required pre-shift and on-shift examinations, we cannot presume that Jackson would have taken no action had Simpson communicated his concerns to Jackson." (Emphasis added.)

Although the Court of Appeals for the D.C. Circuit reversed and remanded the Simpson case to the Commission for further consideration of the issue of whether Simpson should be excused from meeting the communication requirement because notice would have been futile, it nonetheless accepted the Commission's application of the communication requirement set forth in the Northern Coal and Miller cases, supra. Simpson

v. FMSHRC, Court of Appeals, D.C. Circuit, Case No. 86-1441, Slip opinion pgs. 12-13, decided March 18, 1988.

In Dillard Smith v. Reco, Inc., supra, an employee of a battery servicing company who had received no underground mine training was discharged when he refused to carry out a work assignment at an underground mine. The employee was asked to go on a service call by his supervisor, and after ascertaining that the call was at an underground mine, the employee told his supervisor that "he was not going." The employee left the premises and neither he or his supervisor said anything further. Later that same day, the discharged employee returned to the office to inquire about his pay check, and he informed a secretary to advise the president of the company that he had left because he did not want to go underground because his training had expired. Judge Broderick found that the employee's refusal to go underground because of his lack of training was justified and reasonable and therefore protected activity under the Act. However, he dismissed the discrimination complaint on the ground that the discharged employee had failed to communicate his lack of training as grounds for refusing to go underground. 8 FMSHRC 1597. In affirming Judge Broderick's decision, the Commission stated as follows at 9 FMSHRC 995-996:

* * * * *

Among other salutary purposes, the communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work.

* * * * *

Dillard was asked several times at the hearing why he had not communicated his asserted training concern, but provided no answer other than that Williams had failed to ask him his reasons for refusing his work assignment. The responsibility for the communication of a belief in a hazard that underlies a work refusal rests with the miner.

* * * * *

Thus, Dillard failed to make the necessary communication of a belief in a hazard and, accordingly, his work refusal was not protected

under the Mine Act. Because Dillard's work refusal was not protected, his termination by Reco because of that refusal did not violate the Act.

* * * * *

To the extent that the judge held that Dillard had engaged in a protected work refusal apart from his failure of communication, the judge erred. Proper communication of a perceived hazard is an integral component of a protected work refusal in the first instance rather than a wholly separate requirement. (Emphasis added.)

Mr. Conatser's father testified that his son told him that he had informed Mr. Mullins that he lacked the experience to drive a rock truck, and was afraid to drive it because he had never driven one under "bad snow and weather." However, complainant Conatser contradicted this testimony when he subsequently testified under oath at the hearing that the only statement he made to Mr. Mullins at the time of his work refusal was "I couldn't drive a rock truck." Mr. Conatser admitted that he said nothing to Mr. Mullins about the weather, or the steepness of the road in question; did not use the words "I don't know how to drive a truck;" requested no task training; mentioned nothing about putting someone else in the truck with him; and said nothing about his inability to operate the truck under the then prevailing conditions. Indeed, the record clearly establishes that at no time during his conversation with Mr. Mullins, did Mr. Conatser say anything about any safety concerns.

The critical part of the conversation which took place between Mr. Conatser and Mr. Mullins at the time of the work refusal is in dispute. There were no witnesses to the conversation. Mr. Mullins claimed that Mr. Conatser simply stated "no, no" when he asked him to drive the rock truck, and Mr. Conatser denies this and asserts that he informed Mr. Mullins that "I can't drive a rock truck." Superintendent Davis, who arrived at the scene shortly after Mr. Conatser left the mine, testified consistently by deposition and at the hearing that Mr. Mullins told him that Mr. Conatser had told him that he could not drive a rock truck. I find Mr. Davis to be a credible and believable witnesses, and his testimony supports Mr. Conatser's version of the conversation in question. Accordingly, while I conclude and find that Mr. Conatser informed Mr. Mullins that he could not drive a

rock truck at the time of his work refusal, I also find that he did not elaborate further or explain to Mr. Mullins the reasons for his purported inability to drive the truck.

Complainant's suggestion that the words "I can't drive a rock truck" were clearly sufficient to put Mr. Mullins on notice that he was raising a safety concern is rejected. When asked to explain why he refused to operate the rock truck in question, Mr. Conatser gave several reasons beyond a simple "I can't." He explained that his refusal to drive was based on his belief that (1) he was not qualified to drive, (2) he had never been trained to drive on hills or under wet or slick conditions; (3) he thought it would be hazardous to his health; and (4) he thought that there was a chance that he would kill himself. He further explained that he had reservations about driving the rock truck on the hill in question because he had observed trucks sliding on the hill in the past, he was generally afraid of the trucks because of his asserted lack of ability to control them in a slide, and while he drove trucks in the past at the No. 8 Ltd. site, he never drove one down a hill as steep as the one at Red Flame. Yet, none of these reasons or safety concerns were communicated to Mr. Mullins at the time of the work refusal, and I decline to read them into Mr. Conatser's brief statement to Mr. Mullins.

Complainant contends that foreman Mullins clearly understood the plain meaning of his words "I can't drive a rock truck," but failed to address his safety concerns. Conceding that he did not advise Mr. Mullins that it would be unsafe for him to drive the truck because of his lack of training, complainant nonetheless maintains that his statement to Mr. Mullins was sufficiently clear to put him on notice that he was raising a safety concern, and that the testimony of Mr. Mullins and Mr. Davis clearly establishes that Mr. Mullins understood that the complainant was making a safety complaint. In this regard, complainant points to the testimony of Mr. Mullins that the phrase "I can't drive a rock truck" connotes lack of ability or knowledge, and Mr. Davis' testimony that in the event someone told him he couldn't drive a truck this would mean "that I would train him." Complainant concludes that this testimony of Mr. Mullins and Mr. Davis clearly establishes that a safety issue is raised when a miner says "I can't drive a rock truck."

Complainant's argument is rejected. As stated earlier, Mr. Conatser's claim that he could not drive a truck was not true. His claim is that he lacked the experience to drive a truck on a hill under wet road conditions, and it is clear from the record that this safety concern on his part was in no

way communicated to Mr. Mullins at the time of the work refusal. Although Mr. Conatser subsequently stated in a February 2, 1987, statement to MSHA (exhibit C-3), that at the time he refused to operate the truck he "was thinking" and "implying" that he feared for his safety because of his lack of rock truck driving experience, I find these statements to be self-serving, and I have given them no weight. It seems obvious to me that when this statement was given to MSHA, Mr. Conatser had the benefit of advice from his uncle, as well as the MSHA investigator who interviewed him, and he would naturally attempt to put his case in the most favorable light to support his claim of discrimination. As a matter of fact, Mr. Conatser admitted that he learned that communicating any safety concerns to management was a critical element of his case when he spoke with the MSHA inspector to whom he made his complaint after his discharge. When asked during the hearing whether he was aware of the fact that he had to bring safety concerns to the attention of his supervisors, Mr. Conatser responded "I guess so."

Foreman Mullins testified that had Mr. Conatser told him that he feared for his life or safety, or given him a reason for not driving the rock truck, he would not have required him to do so. Superintendent Davis testified that Mr. Mullins would not endanger anyone's life, and if he did, he would fire him. The miners who testified in this case corroborated the fact that Mr. Davis and Mr. Mullins were concerned for their safety and always addressed their concerns over the road conditions. Mr. Davis further confirmed that had Mr. Conatser informed Mr. Mullins that he was afraid to drive the truck, Mr. Mullins would have assigned someone to go with him, or assigned another driver. Former foreman Meade also confirmed that if anyone expressed fear or reluctance in operating a piece of equipment, he would either assign them to other work, or not require them to operate the equipment. In view of this testimony, which I find credible, it would appear to me that management at Red Flame and No. 8 Ltd. took appropriate action to address communicated safety concerns. However, in Mr. Conatser's case, since he did not communicate his safety concerns to his foreman at the time of his work refusal, the foreman had no opportunity to address them and take corrective action.

Mr. Conatser claimed that he was "in shock" and had no opportunity to communicate to Mr. Mullins the reasons for his refusal to operate the truck. I find this difficult to believe. Having observed Mr. Conatser during his testimony, and having review his testimony during his depositions, he does not impress me as a timid individual who would back away

from a confrontation with a supervisor. Mr. Conatser impressed me as a rather combative individual who is quick to take a position and not back off. I note that Mr. Conatser's work refusal on January 26, 1987, was not the first time that he has experienced a job separation situation or encounter with a supervisor. The record reflects that he was discharged from a mining job in 1978, after being accused of "doing too much talking and not enough working" (Tr. 92). He also walked off his job at No. 8 Ltd. at one time after he and Mr. Meade engaged in a confrontation over his work and Mr. Conatser got mad and left his job (Tr. 93).

The evidence establishes that after Mr. Conatser refused to drive the truck, he engaged Mr. Mullins in further conversation and accused him of "forcing me to go to the house." Mr. Conatser also had the presence of mind to request permission to retrieve his safety shoes from the loader machine before leaving. Further, Mr. Conatser confirmed that prior to his work refusal, he had surmised from previous conversation with Mr. Mullins over the CB radio, and with the mechanic who was present, that Mr. Mullins would more than likely assign him to drive the rock truck (Tr. 523-524). Mr. Conatser conceded that Mr. Mullins did not prevent him from speaking, and that he had spoken to Mullins on many occasions in the past. Given all of these circumstances, I conclude that Mr. Conatser had an ample opportunity to communicate his safety concerns to Mr. Mullins, and I find no mitigating reasons or extenuating circumstances to excuse Mr. Conatser's failure to do so.

In view of the foregoing, I conclude and find that Mr. Conatser failed to make the necessary communication of a belief of a safety hazard with respect to his refusal to drive the rock truck in question. Accordingly, his work refusal was not protected under the Act. Since his work refusal was not protected, I further conclude and find that Mr. Conatser's discharge by the respondent because of that work refusal did not violate the Act.

Refusal to Rehire

During the course of the hearing, complainant's counsel suggested that the failure by the respondent to reinstate Mr. Conatser after he met with Mr. Burke and Mr. Davis subsequent to his discharge constituted a second violation of section 105(c) of the Act. However, counsel makes no mention of this issue in his posthearing brief, and no further arguments have been forthcoming by the complainant in this regard. I find no probative credible basis for concluding that the

respondent's failure to reinstate Mr. Conatser after his discharge was in violation of the Act. Accordingly, the complainant's claim to the contrary is rejected.

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 violation of section 105(c) of the Act. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.


George A. Koutras
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 87-186
Petitioner	:	A. C. No. 15-02218-03519
v.	:	
	:	No. 1 Mine
FIFE COAL COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

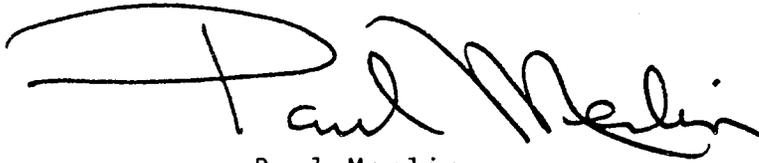
Before: Judge Merlin

The parties have filed a motion to approve settlements of the five violations involved in this case. The total of the originally proposed penalties were \$960. The total of the recommended settlements are \$720.

The parties motion discusses the violations in lights of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The citations were issued for violations of 30 C.F.R. § 75.1710 because canopies were not installed on five pieces of equipment. The parties represent that a reduction from the original assessments is warranted because due to the nature of the seam (rolling floor and roof) the coal height varied from 40 to 60 inches. Canopies are required by regulation in 60-inch coal, but, are not required in 40-inch coal. Therefore, compliance with the regulation would have been difficult given the nature of the seam. Furthermore, the operator, who is now out of business, is small and is having serious financial problems. I accept the parties representations and approve the recommended settlements.

For the foregoing reasons, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY \$720 in installments according to the following schedule: One hundred and forty-four dollars within 30 days of this decision; one hundred and forty-four dollars within 60 days of this decision; one

hundred and forty-four dollars within 90 days of this decision; one hundred and forty-four dollars within 120 days of this decision; and finally, \$144 within 150 days of this decision.

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

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 29 1988

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 87-205
Petitioner : A. C. No. 15-14587-03528
v. :
STERLING ENERGY, INCORPORATED, : Sterling No. 5 Mine
Respondent :

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Kenneth R. Krushenski, Esq., Rogers, Hurst &
Krushenski, LaFollette, Tennessee for Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) filed, on August 14, 1987, a petition for assessment of civil penalty for an alleged violation by Respondent of 30 C.F.R. § 75.319 on November 3, 1986. Pursuant to notice the case was heard in Knoxville, Tennessee, on October 20, 1987. J. Preston Payne, Sr. testified for Petitioner and Ralph Ball testified for Respondent.

Petitioner filed its Post Trial Memorandum on March 2, 1988, and the Respondent filed its Hearing Brief and Proposed Findings of Fact and Conclusions on February 1, 1988.

Issues

The issues are whether the Respondent violated 30 C.F.R. § 75.319, and if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether the alleged violation was the result of the Respondent's unwarrantable failure. If section 75.319, supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (the "Act").

Citation

Order No. 2801008, issued on November 3, 1986, alleges a significant and substantial violation in that:

Two 101 Jeffery continuous miners, 2-506 Bridge carriers and a shuttle car were being used on the same split of air, one miner and two bridge carriers were being used on the 001 section and one miner and shuttle car were being used three crosscuts from the face on the return side.

Regulations

30 C.F.R. § 75.319 provides as follows:

Each mechanized mining section shall be ventilated with a separate split of intake air directed by overcasts, undercasts, or the equivalent, except an extension of time, not in excess of 9 months, may be permitted by the Secretary, under such conditions as he may prescribe, whenever he determines that this subsection cannot be complied with on March 30, 1970.

30 C.F.R. § 75.319-1 provides as follows:

The term "mechanized mining section" means an area of a mine in which coal is mined with one set of production equipment, characterized in a conventional mining section by a single loading machine, or in a continuous mining section by a single continuous mining machine, and which is comprised of a number of contiguous working places. Specialized mining sections, such as longwall mining sections, which utilize equipment other than specified in this section, may, if approved by the Coal Mine Safety District Manager, be ventilated by a single split of air.

Findings of Fact and Conclusions of Law

I

On November 3, 1986, the 001 section of Respondent's Sterling No. 5 Mine was ventilated with only one split of air. One intake air entry ventilated the face and air from the face was vented outby in a return air entry. The face area, which was stipulated to be a working section, contained one continuous miner, two bridge carriers, two roof bolters, and one scoop. In an area located three crosscuts outby the face there was located a continuous miner, a roof bolter, and a shuttle car. It was stipulated at the hearing that there was no power source on this

equipment and no power was hooked up to this equipment. However, in an area three entries to the right of this equipment and in the second crosscut outby the face there was located a power center, and it was stipulated at the hearing that the AC outlet was energized. I find, based on the uncontradicted testimony of J. Preston Payne, Sr., a MSHA Inspector, that a power cable was in place and it would have taken approximately 15 minutes for one worker to get power to the equipment located in the area three crosscuts outby the face.

Payne testified, in essence, that when he inspected the 001 section on November 3, 1986, he issued an order citing a violation of 30 C.F.R. § 75.319. Section 75.319, supra, provides that each "mechanized mining section" shall be ventilated with separate split of intake air. Section 75.319-1, supra, provides that "The term 'mechanized mining section' means an area of a mine in which coal is mined with one set of production equipment" This section further provides that the set of production equipment in a continuous mining section is characterized by ". . . a single continuous mining machine and which is comprised of a number of contiguous working places."

I find that the evidence clearly establishes that the 001 section, on the date in question, was ventilated with only one split of intake air, but had one set of production equipment at the face area and another separate set of production equipment in an area three crosscut outby the face. It is Respondent's position, in essence, that section 75.319, supra, is violated only if there are two sets of mechanized mining section actively operating and engaged in the mining of coal at the same time off the same split of intake air. In this connection, Respondent relies upon the testimony of its President, Ralph Ball, who indicated that the equipment located in the area three crosscut outby the face was "parked up" (Tr. 45, 64), and that coal from that area had been removed before the 001 section was moved in. He further indicated, in essence, that the equipment located three crosscuts outby the face was never run the same time that the equipment at the face was run. In this connection, Payne had indicated that when he made his inspection on November 3, the equipment located in the area three crosscuts outby the face was not working.

I find the interpretation of section 75.319, supra, and 75.319-1, supra, urged by the Respondent to be unduly restrictive. The area three crosscuts outby the face contained a set of production equipment and some coal had already been removed from that area. Accordingly, I find that area to be denominated a mechanized mining section. In reaching this conclusion, I note that although the equipment there was not energized, there was a cable present, which could have been hooked up to the nearby power center thus energizing the equipment.

II

The order in question alleges that the violation of section 75.319, supra, herein was "significant and substantial." However, Petitioner has failed to adduce proof on this issue. I therefore find that Petitioner has failed in its burden and that the violation herein can not be considered to be significant and substantial.

III

Payne testified that in his opinion the violation herein was caused by Respondent's unwarrantable failure, in that the equipment in the area three crosscuts outby the face could have been used any time and that management knew its location. In order to sustain Petitioner's position I must find that the violation herein resulted from Respondent's aggravated conduct which constitutes more than ordinary negligence (Emery Mining Corporation, 9 FMSHRC 1997, (December 1987)). Ball testified that, in essence, it was his understanding that to be in violation of section 75.319, supra, coal must be produced in two different areas in the same split of air, and that it is not a violation to have two sets of equipment as long as they are not being operated at the same time. I find the testimony of Ball credible in this regard and evidencing no bad faith on his part. Accordingly, I conclude that the violation herein was not the result of any aggravated conduct on the part of Respondent, as it resulted from his good faith interpretation of the controlling regulation. Hence, I conclude that the violation was not caused by Respondent's unwarrantable failure.

IV

In assessing a violation herein, I note the history of Respondent's violations as stipulated to at the hearing by the Parties. Further, inasmuch as the evidence fails to establish that the two mining sections, one at the face and the other three crosscuts out by the face, were ever engaged in active mining of coal at the same time, I conclude that the gravity of the violation herein was low. Further, inasmuch as the violation herein was as a result of Respondent's interpretation of the controlling regulation, and there was no evidence that this interpretation was made in bad faith, I conclude that negligence herein was low. Accordingly, taking these factors into account, as well as the other factors in section 110(i) of the Federal Mine Safety and Health Act of 1977, I conclude that a civil penalty herein of \$50 is reasonable.

ORDER

It is ORDERED that Order No. 2801008 be modified to a Section 104(a) citation.

It is further ORDERED that Respondent pay the sum of \$50, within 30 days of this decision, as a civil penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

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Kenneth R. Krushenski, Esq., Rogers, Hurst & Krushenski, 210 West Central Avenue, P. O. Box 1391, LaFollette, TN 37766 (Certified Mail)

Mr. Ralph Ball, President, Sterling Energy, Incorporated, P. O. Box 1528, LaFollette, TN 37766 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 29 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-122
Petitioner	:	A.C. 05-03455-03545
	:	
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC.,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq. and Susan Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Phillip D. Barber, Esq., Welborn, Dufford, Brown and Tooley, Denver, Colorado, for Respondent.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges the operator of the Southfield Mine with two violations of 30 C.F.R. § 75.701 mandatory mine safety grounding standard.

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of civil penalties. The operator filed a timely appeal contesting the existence of each of the alleged violations and the amount of the proposed civil penalties. Hearings were held on these issues on July 8 and 9, 1987 at Denver, Colorado before Administrative Law Judge Michael A. Lasher, Jr., who later entered an Order of Recusation.

This matter was reset for a hearing before me on March 22, 1988 at Denver, Colorado. Prior to that date the parties filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a settlement of the case.

Under the joint motion submitted by the parties, Respondent agrees to use metal grounding straps on all metal couplings, including but not limited to couplings between trailing cables and power centers, and trailing cables and the equipment to which the cables supply power. The two Citations, Nos. 2830956 and 2830957, as issued, charged the Respondent with two significant and substantial violations of the grounding standard, § 75.701. The Secretary agrees to amend Citation No. 2830956 and Citation No. 2830957 to reflect that such Citations are non-significant and substantial. The Secretary states that this amendment is based on the fact that even though Respondent failed to have the required grounding straps, the system used by Respondent provided some limited grounding. In return, Respondent withdraws its contest to the Citations as amended and withdraws its contest to the Secretary's proposed penalties of \$68.00 for each of the violations cited.

In support of the proposed settlement disposition of this case, the parties further agree and stipulate that in the 24 months prior to the inspection, Respondent was inspected a total of 12 days and has received 0 assessed violations; the coal mine in question produces 313,099 tons of coal per year and employs approximately 95 employees. Payment of the proposed penalties will not impair the Respondent's ability to continue in business.

Conclusion

After careful review and consideration of the pleadings and the evidence presented at the July 8 and 9, 1987 hearings, I conclude and find that the proposed settlement disposition is reasonable, appropriate, and in the public interest. Accordingly, the motion of the parties to amend Citation No. 2830956 and Citation No. 2830957 and to permit Respondent to withdraw its contest to the Citations as amended, is granted, and the Settlement is approved.

ORDER

Respondent is ordered to pay civil penalties in the settlement amount totaling \$136.00 in satisfaction of Citation No. 2830956 and Citation No. 2830957 within 40 days of the date of this Decision and Order and, upon receipt of payment by the Petitioner, this proceeding is dismissed.


August F. Cetti
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 30, 1988

PHELPS DODGE CORPORATION, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 87-102-RM
: Citation No. 2674914; 1/21/87
SECRETARY OF LABOR, : Morenci Mine & Mill
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID 02-00024
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-51-M
Petitioner : A. C. No. 02-00024-05519
v. :
: Phelps Dodge Morenci Inc.
PHELPS DODGE CORPORATION, :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

These proceedings are a petition for the assessment of a civil penalty for the one violation involved and the related notice of contest proceeding.

On February 8, 1988, the parties submitted a motion for settlement. The originally assessed amount was \$6,000 and the proposed settlement was for \$3,000. On March 8, 1988, a lengthy telephone conference call was held with both parties and the Administrative Law Judge during which the case was discussed in detail. Thereafter, the parties again conferred and on March 18, 1988 the parties submitted a new motion for settlement with a proposed settlement of \$4,500. I have concluded the second motion may be approved.

On January 21, 1987, MSHA conducted an investigation of a fatal mining accident that took place on the surface of the Morenci Mine and Mill on January 16, 1987. The investigation concluded that a haulage truck dumped too close to the edge of a bank that had been undercut by a steam shovel. The bank col-

lapsed under the weight and the truck overturned down a 50 foot bank. The driver was fatally injured. The subject citation arose from this incident.

The parties motion discusses the violation in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The citation was issued for a violation of 30 C.F.R. § 56.9055 because loads were not dumped back from the edge of the bank when evidence suggests that the ground may fail to support the weight of the vehicle. The parties represent that a reduction from the original assessment is warranted because negligence was less than originally assessed in that the condition which contributed to the accident had existed for a very short period of time. Additionally, the operator was not wearing a seat belt at the time of the accident, even though the operator instructed its employees to wear them at all times. It appears that the operator did all it could with respect to insuring the wearing of seat belts by its employees. I accept the foregoing and representations and approve the recommended settlement which I believe is sufficient to comport with the purposes of the statute.

Accordingly, the joint motion to approve settlement is GRANTED and the operator is ORDERED TO PAY \$4,500 within 30 days of the date of this decision.

Based upon the foregoing, the contest proceeding is hereby DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

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Lawrence Beeman, Director, Office of Assessments, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Handcarried)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 87-207-M
Petitioner : A. C. No. 36-04243-05504
v. :
 : Pocono Quarry & Plant
EUREKA STONE QUARRY, INC., :
Respondent :
 :

DECISION:

Appearances: Evert H. VanWijk, Esq., Office of the Solicitor,
Department of Labor, Philadelphia, Pennsylvania,
for the Secretary;
John T. Kalita, Jr., Esq., Eureka Stone Quarry,
Chalfont, Pennsylvania, for the Respondent.

Before: Judge Weisberger

On October 8, 1987, the Secretary (Petitioner) filed a Petition for Assessment of Civil Penalty for an alleged violation by the Respondent of 30 C.F.R. § 56.15005. Respondent filed its Answer on November 23, 1987. Pursuant to notice, the case was scheduled for hearing on December 17, 1987. On December 9, 1987, Respondent requested an adjournment, in essence, alleging that he had been unable to contact a respective witness as Respondent was "in its winter shutdown." Respondent indicated that the Petitioner did not have any objections to the request for an adjournment. The case was adjourned, and subsequently rescheduled and heard in Philadelphia, Pennsylvania, on January 19, 1988. Robert Carter testified for the Petitioner, and James Cliff and Barry D. Lutz testified for the Respondent.

Petitioner submitted a Prehearing Statement and Respondent submitted a Pretrial Statement along with Proposed Findings of Fact and Conclusions of Law. Subsequent to the hearing, Respondent and Petitioner filed Proposed Findings of Facts and Memorandum of Law on February 24 and February 29, 1988, respectively.

Stipulations

At the hearing, the Parties submitted the following stipulations:

1. The Pocono Quarry & Plant Mine is owned and operated by Stone Quarry, Incorporated.
2. The Pocono Quarry & Plant Mine is subject to the provisions of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this proceeding.
4. In the 2 year period before May 29, 1987, the Pocono Quarry & Plant Mine had zero paid violations of the standards contested in this case. The size of the operator is that the Pocono Quarry & Plant Mine employs approximately 120 employees. The annual production of Eureka Stone Quarry is 304,903 tons; the annual production of the Pocono Quarry & Plant Mine is approximately 57,562 tons.
5. The Respondent operates nine mines.
6. The authenticity of the exhibits offered at the hearing is stipulated, but no stipulation is made as to the facts asserted in such exhibits.
7. The subject Citation and Termination were properly served by a duly authorized representative of the Secretary of Labor upon agents of Eureka Stone Quarry as to dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.
8. The condition was abated within the required time.
9. The imposition of a proposed penalty by the Administrative Law Judge will not affect Respondent's ability to continue in business. However, Respondent does not stipulate to the appropriateness of the imposition of any penalty.

Issues

The issues are whether the Respondent violated 30 C.F.R. § 56.15005, and if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. If section 56.15005 has been violated, it will be necessary to determine the appro-

private civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977.

Regulations

30 C.F.R. § 56.15005 provides as follows: " Safety belts and lines shall be worn when persons work where there is danger of falling;"

Findings of Fact and Conclusions of Law

I.

Robert Carter, an inspector for the Mine Safety and Health Administration, issued, on May 29, 1987, Citation No. 2851906 alleging a violation of 30 C.F.R. § 56.15005 which requires the wearing of safety belts if a person is working ". . . where there is danger of falling." In evaluating whether the following facts establish a "danger of falling," I applied the test of ". . . whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." Secretary v. Great Western Electric Co., 5 FMSHRC 840, 842 (May 1983).

Carter testified that, on May 29, 1987, he observed Respondent's driller, Barry D. Lutz, shoveling dirt on top of the highwall at Respondent's Pocono Quarry at a distance of approximately 3 to 4 feet from the face. Lutz was not wearing either a safety belt or a line at the time.

Carter testified, in essence, that there was a danger of Lutz falling inasmuch as he could trip on "numerous" backbreaks or cracks in the ground that were spread throughout the strata of the highwall. Carter described these cracks as being approximately 6 to 8 inches wide and up to approximately 1 foot deep. In addition, according to Carter, if Lutz, working 3 to 4 feet of the highwall, would have fallen off the highwall by losing his balance, he might have been fatally injured, as the distance from the top of the highwall to the top of the muck pile below was approximately 30 to 40 feet.

In contrast, James Cliff, Respondent's manager in charge of drilling and blasting, testified that, on the date in question, there were no cracks on the highwall except those backbreaks within a foot of the face. He also testified that the distance from the highwall edge to the top of the muck pile was 15 feet at most. He also testified that when he observed Lutz, on May 29, the latter was 5 or 6 feet away from the edge of the highwall. He stated that he was of the opinion that, on May 29, Lutz was not in any danger of falling. On cross examination Cliff indi-

cated that, on the date in question, there were cracks in the ground, but not big enough for a foot to get stuck in and they were all "filled in." (Tr. 58).

Barry D. Lutz indicated he did not perceive himself in danger of falling on May 29, 1987, and that he felt comfortable being 4 to 5 feet from the edge. He was asked whether there were cracks approximately 6 to 8 inches wide and he indicated that there were not any in the area where he was working. He indicated, however, that on May 29, he came within a couple of feet of the edge.

In reconciling the conflict between Carter and Respondent's witnesses, with regard to the condition of the highwall, I have given more weight to the version testified to by Carter based upon my observation of his demeanor. Further, I note that of the three witnesses, Lutz would have the most knowledge of the actual conditions at his work site. In this connection, Lutz testified that on May 29, he was within a couple of feet of the face at the closest, and his testimony did not negate the existence of any cracks. Also, Lutz's testimony did not contradict the opinion of Carter with regard to the distance from the top of the highwall to the muck pile. Accordingly, I find that Lutz, in working within a couple of feet of the face on a highwall surface with cracks on it, was in danger of falling.

II.

In essence, Respondent's witnesses indicated, that in the normal course of the drilling operation, a driller wearing a belt would need a cable of approximately 25 feet to enable him to perform all his tasks. It was further their testimony that working attached to such a length of cable would be hazardous as there would be a possibility of it getting tangled in the feet of the driller causing the latter to fall. They indicated that there was also a danger of the cable getting caught in the controls of the drill. It was the opinion of Lutz that the use of a belt line could prevent him from getting away from any burst of the high pressure lines. Lutz and Cliff also indicated that such a cable length of 25 feet would not prevent the hazard of an injury, as the distance from the top edge of the highwall to the top of the muck pile is only approximately 15 feet. Further, they indicated that they have never seen a driller on a highwall use a safety belt.

I find that Respondent has not established either that the wearing of a safety belt is not feasible or that it would present a greater hazard. In this connection, I note the distinct hazards of not wearing a safety belt in proximity to the edge of the highwall as delineated in the testimony of Carter as discussed above, infra. Further, I find, as agreed to by Cliff on cross-examina-

tion, (Tr. 60-61), that the hazards of a driller working with a 25 foot belt line can be obviated by having a smaller length belt line that could be unsnapped when the driller has to move around the drill away from the face. Also, I find that the evidence is insufficient to conclude that tethering a belt line to the drill would create a greater hazard than working in close proximity to the edge without such a belt.

In essence, Respondent's witnesses, Cliff and Lutz, offered their opinion that Lutz was not in any danger of falling, when he was observed by Carter working without a safety belt. In addition, Cliff had testified that the cracks in the ground, were not big enough for a foot to get in and they were all filled in. Lutz testified that there were not any 6 to 8 inch cracks in the area that he was working. However, as discussed above, infra, I have found, based upon the testimony of Carter, that, indeed, the surface of the highwall near the edge did contain cracks. In this connection even Cliff indicated that there were backbreaks within 1 foot of the face. I thus find that due to the nature of the surface of the highwall that there was a danger of Lutz falling. Due to the proximity of Lutz to the edge of the highwall in the normal mining operation, I conclude that by not wearing a safety belt there was a reasonable likelihood of Lutz tripping and falling over the edge. I find, based upon observations as to the demeanor of Carter, that the distance from the top of the highwall to the muck pile was approximately 40 feet.

Based on all the above, I conclude that Lutz, being without a belt, in the condition observed by Carter, was in danger of falling and this danger would be recognized by an informed reasonably prudent person (See, Great Western Co., supra). As such, I find Respondent herein violated section 56.15005, supra. In addition, as analyzed above, I conclude that the violation herein, of Lutz not having a safety belt, contributed to a measure of danger to safety with a reasonable likelihood that the hazard contributed to will result in a injury of a reasonably serious nature, and as such the violation must be considered to be significant and substantial. (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984)).

III.

For the reasons discussed above, infra, I conclude that the gravity of the violation herein to be moderately serious. Further, the evidence establishes that Lutz was not provided with a safety belt, and I conclude, based on the testimony of Carter, that Respondent should have known that working without a safety belt, under the condition testified to by Carter, would have subjected Lutz to a danger of falling. Accordingly, I find that Respondent, in violating section 56.15005, supra, was negligent

to a moderate degree. I also have considered the other factors of section 110(i) of the Federal Mine Safety and Health Act of 1977, as stipulated to by the Parties. Based on all of the above, I conclude that a fine of \$126 is proper.

ORDER

It is ORDERED that the Respondent pay the sum of \$126, within 30 days of this Decision, as a Civil Penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 10, 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 87-21-D
ON BEHALF OF	:	
DONALD J. ROBINETTE	:	NORT CD 87-5
Complainant	:	
v.	:	Mine No. 8
	:	
BILL BRANCH COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 87-22-D
ON BEHALF OF JOEY F. HALE,	:	
Complainant	:	NORT CD 87-7
v.	:	
	:	Mine No. 8
	:	
BILL BRANCH COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	

ORDER

On February 24, 1988, Respondent, in a telephone call to the undersigned, made a request to compel Petitioner to produce names of certain witnesses pursuant to a written interrogatory. In response to this request, on February 24, 1988, a telephone conference call was arranged by the undersigned with attorneys for both Parties. In this conference call the undersigned requested that the Parties file by March 4, 1988, a memorandum setting forth their position on the issues raised by Respondent's request. Memorandum were filed on March 7, 1988.

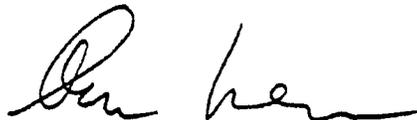
It appears from Respondent's Memorandum that its request at this point is for Petitioner to respond to the following interrogatory:

"Please state the names, addresses and telephone numbers of all witnesses interviewed by agents, servants or employees of the government who were not employees of the respondent, Bill Branch Coal Corporation, at the time of their interview with said agents, sub-agents, employees, etc."

Specifically, Respondent has indicated that it seeks "to discern the identity of those individuals whom the Respondent now claim 'over heard' certain statements or 'observed' certain conduct which the Claimants now maintain subsequently cause the Respondent to act in a way which would violate the Act." It appears to be the Respondent's position that these individuals cannot be classified as informers as they have not ". . . furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act." (Secretary on behalf of George Roy Logan v. Bright Coal Company, Inc. 6 FMSHRC 2520, 2525 (Nov. 1984)). I find, however, that an individual is an informer if he provides information which is corroborative or supportive of the Complainant's cause of action and thus is in assistance of the government's investigation of a possible violation of section 105 of the Federal Mine Safety and Health Act of 1977. (See, Logan, supra.) As set forth by the Commission in Logan, supra at 2526, the Respondent herein has the burden of proving the necessary facts ". . . to show that the information is essential to a fair determination" In this connection, I note that in its Memorandum the Respondent has merely alleged in general that its need to discover these witnesses is essential to a fair determination, but has not set forth any facts to establish its position. I therefore conclude that the Respondent has not met its burden of establishing its specific need for divulgence of names of informer witnesses to the point that would outweigh the privilege granted in 29 C.F.R. § 2700.59.

Therefore, it is ORDERED that, within 7 days of this Order, Petitioner serve upon the Respondent the names, addresses, and telephone numbers of all its witnesses who are not miners.

It is further ORDERED that Petitioner, shall within 7 days of this Order, file with the undersigned a statement containing the names of all witnesses who are informers, and a statement setting forth any facts Petitioner relies upon to establish the informers' privilege for each of the witnesses alleged to be informers. I shall then determine in a subsequent order those witnesses, if any, who are not informers and whose names are to be divulged to the Respondent.



Avram Weisberger
Administrative Law Judge
(703) 756-6210

