

MARCH 1996

COMMISSION DECISIONS AND ORDERS

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ADMINISTRATIVE LAW JUDGE ORDERS

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MARCH 1996

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

Secretary of Labor, MSHA v. Harold Moody, employed by Grand River Quarry, Inc.,
Docket No. CENT 95-214-M. (Judge Amchan, January 26, 1996)

Secretary of Labor, MSHA v. Gouverneur Talc Company, Docket No. YORK 95-70-M.
(Judge Weisberger, January 29, 1996)

Secretary of Labor, MSHA on behalf of Ramon Franco v. W.A. Morris Sand &
Gravel, Inc., Docket No. WEST 96-120-DM. (Judge Manning, February 15, 1996)

Secretary of Labor, MSHA v. REB Enterprises, Inc., Docket Nos. CENT 95-20-M,
etc. (Judge Weisberger, February 9, 1996 - printed in this issue)

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

Secretary of Labor, MSHA v. U.S. Coal Incorporated, Docket No. SE 93-119.
(Judge Fauver, February 5, 1996)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 1996

| | | |
|----------------------------------|---|------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. KENT 94-972 |
| | : | |
| BROKEN HILL MINING COMPANY, INC. | : | |

ORDER

On October 11, 1995, the Commission granted the petition for discretionary review filed by Broken Hill Mining Company, Inc. ("Broken Hill"). Pursuant to Commission Procedural Rule 75, 29 C.F.R. § 2700.75,¹ Broken Hill's opening brief was due to be filed by November 13, 1995. To date, no brief has been filed. On January 26, 1996, the Secretary of Labor filed a Motion to Dismiss for Want of Prosecution pursuant to Commission Procedural Rule 75(e), 29 C.F.R. § 2700.75(e).² Broken Hill has filed no opposition to the motion.

¹ Rule 75 provides, in part:

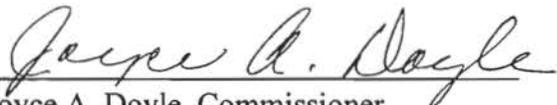
(a) *Time to file.* (1) *Opening and response briefs.*
Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. . . .

² Rule 75(e) provides:

Consequences of petitioner's failure to file brief. If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

Broken Hill is hereby ordered to show cause within 14 days of the date of this order why its appeal should not be dismissed.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 1996

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

FAITH COAL CO.

:
:
:
:
: Docket Nos. SE 91-97, etc.
:
:

ORDER

On August 28, 1995, the Commission granted the cross petitions for discretionary review filed by Faith Coal Co. ("Faith") and the Secretary of Labor. Pursuant to Commission Procedural Rule 75, 29 C.F.R. § 2700.75,¹ Faith's opening brief was due to be filed on September 27, 1995. On January 26, 1996, the Secretary filed a Motion to Dismiss For Want of Prosecution ("Motion") pursuant to Commission Procedural Rule 75(e), 29 C.F.R. § 2700.75(e).² On February 1, the Commission received Faith's response to the Secretary's opening brief. To date, the Commission has not received Faith's opening brief, nor has Faith designated its petition as its brief. Further, Faith has filed no opposition to the Motion.

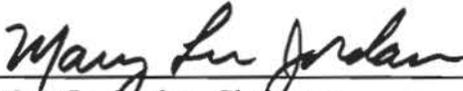
¹ Rule 75 provides, in part:

(a) *Time to file.* (1) *Opening and response briefs.*
Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. . . .

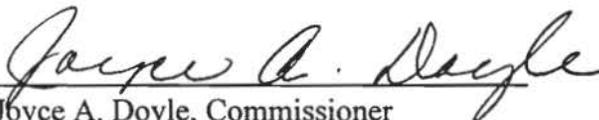
² Rule 75(e) provides:

Consequences of petitioner's failure to file brief. If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

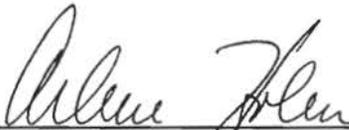
Faith is hereby ordered to show cause within 14 days of the date of this order why its appeal should not be dismissed.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 1996

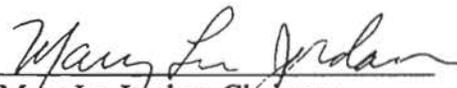
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|-------------------------------|---|---------------------------|
| SECRETARY OF LABOR, on behalf | : | |
| RAMON S. FRANCO | : | |
| Complainant | : | |
| | : | |
| v. | : | Docket No. WEST 96-120-DM |
| | : | |
| W.A. MORRIS SAND AND | : | |
| GRAVEL, INC., | : | |
| Respondent | : | |

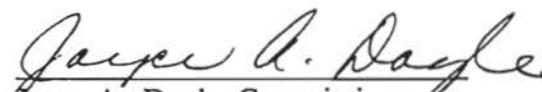
DIRECTION FOR REVIEW
DENIAL OF REVIEW AND
DENIAL OF STAY OF TEMPORARY REINSTATEMENT

On February 26, 1996, respondent W.A. Morris Sand and Gravel ("Morris") filed a petition for discretionary review of the February 15, 1996, orders of Administrative Law Judge Richard W. Manning granting the Secretary's application for temporary reinstatement and denying Morris' motions to dismiss. Morris also has requested a stay of the temporary reinstatement order.

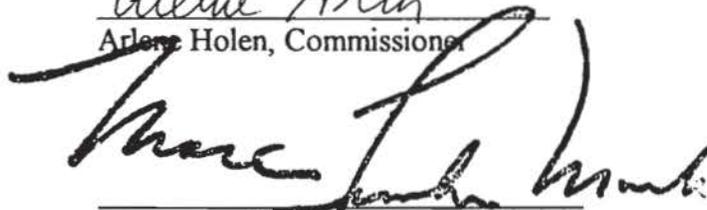
Upon consideration of Morris' petition and request, the Secretary's response in opposition and respondent's reply, the petition for review is granted as to the issue of jurisdiction, i.e. whether the complainant is a miner. In all other respects the petition is denied.

Respondent's request for a stay of the temporary reinstatement order fails to demonstrate compelling or extraordinary circumstances, and is therefore denied. *See Perry Transport, Inc.*, 15 FMSHRC 196, 198 (February 1993).


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 15, 1996

| | | |
|----------------------------|---|------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| on behalf of | : | |
| WILLIAM KACZMARCZYK | : | |
| | : | |
| | : | |
| v. | : | Docket No. PENN 95-1-D |
| | : | |
| READING ANTHRACITE COMPANY | : | |

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On May 24, 1995, Administrative Law Judge Arthur J. Amchan determined that the Reading Anthracite Company (“Reading”) had violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it transferred William Kaczmarczyk from a light duty position to workers’ compensation status. 17 FMSHRC 784 (May 1995) (ALJ). On September 28, 1995, a hearing was held on the issues of civil penalty and damages. 17 FMSHRC 2065, 2066 (November 1995) (ALJ). The parties stipulated that Kaczmarczyk was entitled to receive \$4,942.42 “to compensate for economic loss” as a result of the discrimination. *Id.* at 2066. The judge awarded an additional \$156 to compensate Kaczmarczyk for travel expenses that he incurred in seeking another job, for total “damages” of \$5,098.42. *Id.* at 2066-67, 2069.

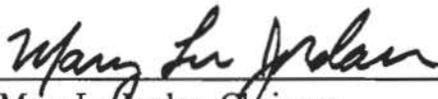
In December 1995, Reading paid Kaczmarczyk \$3,945.06. Reading apparently treated all or most of the monetary award as wages subject to income tax withholding. On December 22, 1995, the Secretary filed a petition for discretionary review with the Commission. The Secretary stated that an attempt was made to resolve the dispute with Reading’s counsel but that Reading was unwilling to retreat from the position that the monetary award was subject to withholding allowances and taxes. PDR at 3. The Secretary sought review from the Commission, rather than reconsideration from the judge, because the judge no longer had jurisdiction under Commission

Rule 69(b), 29 C.F.R. § 2700.69(b) (1995), once his decision issued. *Id.* at 1-2. The Secretary concluded that, “[s]ince the record is unclear as to the intention of the parties and the judge’s order is not clear on the issue of allocation of the monetary award,” the matter should be remanded to the judge for clarification. *Id.* at 3-4. Reading did not respond.

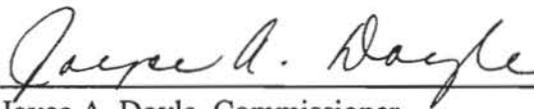
On December 29, 1995, the Commission granted the petition and stayed briefing pending further order of the Commission.

Apparently Reading does not dispute that, under the terms of the stipulation approved by the judge and his further order regarding travel expenses in the amount of \$156, Kaczmarczyk is entitled to a gross amount of \$5,098.42. There is, however, disagreement between the parties as to whether that amount is subject to income tax withholding in its entirety. That issue is governed by the terms of the Internal Revenue Code, not the Mine Act. In order for both Reading and Kaczmarczyk to treat the damage award properly for income tax purposes, the basis for the stipulated damages must be categorized in appropriate detail.

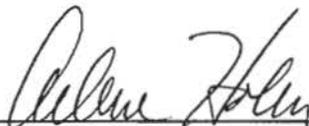
Accordingly, we remand the matter for further appropriate proceedings.



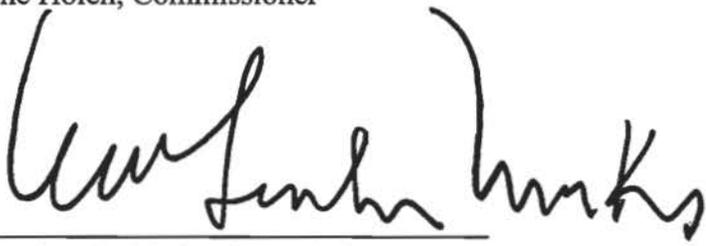
Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 18, 1996

| | | |
|-------------------------------|---|-----------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. PENN 93-51 |
| | : | |
| POWER OPERATING COMPANY, INC. | : | |

BEFORE: Jordan, Chairman; Doyle, Holen, and Marks, Commissioners¹

DECISION

BY: Jordan, Chairman; Holen and Marks, Commissioners

This civil penalty proceeding involves a violation of 30 C.F.R. § 77.1710(a), which requires the wearing of face-shields or goggles when hazards to the eyes exist.² Administrative Law Judge Avram Weisberger concluded that Power Operating Company, Inc. ("Power") violated the standard but that the violation was not significant and substantial ("S&S"). 16 FMSHRC 591 (March 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's S&S determination. For the reasons that follow, we reverse and remand for reassessment of the civil penalty.

¹ Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

² Section 77.1710(a) states:

Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

I.

Factual and Procedural Background

During an inspection of Power's Frenchtown mine in Clearfield County, Pennsylvania, on September 16, 1992, Inspector Charles Lauver of the Department of Labor's Mine Safety and Health Administration ("MSHA") noticed a miner steam cleaning the side of a rock truck with a "steam jenny,"³ which applies "high pressure steam and liquid" through a hose. 16 FMSHRC at 606; Tr. 212-13.⁴ According to Lauver, such steam cleaning causes "dirt, grease, [and] all manner of material to become dislodged and . . . splatter in all directions." *Id.* at 606-07; Tr. 213. Lauver observed that the miner was not wearing goggles or a face shield and that his face was "splattered with black spots from the material that had been sprayed up." *Id.* at 606; Tr. 213. He thereupon issued a citation to Power alleging an S&S violation of section 77.1710(a).

Power conceded the violation but contested the S&S designation. 16 FMSHRC at 606. The judge concluded that the violation was not S&S and assessed a \$100 civil penalty. *Id.* at 607.

II.

Disposition

In analyzing the S&S issue, the judge found that an injury-causing event involving the miner's eyes was reasonably likely to occur as a result of the violation. 16 FMSHRC at 607. He opined, however, that the record contained no evidence regarding the seriousness of such an injury. *Id.* at 607.

The Secretary argues that the judge's finding that there was no evidence regarding the severity of an eye injury erroneously overlooks the inspector's contemporaneous notes, which were entered into evidence and state that a "serious eye injury could result." PDR at 4 (*citing* Gov't Ex. 21.)⁵ The Secretary further contends that "the splattering of foreign material into the eye under high pressure, is recognized by most people, in light of common life experiences, to be very likely . . . of a serious nature." PDR at 4; *see also id.* at 5 n.2.

³ A "jenny" is "a machine for cleaning . . . surfaces by means of a jet of steam." *Webster's Third New International Dictionary (Unabridged)* 1213 (1986).

⁴ Transcript references are to the volume of testimony taken on December 8, 1993.

⁵ The Secretary designated his PDR as his brief.

Power responds that the judge properly concluded that the Secretary failed to establish the likelihood of a reasonably serious injury. P. Br. at 2-3. It asserts that the testimony of its witness, Peter Baughman, an experienced jenny operator, who perceived no serious hazard in using it without protective equipment, constitutes substantial evidence in support of the judge's determination. *Id.* at 3. In its view, the Secretary's argument based upon "common life experiences" lacks common sense and impermissibly attempts to shift the burden of proof. *Id.* at 3-5.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

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.

Id. at 3-4 (footnote omitted). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second *Mathies* elements are established. Power concedes the violation (Tr. 210) and the record shows that the violation contributed to the hazard of exposing the jenny operator's unprotected eyes to flying debris from the high pressure jet of steam and water. 16 FMSHRC at 606; Tr. 212-13; see also Tr. 222-23. Concerning the third *Mathies* element, substantial evidence supports the judge's finding that there was a reasonable likelihood of injury resulting from that hazard.⁶ Usually, the nozzle of the jenny's hose is held only about three feet

⁶ The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must

away from the truck being cleaned. It was undisputed that the steam cleaning causes dirt, grease, and other material to dislodge and splatter loose and that, in fact, the jenny operator's face was spattered with spots of "sprayed up" material when the inspector observed the violative situation. 16 FMSHRC at 606; Tr. 212-13, 222. Thus, on this record, it is clear that an injury-producing event of materials dislodged from the truck during steam cleaning being propelled into the equipment operator's unprotected eyes was reasonably likely to occur.

We conclude, however, that the judge's ultimate S&S determination is erroneous. With respect to the fourth *Mathies* element, he failed to consider all the relevant evidence and his finding is not supported by substantial evidence.

In *Mathies*, the Commission recognized that "[a]s a practical matter, the last two [*Mathies*] elements will often be combined in a single showing." 6 FMSHRC at 4. Much of the evidence on this record that establishes the reasonable likelihood of an eye injury also demonstrates that the injury would be reasonably serious. Steam cleaning the rock truck required the jenny operator to shoot a pressurized jet of hot water and steam at close range (approximately three feet), forcibly dispersing whatever debris had accumulated on the truck. Hot water and dislodged materials splattered on the operator's unprotected face. These facts support only one conclusion: forcibly propelled debris such as dirt, grease, or hot water striking the eye is reasonably likely to cause reasonably serious trauma.⁷

Moreover, in *Ozark-Mahoning Co.*, 8 FMSHRC 190 (February 1986), the Commission observed in general terms that, for S&S purposes, "it is obvious that whenever foreign objects are propelled into the eye there is a reasonable likelihood of loss or impairment of vision as well as injury." 8 FMSHRC at 192. Although that case involved different facts, the hazard of rock fragments propelled through the air as a result of percussion drilling, the Commission did not confine its observation to that context.

Contrary to the judge's view, the record also contains evidence of the inspector's opinion regarding the severity of such injury. The citation issued by the inspector (Gov't Ex. 29) and his contemporaneous notes (Gov't Ex. 21), both introduced into the record without objection (Tr. 212, 214-15), state that the eye injury likely to result from the violation would be serious. On cross-examination, the operator's counsel asked the inspector about the somewhat different

also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

⁷ Chairman Jordan and Commissioner Marks decline to accord any weight to Baughman's assertion that he had so far avoided eye injury while steam cleaning without goggles (Tr. 220-22). It would be inconsistent with the safety promoting goals of the Mine Act to permit an operator to defend itself against an S&S designation in a citation by presenting evidence of its previous failures to comply with the standard in question.

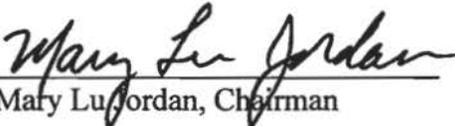
wording of his injury characterizations on these two documents, and the inspector replied, in clarification, that a serious eye injury was “highly likely,” not just “reasonably likely.” Tr. 216. The judge overlooked this relevant documentary and testimonial evidence and, hence, failed to address the record adequately. *See, e.g., Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), and authorities cited. In concluding that the fourth *Mathies* element has been established, the Commission has relied on the opinions of a mine inspector concerning the seriousness of potential injury, including opinions set forth in the inspector’s citation. *E.g., Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993). *Accord Buck Creek*, 52 F.3d at 135-36.

The evidence of record supports no other conclusion than the reasonably serious nature of the eye injury likely to occur as a result of the violation. *See generally Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984). We therefore conclude that the judge’s contrary finding with regard to the fourth *Mathies* element is not supported by substantial evidence. Accordingly, we reverse.⁸

III.

Conclusion

For the foregoing reasons, we reverse the judge’s determination that the violation was not S&S and remand for reconsideration of the civil penalty.


Mary Lu Jordan, Chairman


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

⁸ Given our conclusion, we need not address the Secretary’s “common life experience” presumption (S. Br. at 4).

Commissioner Doyle, dissenting:

I must respectfully dissent from my colleagues' decision to reverse the administrative law judge's determination that the Secretary of Labor had failed to carry his burden of proving that an injury resulting from the violation in issue was reasonably likely to be reasonably serious. The majority has concluded that the judge's decision is not supported by substantial evidence and has reversed the judge based on their own determination that the "facts support only one conclusion: forcibly propelled debris such as dirt, grease, or hot water striking the eye is reasonably likely to cause reasonably serious trauma." Slip op. at 4. The facts on which my colleagues rely to establish that conclusion are: (1) a pressurized jet of hot water and steam was being shot at close range, dispersing debris accumulated on the truck; and (2) hot water and dislodged materials splattered on the operator's face. *Id.* I disagree that these facts give rise to no other conclusion than that it is reasonably likely that a reasonably serious injury will result.

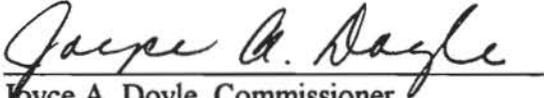
That all eye injuries are not *ipso facto* serious is evidenced by the Secretary's own regulations for the reporting of accidents, injuries, and illnesses set forth at 30 C.F.R., Part 50. Sections 50.20-3(a)(5)(i) & (ii) set forth the criteria for differentiating, for purposes of eye injuries, between first aid and medical treatment. First aid encompasses irrigation of the eye, removal of foreign material not imbedded in the eye, and the use of non-prescription eye medications. 30 C.F.R. § 50.20-3(a)(5)(i). Medical treatment encompasses removal of imbedded foreign objects, use of prescription medications, and other professional treatment. 30 C.F.R. § 50.20-3(a)(5)(ii). First aid is characterized as "one-time treatment, and any follow-up visit for observational purposes, of a *minor* injury" (emphasis added). 30 C.F.R. § 50.2(g). It appears that the potential injury here could well fall into the category of eye injury characterized by the Secretary as *minor* (one requiring only first aid) and which need not even be reported to MSHA on its Mine Accident, Injury, and Illness Report Form 7000-1. 30 C.F.R. §§ 50.2, 50.20. Thus, I disagree with my colleagues that the only possible conclusion is that forcibly propelled "dirt, grease, or hot water striking the eye is reasonably likely to cause reasonably serious trauma." Slip op. at 4.

The majority also relies, in part, on the inspector's unsupported allegation, as set forth in the citation and his notes, that the injury would be serious. Neither document gives a basis for the inspector's opinion nor did he testify as to the basis for that opinion. Under my colleagues' analysis, the mere allegations set forth by the inspector in a citation or order would establish a *prima facie* case as to those allegations, including allegations that a violation was S&S, and, as noted by Power, P.Br. at 3-5, shift the burden to the operator to rebut those allegations. I disagree that the Secretary's burden of proof is so easily met.

I believe that my colleagues also err in relying on the facts of another case, *Ozark-Mahoning Co.*, 8 FMSHRC 190 (February 1986), to establish S&S in this case. Slip op. at 4. The Commission has held that an S&S determination is a factual issue and must be based on the particular facts surrounding the violation, including the nature of the mine involved. *Peabody*

Coal Co., 17 FMSHRC 508, 511-12 (April 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Moreover, the facts in the two cases are not the same. In *Ozark-Mahoning*, the undisputed evidence showed that miners without eye protection were using a percussion *drill*, not a hose, to drill *into rock*, not to clean a vehicle, and that *rock fragments*, not dirt, grease, or hot water, were being propelled as a result. 8 FMSHRC at 191. I do not agree that the facts of *Ozark-Mahoning* establish that the potential eye injury here is reasonably likely to be of a reasonably serious nature.¹

Thus, I would affirm the judge's conclusion that the Secretary failed to sustain his burden of proving that the violation was S&S.


Joyce A. Doyle, Commissioner

¹ In *Ozark-Mahoning*, the Commission relied primarily on the evidence of record as support for the judge's determination that the injury was reasonably likely to be reasonably serious, not on the dicta cited by the majority. 8 FMSHRC at 192.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 1996

| | | |
|-------------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket Nos. CENT 95-29-M |
| | : | CENT 95-30-M |
| REB ENTERPRISES, INC. | : | |
| | : | |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. CENT 95-239-M |
| | : | |
| HAROLD MILLER, employed by | : | |
| REB ENTERPRISES, INC. | : | |
| | : | |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. CENT 95-240-M |
| | : | |
| RICHARD E. BERRY, employed by | : | |
| REB ENTERPRISES, INC. | : | |

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 9, 1996, Administrative Law Judge Avram Weisberger issued an Order of Default entering judgment in favor of the Secretary of Labor and ordering REB Enterprises, Inc. ("REB") and Harold Miller and Richard E. Berry, employed by REB, to pay civil penalties of \$7,550, \$1,200, and \$1,600, respectively. For the reasons that follow, we vacate and remand.

On December 5, 1994, the Secretary filed petitions, which REB answered, for assessment of civil penalties against REB for alleged violations of various safety standards. On September 1, 1995, the Secretary filed petitions for assessment of civil penalties against Miller and Berry pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing, ordering, or carrying out the alleged violations. Thereafter, the judge consolidated the cases and scheduled a hearing.

On January 12, 1996, the Secretary filed a motion for default asserting that REB, Miller, and Berry had failed to respond to a prehearing order and that Miller and Berry had failed to answer the penalty petitions. On January 25, 1996, the Secretary filed a motion for postponement of the hearing. Judge Weisberger granted the motion for default on February 9, 1996.

On March 7, 1996, the Commission received a petition for discretionary review from REB, Miller, and Berry, requesting relief from default.¹ They explain that they had previously not been represented by counsel and were unfamiliar with Commission rules and procedures, and that the Secretary's motion for default and subsequent motion for postponement had "le[f]t the matter in a very confusing status to the laymen involved." REB Pet. at 3.

The judge's jurisdiction in this matter terminated when his decision was issued on February 9, 1996. 29 C.F.R. § 2700.69(b) (1995). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The petition was timely filed and we grant it.

The Commission's procedural rules provide that a judge shall issue an order to show cause prior to entry of any order of default or dismissal unless a party fails to attend a scheduled hearing, in which case an order to show cause is not required. 29 C.F.R. § 2700.66(a) & (b). Here, the judge did not issue a show cause order affording the operator and individuals the opportunity to explain their failure to respond to the prehearing order or to answer the penalty petitions. It appears from the record that REB, Miller, and Berry, who were proceeding without counsel, were unfamiliar with Commission procedure, confused by the Secretary's filing of a motion for postponement after he had filed a motion for default, and did not appreciate the consequences of failing to respond to the motion for default. In addition, the prehearing order to which Miller and Berry failed to respond was issued before they were named as parties and made no direct reference to them.

¹ On March 14, 1996, the Commission received an amended petition for discretionary review. The amended petition was filed out of time. See 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a).

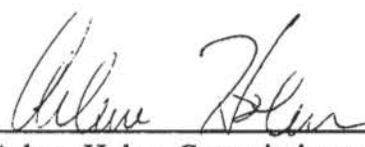
For the foregoing reasons, we vacate the default order and remand this matter to the judge for further appropriate proceedings. See *Patsy v. Big "B" Mining Co.*, 16 FMSHRC 1937, 1938 (September 1994).



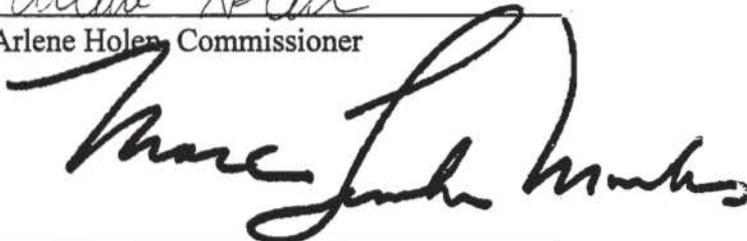
Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 9 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-29-M
Petitioner : A.C. No. 03-01640-05511
v. :
: Docket No. CENT 95-30-M
REB ENTERPRISES, INCORPORATED, : A.C. No. 03-01640-05512
Respondent :
: REB Enterprises Inc.
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-239-M
Petitioner : A.C. No. 03-01640-05517 A
v. :
: REB Enterprises, Inc.
HAROLD MILLER, :
Employed by REB ENTERPRISES, :
INC., :
Respondent :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-240-M
Petitioner : A.C. No. 03-01640-05518 A
v. :
: REB Enterprises Inc.
RICHARD E. BERRY, :
Employed by REB ENTERPRISES, :
INC., :
Respondent :

ORDER OF DEFAULT

Before: Judge Weisberger

On January 12, 1996, Petitioner filed a Motion for Default asserting that Respondents have not filed any response to the prehearing order issued on January 23, 1995. Petitioner further

asserts that Respondents Miller and Berry have not filed an answer to the Petitions for Assessment of Penalty filed in Docket Nos. CENT 95-239-M, and 95-240-M. A Certificate of Service appended to the Motion contains a certification by Petitioner's Counsel that on January 12, 1996, she mailed a copy of "the foregoing pleading ... upon all parties, representatives" To date, none of the Respondents filed a response to Petitioner's motion. Accordingly, and based on the assertions set forth in the motion, it is granted.

It is **ORDERED** that the citations issued in these cases, and the associated penalties sought are affirmed. It is further **ORDERED** that within 30 days, Respondents shall pay a civil penalty as follows: REB Enterprise-\$7,550; Richard E. Berry-\$1,600; and Harold Miller-\$1,200.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

MAR 4 1996

| | | |
|------------------------|---|---------------------------|
| ASARCO, INCORPORATED, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. CENT 95-8-RM |
| | : | Citation 4444361; 9/20/94 |
| | : | |
| SECRETARY OF LABOR, | : | Docket No. CENT 95-9-RM |
| MINE SAFETY AND HEALTH | : | Citation 4328815; 9/21/94 |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | Sweetwater Mine |
| | : | Mine I.D. 23-00458 |
| | : | |
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 95-122-DM |
| on behalf of | : | |
| DAVID HOPKINS, | : | Sweetwater Mine |
| Complainant | : | |
| v. | : | Mine I.D. 23-00458 |
| | : | |
| ASARCO, INCORPORATED, | : | |
| Respondent | : | |

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor and David Hopkins; Henry Chajet, Esq., and M. Shane Edgington, Esq., Patton and Boggs, Washington, D.C. and Denver, Colorado, for Asarco, Inc.

Before: Judge Manning

These cases are before me on (1) notices of contest filed by Asarco, Inc. ("Asarco") against the Secretary of Labor and his Mine Safety and Health Administration ("MSHA") under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"); and (2) a complaint of discrimination brought by the Secretary of Labor on behalf of David Hopkins against Asarco under section 105(c) of the Mine Act. For the reasons set forth below, I find that Mr. Hopkins was discriminated against in violation of 105(c) of the Mine Act, and I affirm the two citations.

David G. Hopkins filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). MSHA investigated the complaint, concluded that Asarco had violated the provisions of section 105(c)(1), and brought this discrimination action. During the course of its investigation, MSHA issued two citations. Asarco challenged these citations in the two contest proceedings.

A hearing was held in these cases in Rolla, Missouri. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT

Asarco operates the Sweetwater Mine, an underground lead and zinc mine in Reynolds County, Missouri. The mine produces about 1.3 million tons per year and employs about 90 hourly workers and 9 salaried employees underground. (Tr. 774). The mine uses a standard room and pillar mining method. The roof (back) is generally 16-18 feet high, but in some areas the roof can be up to 60 feet high. (Tr. 775). In order to reduce the risk that miners and equipment will be struck by falling rock, the walls and roof of the mine are periodically scaled with a scaling bar to remove loose and weak rock. In areas where the roof is high, miners must get into the basket of equipment that is capable of raising them to a sufficient height to scale down any hazardous rock. The incident that gave rise to this discrimination case centers around a piece of equipment known as the 1311 High Scaler (the "high scaler"), which is described below.

Mr. Hopkins was employed by Asarco at the Sweetwater Mine starting in February 1993. He had previously worked two years underground for another mining company. He started at Sweetwater as a laborer in the West end of the mine. He was subsequently transferred to the South end as a powderman. Finally, he was transferred back to the West end of the mine as a powderman. His supervisor was Douglas Swearingin, Shift Foreman.

The powdermen on a crew are responsible for all explosives work on that shift. Because that work does not take the full shift, powdermen are also responsible for scaling down loose rock, as assigned by their supervisor. Scaling is a major part of a powderman's job. Mr. Hopkins was frequently assigned to scale areas of the mine by Mr. Swearingin. In general, there were two powdermen on Mr. Hopkins' shift and they worked as a team on all assignments including scaling.

In most areas of the mine the roof is between 16 and 18 feet above the mine floor. In those areas, scaling is performed from the floor or from mobile equipment such as a Getman low scaler. In some areas, however, the roof is 60 feet above the mine floor. In those areas scaling must be performed from the basket of a

high scaler. The high scaler involved in this case is a large vehicle equipped with a two-part boom that operates like scissors to raise and lower the basket. The boom also swivels on a turntable so that the basket can swing from side to side. The high scaler functions much like a cherry picker used by power companies, but is larger. Once the high scaler is moved into position and the outrigger jacks are set, the two miners who are going to scale get into the basket. The basket contains controls to raise and lower the boom and to operate the turntable. One miner operates the controls and the other miner bars down loose rock with a metal bar.

The first time Mr. Hopkins was asked to high scale was with Thomas "Rick" Huggins soon after he began working at the mine. They used a smaller high scaler, No. 1307, with controls that are of a different type from the No. 1311. (Tr. 740). The boom had to be fully extended to reach the back and when they came down the boom started jerking. The basket dropped about 10 feet and bounced. (Tr. 95, 741). Mr. Huggins looked at Mr. Hopkins and laughed. Id. Mr. Hopkins became concerned about his safety and wondered if Mr. Huggins bounced the basket on purpose to scare him. (Tr. 96). Mr. Huggins testified that he has a nervous laugh and that the basket jerked because the boom of the small high scaler bounces when you bring it down from such a high level. (Tr. 741).

Mr. Hopkins did not high scale again until he returned to the West end as a powderman. He scaled while Jerry Williams operated the controls of the 1311 high scaler. Mr. Hopkins testified that the high scaler rocked slightly, but that it was otherwise a "fine experience." (Tr. 96). Starting sometime in July 1994, Mr. Hopkins began telling other miners during lunch that he would not high scale. He told other miners that he was afraid of heights and that it terrifies him to get into a machine that rocks. (Tr. 98). Mr. Hopkins testified that he was scared of the high scaler, in part, because of the stories he had heard about it. He stated that miners on his crew told him that the high scaler fell over once when the mine was owned by a different mine operator and that sometimes guys talked about "getting somebody in there and giving them a ride...." (Tr. 99-100). He had also heard that the basket once became stuck against a rib and miners had to climb down on a rope. (Tr. 101).

In July 1994, Mr. Huggins, who sometimes filled in for Mr. Swearingin, discussed the high scaler with Mr. Hopkins. Mr. Huggins testified that he ordered Mr. Hopkins to high scale and that he refused. (Tr. 750-52). Mr. Huggins said that he sent a note to Michael Mutchler, underground manager at Sweetwater, stating that Mr. Hopkins refused to highscale. Mr. Mutchler testified that he never received such a note, but that he remembers the incident. (Tr. 794). Mr. Hopkins testified that he discussed the high scaler with Mr. Huggins, but that

he did not understand that he was being ordered to high scale. (Tr. 102-04).

On the morning of August 4, 1994, Mr. Hopkins was called in to Mr. Mutchler's office to discuss the high scaler. Mr. Mutchler testified that he called the meeting because Mr. Swearingin advised him that Mr. Hopkins had been bragging to the crew that he would not operate the high scaler. (Tr. 794-95). Owen Erickson, Safety Manager; Kenneth McCabe, General Mine Foreman; Larry Hampton, miners' representative; and Mr. Swearingin were also present at the meeting. Mr. Mutchler asked Mr. Hopkins why he was telling crew members that he would not operate the high scaler. Mr. Hopkins replied that he felt that the high scaler was old and unsafe to operate. (Tr. 108, 795-96). Mr. Mutchler asked Mr. Hopkins to list the specific safety problems he had with the high scaler and Mr. Hopkins could not do so. (Tr. 796). Mr. Hopkins said that the basket rocks and sways when you operate it and that he had heard stories about past accidents. (Tr. 181). Mr. Mutchler explained that the high scaler recently had major preventive maintenance work performed on it and that other miners told him that it was in good condition. (Tr. 796-97). Mr. Mutchler told Mr. Hopkins that high scaling was part of his job and that unless Mr. Hopkins had a specific safety complaint that could be addressed, he would be expected to high scale. (Tr. 799).

Mr. Hopkins also told Mr. Mutchler that he was afraid of heights. (Tr. 232, 797). Mr. Mutchler said that he would transfer him to the South end where high scaling is not a part of a powderman's day-to-day job. (Tr. 110, 798). Mr. Hopkins did not believe that he had to respond to the offer to transfer at that time so he did not immediately accept the offer. (Tr. 110-11). During the meeting, mine management said that they would have MSHA inspect the high scaler to get a "third-party opinion" about the safety of the machine. (Tr. 798). After the meeting, Mr. Erickson called the local MSHA office and was advised that MSHA would not inspect the mine without a specific complaint being filed by a miner.

After he went underground on August 4, Mr. McCabe told Mr. Hopkins that he could not transfer to the South end. (Tr. 111, 855-56). Near the end of the shift Mr. Swearingin and Mr. McCabe approached Mr. Hopkins, and McCabe told Hopkins that he was nothing but a pain in the ass and that he had another meeting in Mr. Mutchler's office at the end of the shift. (Tr. 112). Mr. Hopkins believed that the meeting was held so that management could "flex ... their muscles." (Tr. 112-13). Mr. Mutchler told Mr. Hopkins that high scaling was part of his job and that unless he could point to a specific safety problem on the high scaler, he would be expected to high scale. (Tr. 801). At 5:00 p.m., the end of Mr. Hopkins shift, Hopkins told Mr. Mutchler that unless he was paid overtime, he would leave the

meeting. (Tr. 113, 185-88, 802). The meeting ended abruptly. Mr. Mutchler believed that Mr. Hopkins was belligerent and uncooperative at the two meetings. (Tr. 799).

On August 31, MSHA Inspector Robert Seelke inspected the mine. During the inspection, Erickson and Hampton asked him to closely examine the high scaler. Mr. Hopkins was asked to accompany Inspector Seelke so that he could discuss his safety concerns with the inspector. (Tr. 28-29). Mr. Hopkins refused the offer because he did not want to stir up any more trouble and he thought that the company would be "courteous enough" not to make him high scale. (Tr. 29, 115). Inspector Seelke inspected the high scaler and did not issue any citations.

On September 8, Mr. Hopkins and David A. Hooper were assigned to high scale by their supervisor, Doug Swearengin. Mr. Hopkins performed a preshift examination on the high scaler. He found what he believed to be several safety defects: a hole in the boom, a hydraulic leak in a metal tube inside the upper part of the boom, smashed hoses at the knuckle of the boom where the upper and lower booms pivot, a dent in the boom, play in the turntable for the boom, and a defective emergency relief valve. (Tr. 119-23, 347). Hopkins and Hooper told the mobile maintenance crew about the safety problems. Mechanic Rick Stevens told them that he was working on a drill and that he would come and look at the high scaler as soon as he was finished. (Tr. 124, 78-79, 348).

Before mobile maintenance arrived to look at the high scaler, Mr. Swearengin returned and asked Hopkins and Hooper why they were not high scaling. They replied that they were waiting for maintenance to check out problems they had found. Hopkins briefly described the problems he had found on his preshift. (Tr. 130, 368). Mr. Swearengin told Hooper and Hopkins to get on his tractor. He then drove them to a powder magazine and told them to wait there until he returned. (Tr. 130, 368-69).

About a hour later, Mr. Swearengin returned to the powder magazine and told the miners to get on his tractor. He took them back to the high scaler and told them that the high scaler had been checked out and to start high scaling. (Tr. 131, 352). Mr. Hopkins replied that he would be the judge of that because he was the one going up and he did not know what had been done to repair the high scaler. Id. At that point, Hopkins and Swearengin began inspecting the machine. The high scaler was started and Hopkins looked to see if the hydraulic leak had been repaired. Hopkins testified that he saw the same V-shaped spray of hydraulic fluid coming from inside the boom as he saw when he preshifted the high scaler. (Tr. 132). Hopkins testified that he believes that Mr. Swearengin saw the hydraulic leak because he told Hopkins to go ahead and ride it and assured him that it would not fall because it has check valves. Id. Hooper and

Mutchler testified that Swearengin could not see the hydraulic leak. (Tr. 371, 825).¹

Mr. Swearengin explained to Mr. Hopkins that hydraulic fittings had been tightened and that it was safe to operate. (Tr. 282-87, 743-45). Mr. Swearengin showed Hopkins how to use the emergency relief valve and explained that the hole and dent in the boom had always been there and did not present a hazard. (Tr. 370). He also explained that the play in the turntable did not create a safety hazard. Id.

Hopkins continued to refuse to operate the high scaler principally because he believed that the hydraulic line was still leaking inside the boom. Swearengin kept on saying that he did not see the leak, but Hopkins did not believe him. (Tr. 136-37, 227-28, 371, 825). Mr. Hopkins believed that the high scaler was unsafe to operate and he refused to operate it. (Tr. 133-34, 352-53, 815-16).

After Hopkins and Swearengin argued for a while, Swearengin told Hopkins and Hooper to shut down the high scaler and to get on the tractor because he was taking them to another section to low scale. As they were getting on the tractor, Hopkins asked Swearengin to give his word that nobody else would run the high scaler because it was not safe to operate. Swearengin replied that it was none of his business and they argued further. Swearengin took them to the section where Huggins and Garry Moore were low scaling. He told Huggins to get on the tractor and took them to the shaft. At the shaft, Hopkins told Swearengin that if the leak was fixed he would operate the high scaler. (Tr. 134-35). Hooper told Swearengin that he did not want to go to the top. (Tr. 355, 760).² Swearengin escorted Hopkins into the elevator and took him to the surface. Id. One the way up, Hopkins and Swearengin argued further about the leak in the hydraulic line and Hopkins called Swearengin a liar because he believed that Swearengin saw the leak but would not admit it. (Tr. 136-37). At the top Hopkins was escorted off of the property after he called his wife to come pick him up. (Tr. 137-38). On September 12, Hopkins met with Mutchler and Erickson at the mine. Hopkins was informed that he was being terminated from his employment for an improper work refusal and interference with management. (Tr. 835-36, 841).

While Hopkins, Hooper, Huggins, and Swearengin were at the shaft on September 8, Hopkins told Huggins how to find the hydraulic leak in the boom. (Tr. 745-46). Huggins went back and

¹ Mr. Swearengin did not testify at the hearing.

² Hooper believed that the hydraulic leak was a routine leak that did not present a hazard. (Tr. 354-55, 372).

looked for the leak, but could not find it. Id. He operated the high scaler on September 8, after Hopkins refused to operate it, without any problem. (Tr. 746). On September 21, Randall Blount, a mechanic, found a leak in the same location as the leak described by Hopkins. (Tr. 296-98, 304-05). He testified that the hydraulic line leaked only when you moved a particular lever on the controls to a certain position. (Tr. 297-98). Mr. Huggins testified that he observed a leak on September 21 "right where David [Hopkins] said there was a leak." (Tr. 746-47). He had to get on a ladder to see it. Id.

Hopkins filed a discrimination complaint with MSHA on September 16. In his complaint, he alleged that: (1) a hydraulic hose or metal line inside the boom was leaking hydraulic fluid and that other hoses were dripping fluid at the knuckle; (2) a hole was present in the boom about 10 to 15 feet from the basket that had been cut with a torch; (3) the emergency valve would not let the basket down; (4) and the turntable of the boom had one inch of play. (Ex. R-3).

On September 19, 1994, MSHA Inspector Michael Roderman inspected the high scaler for about three hours looking for safety problems described in a safety complaint, including the hydraulic leak in the boom. (Ex. P-15). He did not issue any citations on that day, but on September 21 issued Citation No. 4328815 alleging a violation of 30 C.F.R. § 57.1400(b). The citation is five pages long and discusses each of the allegations raised by Mr. Hopkins. (Ex. P-14). In particular, the citation states that: (1) the high scaler had two holes in the metal hydraulic line inside the upper boom near the knuckle; (2) a 2½ inch by 3 inch hole had been cut in the upper boom; and (3) a section of the bottom side of the upper boom was bent as a result of contact with the top frame of the outrigger jacks. Id. In addition, the citation alleges that the emergency rotation ("swing") motor for the turntable was missing. Id. Inspector Roderman determined that the alleged violation was not significant and substantial.

On September 20, 1994, Ms. Judy Peters, an MSHA Special Investigator, was at the mine to talk with Mr. Erickson about Mr. Hopkins' dismissal. While she was at the mine, she observed two compressed gas cylinders in a hallway that were not secured in any manner. (Tr. 599). She issued Citation No. 4444361 alleging a violation of 30 C.F.R. § 56.16005. She determined that the alleged violation was not significant and substantial.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. DISCRIMINATION PROCEEDING (CENT 95-122-DM).

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act.

The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine 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 the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). 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 activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

It is also well settled that section 105(c) protects "a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." John A. Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir 1989) (citations omitted). The Commission has consistently held that "the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal." Id.

1. Protected Activity

I find that Hopkins had a reasonable good faith belief that the high scaler posed a hazard to his safety. His primary concern was the hydraulic leak that he observed inside the upper boom of the high scaler. He also was concerned about the hole in the boom.

With respect to the hydraulic leak, Hopkins was concerned that the basket could drop or could swing against a pillar. (Tr. 120). Asarco questions whether this leak existed since Swearingin and Huggins could not find it on September 8. I credit the testimony of Hopkins. Blount testified that he found a leak in the same location on September 21. (Tr. 296-98, 304-05). Huggins also testified that he saw the leak on that date. (Tr. 746-47). Because the hydraulic line leaked only when the

basket was moved in a certain direction, it was not easy to detect.

With respect to the hole in the boom, Hopkins was concerned that the area was "taking weight" because the top of the hole was "pooched out." (Tr. 121). Asarco contends that the hole did not present a safety problem and points to the fact that the high scaler had been operated safely for years with this condition. It also states that other miners had observed the hole in the boom and were not concerned that it presented a safety hazard. Indeed, it notes that Inspector Seelke did not issue a citation on the high scaler and Inspector Roderman testified that he would have operated the high scaler after he inspected it on September 20. (Tr. 483-84, 486-87). I find, however, that Hopkins' perception of a hazard was reasonable despite the fact that the hole was not new. Indeed, I note that Asarco's expert witness, Kenneth Lau, testified that when he first saw the high scaler, he was concerned about the hole because of its sharp corners. (Tr. 713, 723, 727).

Asarco relies on National Cement Co. v. FMSHRC, 27 F.3d 526, 533 (11th Cir. 1994), for the proposition that "[i]f the work refusal is not objectively reasonable, there is no protected activity." In that case, however, the miner continued his work refusal after the operator suggested an alternative means to perform his work. The administrative law judge found that this alternative means was not unsafe, but held that the miner had engaged in protected activity. I interpret the Eleventh Circuit's decision to mean that a Commission judge should continue to view the hazard from the miner's perspective, but that an irrational or groundless fear cannot be the basis for protected activity because it is not "objectively" reasonable. In the instant case, I find that Hopkins' perception of the hazards was "objectively" reasonable. His perception of the hazard was not so groundless or irrational as to fail an objective test.

I also find that Hopkins' work refusal was made in good faith. Immediately following his preshift examination, Hopkins asked the mobile maintenance crew to check out the items that were of a concern to him and Mr. Hooper. Miners often ask mobile maintenance to examine equipment that needs repair, particularly if the miner's immediate supervisor is not present. (Tr. 54, 274-75, 284, 350, 399, 749). Swearengin was making his rounds at the time of Hopkins' preshift examination. Hopkins communicated his concerns to Swearengin when he returned to the section.

I have taken into consideration the fact that Hopkins was afraid of heights. A miner's refusal to work at a high location solely because of a fear of heights is not protected under the Mine Act because he does not have a good faith belief that the work is hazardous. In addition, such a work refusal would not

be reasonable because it would not pass the Eleventh Circuit's objective test in National Cement. I find, however, that Hopkins' refusal to work was based on the safety problems he observed during his preshift examination. Hopkins told the crew on a number of occasions that he did not want to work on the high scaler. He even bragged that he would not do so. I believe that he made these statements because of his fear of heights and because he was afraid of the high scaler as a result of his experience and the stories he had heard about it. Nevertheless, he testified that he would have high-scaled on September 8 if the hydraulic leak was repaired. (Tr. 135, 245). I credit this testimony. He told at least one other miner that he would high scale in order to keep his job. (Tr. 305-06) Thus, his work refusal on September 8 was motivated by his safety concerns.³

A miner's work refusal is not protected if the operator addresses his safety concerns "in a way that his fears reasonably should have been quelled." Gilbert, 866 F.2d at 1441. Asarco contends that it went to great lengths to address Mr. Hopkins' safety concerns. It points to the two meetings of August 4 at which Hopkins was asked to describe his safety concerns with the high scaler. It also refers to the fact that Hopkins was invited to accompany Inspector Seelke during his inspection of the high scaler on August 31. In addition, Mr. Swearengin inspected the high scaler with Hopkins on September 8 and Mr. Huggins inspected it after Hopkins and Hooper were transported to the powder magazine. Asarco argues that in each instance it attempted to address Hopkins' fears. Asarco argues that Hopkins acted unreasonably because he did not provide any specific safety concerns at the August 4 meetings, he refused to inspect the high scaler with the MSHA inspector and he continued to refuse to operate the high scaler after his concerns were addressed by Swearengin.

Asarco was diligent in attempting to discover why Hopkins was concerned about the high scaler. I credit Asarco's evidence that the Sweetwater Mine encourages miners to raise safety complaints and that management attempts to address these safety

³ Asarco argues that Hopkins' work refusal was not based on his safety concerns because he testified that he had decided that he would not high scale before he preshifted the machine. (A. Br. 9; A. Reply Br. 2). Hopkins testified that before he preshifted the high scaler on September 8, he "already knew what was wrong with it." (Tr. 245). He went on to testify that he had previously decided that he would not high scale if the problems he believed existed "weren't corrected." Id. He further stated that he would have operated the high scaler if the hydraulic line had been fixed. Id. I do not interpret this testimony to mean that Hopkins had decided that he would not high scale under any circumstances. His apprehension was rooted in his concerns about the safety of the machine.

concerns. Indeed, the mine has never had a discrimination claim under the Mine Act prior to this case. (Tr. 786-87). In the particular facts of this case, however, I find that Swearingin did not address Hopkins' safety concerns "in a way that his fears reasonably should have been quelled" Gilbert, 866 F.2d at 1441.

Asarco relies on the Commission's decision in Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993 (June 1983) in making its argument. In that case, the Commission held that where "the necessary communication between the miner and operator has occurred and management has taken corrective measures at some point repetition of the same complaint and work refusal loses the protection of the Mine Act." 5 FMSHRC at 998. There are two significant differences between that case and the instant case. First, the operator had totally corrected the condition that prompted Mr. Bush's work refusal. Id. Mr. Bush could not articulate any further safety problems. Second, Mr. Bush made it quite clear that he would not perform his assigned task under any circumstances. As stated above, Hopkins believed that the leak in the hydraulic line had not been corrected and he told Swearingin that he would operate the high scaler if the leak was fixed.

Although mine management tried to get Hopkins to explain his concerns at the August 4 meetings, Hopkins saw the meetings as an opportunity for management to "flex ... their muscles." (Tr. 112-13, 188). He believed that he was being "hammered" by management for raising concerns about the high scaler and that he had been "drug [into these meetings] five against one." (Tr. 188, 232).⁴

When Hopkins and Hooper discovered the hydraulic leak and the other safety items during the preshift examination on September 8, they sought the aid of the maintenance crew. When Swearingin discovered that Hopkins and Hooper had asked the maintenance crew to look at the high scaler, Swearingin took Hopkins and Hooper to a powder magazine and told the maintenance crew not to look at the high scaler. Instead, Mr. Huggins, a miner with extensive experience with the high scaler, examined the machine. Huggins, by his own admission, had no mechanical experience and testified that if he had a mechanical problem he would have a mechanic look at it. (Tr. 748-49)

⁴ I do not understand why Hopkins did not take the opportunity to express his concerns to Inspector Seelke on August 31. He testified that he believed he would get in trouble and have to attend more meetings if he pointed out problems to the inspector. (Tr. 29, 115). While Hopkins may have been required to attend more meetings, the record does not indicate that Asarco would have disciplined him for actively participating in the inspection. Nevertheless, his failure to participate is not fatal to his discrimination complaint.

After Hopkins and Hooper were brought back to the high scaler, they were told that it had been "checked out" and that they should high scale. Hopkins was genuinely apprehensive. He did not understand why he had been made to sit in a powder magazine for over an hour and he did not know what if anything had been done to correct the perceived safety problems. He did not know who, if anyone, had examined the machine. There is no dispute that Hopkins and Swearengen did not get along. The witnesses testified that there was a personality conflict between them. When Hopkins showed Swearengen the leak in the hydraulic line, Hopkins believed that Swearengen saw it but was not concerned about it.

Asarco contends that it was within Swearengen's authority to have Huggins examine the high scaler in lieu of a mechanic. It maintains that mobile maintenance was busy with other work, and supervisors have full authority to respond to safety complaints and to release equipment into production after the complaint is checked out. Although the record establishes that Swearengen did have such authority, that fact does not resolve the question. The witnesses testified that a mechanic frequently examines equipment in such circumstances. (Tr. 39, 54-56, 70, 79-80, 274-75, 284, 350, 399, 749). It is highly unusual for a supervisor to take a miner away from his work station to wait for a hour in a powder magazine after safety problems are raised. Moreover, after Hopkins was brought back to the high scaler, he observed the same leak in the hydraulic line and he was not told what had been done to correct the problems he reported. Accordingly, Hopkins' fears were not reasonably quelled.⁵

At first, Swearengen offered Hopkins and Hooper alternative work. When Hopkins asked Swearengen to give his word that other miners would not use the high scaler, Swearengen took Hopkins and Hooper to the mine shaft, instead. Hooper agreed to go back and high scale, but Hopkins continued to insist that the high scaler was not safe. Asarco contends that Hopkins' insistence that other miners not use the high scaler until his safety concerns were addressed is not protected under the Mine Act. It maintains that Hopkins was taken out of the mine only after "he refused to allow Swearengen to let another miner operate the high scaler until he cleared it." (A. Br. at 16). In Consolidation Coal Co. v. Marshall, 663 F.2d 1211, 1219 (3d Cir 1981), the court held that "the Mine Act does not provide for the right to shut down

⁵ As discussed above, Hopkins also described other hazards: hoses dripping hydraulic fluid at the knuckle, a defective emergency relief valve, and play in the turntable. I find that these items were either repaired by Asarco after Hopkins pointed them out or were addressed by Asarco in such a way that his fears reasonably should have been quelled. In addition, Hopkins was willing to operate the high scaler with the hole in the boom.

equipment so that other miners may not work." (emphasis in original). The court held that the complainant's termination did not violate the Mine Act because "no one has the right to stop others from proceeding to work if they so wish." Id.

In Consolidation Coal, the complainant, David Pasula, shut down a continuous miner and prevented the only other qualified miner on the shift from operating it. Thus, he shut down all coal production on the section. In addition, Pasula refused his right to have a safety committeeman evaluate the hazard. Id. at 1120. It was only after he refused all other options and he shut down the machine that he was taken out of the mine. Id. at 1120-21. In the present case, Swaeringin ordered Hopkins and Hooper to shut down the high scaler. Although Hopkins asked Swaeringin to give his word that no other miner would high scale, he did not prevent anyone else from using it. It was Swaeringin not Hopkins who had the authority to assign work. Other qualified miners were willing and able to high scale. Thus, Asarco's argument that Hopkins "refused to allow Swaeringin to let another miner operate" the high scaler is not supported by the record. Swaeringin could have simply said "no" to Hopkins' request.

2. Motivation for Hopkins' Dismissal

Hopkins was terminated, at least in part, for his protected activity. Mr. Hooper was taken to the shaft along with Hopkins for his refusal to work in the high scaler. When Hooper agreed to high scale, he was not taken to the surface for disciplinary action. Hopkins continued his refusal to work in the high scaler because of the hydraulic leak and was terminated. Thus, his termination was motivated at least in part by his protected activity.

The issue is whether Asarco was also motivated by Hopkins' unprotected activity and would have terminated him in any event for these unprotected activities. Mr. Mutchler, the underground manager, testified that Hopkins was not terminated for his alleged safety concerns but was terminated for refusing to do his normal work without a valid reason and interfering with Swaeringin's operation of his crew. (Tr. 841-42, 878).

It is true that Hopkins refused to do his normal work, scale loose rock, but his refusal was a direct result of his belief that the high scaler was unsafe to operate. Mutchler and Swaeringin did not consider the high scaler to be unsafe and, therefore, characterize his work refusal as insubordination. Mr. Mutchler believes that Hopkins was malingering because he did not want to high scale. Thus, in Mr. Mutchler's mind "there was no relationship whatsoever" between Hopkins' safety concerns and his termination. (Tr. 842). I have determined that Hopkins had a reasonable, good faith belief that the high scaler was unsafe to operate. Mr. Mutchler and Swaeringin had knowledge of

Hopkins' safety concerns but did not take the necessary steps to quell his concerns, as discussed above. Thus, I find that there was a direct relationship between Hopkins' safety concerns and his dismissal by Asarco.

Asarco asserts that it would have terminated Hopkins solely for his unprotected activity. First, it contends that Hopkins was terminated for refusing to allow Swearingin to put other miners on the high scaler. As discussed above, Hopkins was not in charge and did not "refuse to allow" anyone else to high scale. Second, Asarco contends that Hopkins repeatedly called Swearingin a liar on September 8 and that such insubordination was not protected. There is no question that Hopkins called Swearingin a liar at least twice because Hopkins believed Swearingin saw the leak in the hydraulic line but would not admit it. Bad mouthing a supervisor is not protected under the Mine Act. (See, for example, my decision in Sorensen v. Intermountain Mine Services, 17 FMSHRC 145 (February 1995)). I find, however, that Hopkins was not fired because he called Swearingin a liar. Employees sometimes became emotional during disputes with a supervisor and Hopkins was known to be rather hotheaded. Hopkins would not have been fired for this conduct alone. I find that Asarco has not established that it would have discharged Hopkins for his unprotected activity.⁶

3. Remedy

Although he was employed at the time of the hearing, Hopkins testified that he might want to be reinstated because his current job may only be temporary. (Tr. 909). He was not sure that he would seek reinstatement if he prevailed in this proceeding. Id. Asarco contends that reinstatement should not be awarded because Hopkins stole the September 8 preshift examination card for the high scaler. Hopkins admitted that he took the preshift examination card when he left the mine on September 8. (Tr. 212-13). Apparently it was in his pocket when he was escorted from the mine. He later gave it to MSHA and it was not returned to Asarco until the discovery phase of this case. Theft of company property is grounds for dismissal at the Sweetwater Mine. (Tr. 779-80).

In making this argument, Asarco relies on the Supreme Court's decision in McKennon v. Nashville Banner Pub. Co., 115 S.Ct. 879 (1995). In that case, the employer discovered during

⁶ Mr. Mutchler also testified that he took into consideration Hopkins' work history, including incidents involving cutting fuses too short and distributing religious literature after being instructed not to. I find that he would not have been discharged for these unprotected activities.

discovery that the plaintiff in an age discrimination case had copied confidential documents that disclosed financial information about the company. It sought to have the case dismissed for the theft. The Supreme Court held that after-acquired evidence of the employee's theft did not bar the age discrimination suit, but held that it had a bearing on the remedies available. Specifically, the Court ruled that reinstatement would be inequitable because the employee would have been terminated in any event for the theft.

The facts in McKennon are different from the case presented here. There is no evidence that Hopkins' theft of the preshift card was anything but inadvertent. He had it in his pocket when he was escorted from the mine. It is understandable that an employee would forget such a card when he believes that he is being fired. He testified that he did not think it had any value to the company because it did not contain any production information. (Tr. 212-13). (That information is added at the end of the shift.) It did contain a list of the problems he found on the high scaler. (Ex. P-4). In McKennon, however, the employee admitted that she took the confidential information in the months prior to her discharge to protect herself in case she was fired on the basis of economic necessity. Thus, the employee in McKennon intentionally took confidential information from her employer. There is no evidence that Hopkins intentionally stole Asarco's property. "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on these grounds alone if the employer had known at the time of discharge." McKennon, 115 S.Ct. at 886-87. A miner who inadvertently walks off with a preshift examination card would not be terminated by Asarco. Moreover, if Hopkins had not been terminated, it is unlikely that he would have taken the card. Accordingly, reinstatement is not barred by McKennon.

B. CONTEST PROCEEDINGS (CENT 95-8-RM & CENT 95-9-RM).

1. High Scaler Citation

Citation No. 4328815 alleges that the following four defects affecting safety were present on the high scaler: (1) a leak in the hydraulic line inside the upper boom near the knuckle; (2) a 2½- by 3-inch hole in the upper boom; (3) a dent in the upper boom; and (4) a missing emergency swing motor for the turntable. (Ex. P-14). The citation alleges a violation of 30 C.F.R. § 57.14100(b) which provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." Inspector Roderman determined that the violation was not significant and substantial.

For the reasons discussed below, I find that the Secretary has not established that the hole and the dent in the upper boom were defects that affected safety. I also find that the Secretary failed to establish that an emergency swing motor was missing from the high scaler. I find, however, that the hydraulic leak in the upper boom affected safety and that this defect was not corrected in a timely manner to prevent the creation of a hazard.

Inspector Roderman did not observe the leak in the hydraulic hose when he inspected the high scaler on September 19. (Tr. 445). He spent a considerable amount of time looking for the hydraulic leak described in the complaint. (Tr. 477-78, 545) He did not see the leak on September 21 when he returned to the mine. (Tr. 445). Roderman testified that an hourly maintenance employee approached him when he arrived on September 21 and said that the leak he had been looking for had been found. (Tr. 446, 543-44). The leaking hydraulic line had been repaired sometime before the inspector arrived by bypassing it with a new hydraulic hose. (Tr. 298-300, 446). The miner described the V-shaped spray but could not say how long the leak had been there. (Tr. 446). Huggins and Blount also saw the leak on September 21. The leaking line controlled the rotation of the turntable for the boom. Inspector Roderman was concerned that the leak could cause the basket to "swing around and overturn, ... [or] hit a pillar or rib and maybe throw someone from the basket." (Tr. 448).

Inspector Roderman testified that, in general, one would expect to see a leak of the magnitude described by the mechanic who reported it to him on September 21. (Tr. 553-55, 560). He stated that he looked for the leak on September 19 while the boom was in motion, but that he was not inspecting for leaks when the turntable was moved from side to side. (Tr. 553, 585). Inspector Roderman does not know when the leak occurred. (Tr. 545, 569). He assumed that the leak that was found on September 21 was the same leak that Hopkins saw on September 8 because it had the same V-shaped spray and was in the same location. (Tr. 570-71).

I credit the testimony of Roderman, Blount, and Huggins that a hole existed in the hydraulic line on September 21, 1994. I also credit the testimony of Inspector Roderman and Michael Sheridan, an MSHA engineer, that such a hydraulic leak constitutes a defect that affects safety. (Tr. 448, 647). It is impossible to know how long the leak existed or if it was the same leak that Hopkins saw on September 8. On one hand, there is evidence that such a leak would be readily obvious because it would cause hydraulic fluid to pour out of the upper boom at a fairly steady rate. (Tr. 769). There is also evidence that such a hole can develop in a matter of minutes. (Tr. 312-13). On the other hand, there is evidence that the hole in the hydraulic line only sprayed significant amounts of fluid when the turntable was

moved. Charles Walker, a miner at the Sweetwater Mine, testified that he operated the high scaler between September 8 and 21. (Tr. 70-71). He stated that the high scaler "still ran a little hydraulic oil out of the boom, but you still couldn't see [any] leak." (Tr. 71).

Based on this evidence and the record as a whole, I find that the leak was not corrected in a timely manner. I find that it is likely, although far from certain, that the leak had existed since the time Hopkins observed it on September 8. It was difficult to see the V-shaped spray because it was inside the boom and it only sprayed when the controls were operated in a certain manner. Mr. Hopkins and Hooper reported that the boom was leaking on September 8. Walker stated that the boom leaked hydraulic oil at the time he operated it. Garry Moore and Huggins checked the boom for leaks while Hopkins and Hooper were at the powder magazine on September 8. They testified that they found a leak in the boom but fixed it by tightening a fitting. (Tr. 282-83, 744-46). It is possible that this repair did not fix the leak. Inspector Roderman did not see the leak on September 19, but stated that the turntable was not moved while he was looking at the boom. In any event, I find that the leak had existed for some length of time.

I recognize that older mining equipment is bound to leak hydraulic fluid.⁷ Minor leaks are to be expected and do not pose a safety hazard. Nevertheless, the leak in the boom was more than a routine leak; it affected safety, and was not timely corrected.

The hole in the boom had existed for as long as anyone could remember. The hole had apparently been cut to facilitate the replacement of hydraulic hoses. The Secretary has not established that this hole was a defect that affected safety. Mr. Sheridan, the Secretary's engineer, testified that the hole was not a hazard unless cracks developed around the hole. (Tr. 642, 683). He recommended that the operator monitor the hole for cracks. Neither Sheridan nor Inspector Roderman saw any cracks around the hole and the photographs do not show any cracks. (Tr. 482, 645; Exs. P-6E, P-6F). Kenneth Lau, Asarco's engineer, did not observe any cracks and concluded that it was reasonable for the mine to operate the high scaler with the hole in the boom. (Tr. 704, 711). Inspector Roderman included this allegation in the citation because he was told to by a supervisor in MSHA's Dallas office. (Tr. 448-50, 561-62).

I also find that the dent in the boom did not create a safety hazard. Mr. Sheridan testified that the dent was not a major

⁷ The 1311 high scaler had been in operation at this mine since 1974. (Tr. 437).

distortion and that it did not create a safety risk. (Tr. 684). Mr. Lau did not find any cracks around the dent and concluded that it was reasonable for the mine to operate the high scaler with the dent in the boom. (Tr. 704, 711). When Inspector Roderman saw the dent on September 19, he concluded that it did not create a hazard. (Tr. 487). He included this allegation in the citation only after he talked to a supervisor in MSHA's Dallas office. (Tr. 452).

Finally, I conclude that the Secretary did not establish that the emergency swing motor was missing from the high scaler. Inspector Roderman testified that he believed that the emergency swing motor was missing from the high scaler. (Tr. 454-56). He based his finding, in part, on his experience operating this particular high scaler when he worked for the previous operator of the mine. Id. According to Roderman, this motor allows the boom and turntable to rotate. Mr. Sheridan, in his report, stated that a swing motor was missing. (Ex. P-2). He testified, however, that he did not look for a swing motor. (Tr. 674-75). Mr. Mutchler testified that the high scaler was never equipped with the type of emergency swing motor that Inspector Roderman said was missing. (Tr. 842-49). He further testified that the high scaler was equipped with two motors that can be used to turn the boom and turntable: a hydraulic motor, and an electric motor. Id. Using photographs and other exhibits, he showed where these motors were located. Because these motors were incorporated into the structure of the high scaler, he stated that they were somewhat hidden from view. Id. I credit Mr. Mutchler's testimony in this regard and find that an emergency swing motor was not missing from the high scaler.

2. Compressed Gas Cylinder Citation

On September 20, 1994, Inspector Peters issued citation No. 4444361 alleging a violation of 30 C.F.R. § 56.16005. The citation states, in part: "Two compressed gas cylinders both labeled full oxygen containers were observed lying on the floor beside the mail box in the main office." (Ex. P-3). The citation further states that employees were observed in the area and that she was told that the cylinders were there for less than two hours. (Tr. 599). Section 56.16005 states that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." Inspector Peters determined that the violation was not significant and substantial.

Asarco did not offer any evidence or argument on this citation. Accordingly, I credit the testimony of Inspector Peters with regard to this matter and affirm the citation.

III. ORDER

A. CENT 95-122-DM

For the reasons set forth above, I conclude that the discharge of David G. Hopkins by Asarco in September 1994, violated section 105(c) of the Mine Act. Consequently, it is **ORDERED** that:

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

(a) stipulating to the position and salary to which Mr. Hopkins should be reinstated at Asarco's Sweetwater Mine, if he seeks reinstatement;

(b) stipulating to the amount of back pay and interest computed from September 9, 1994, to the present, less deductions for unemployment benefits and earnings from other employment;

(c) stipulating to any other reasonable and related economic losses or litigation costs incurred as a result of Mr. Hopkins' September 1994, discharge.

2. If the parties are unable to stipulate to the appropriate relief in this matter, Complainant shall file, within 40 days of the date of this decision, a proposed order for relief. This proposed order shall be supported by documentation, including check stubs from his prior and current employment, notices of unemployment compensation awards, and bills and receipts to support any other losses or expenses claimed.

3. Asarco shall have 20 days to reply to Complainant's proposed order for relief.

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

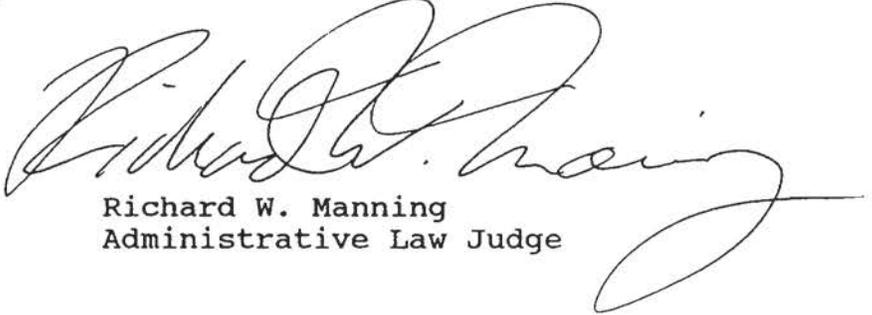
5. This decision does not constitute my final decision in CENT 95-122-DM until my final order for relief is entered. Asarco's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of this decision on liability or relief.

B. CENT 95-8-RM

For the reasons set forth above, Citation No. 4444361 is **AFFIRMED**. No civil penalty can be assessed at this time because the Secretary of Labor has not filed a petition for assessment of penalty under 29 C.F.R. § 2700.28.

C. CENT 95-9-RM

For the reasons set forth above, Citation No. 4328815 is **AFFIRMED** as to the allegation concerning the leak in the hydraulic line in the boom of the 1311 High Scaler, and is **VACATED** as to all other allegations. No civil penalty can be assessed at this time because the Secretary of Labor has not filed a petition for assessment of penalty under 29 C.F.R. § 2700.28.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 5 1996

| | | |
|---------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 95-322 |
| Petitioner | : | A.C. No. 15-17164-03544 |
| v. | : | |
| | : | Docket No. KENT 95-388 |
| NARROWS BRANCH COAL INC., | : | A.C. No. 15-17164-03545 |
| Respondent | : | |
| | : | Docket No. KENT 95-424 |
| | : | A.C. No. 15-17164-03546 |
| | : | |
| | : | Docket No. KENT 95-447 |
| | : | A.C. No. 15-17164-03547 |
| | : | |
| | : | Mine No. 1 |

DEFAULT DECISION

Before: Judge Weisberger

On January 24, 1996, an order was issued which provided as follows:

It is **ORDERED** that Respondent shall within 10 days of this order either file a statement setting forth good cause why it should not be held in default, or sign and file the original joint motion to approve settlement. If Respondent shall not comply with this Order, a default decision will be issued finding Respondent in default, and ordering Respondent to pay a civil penalty of \$33,947, the total amount sought by Petitioner in the Petitions for Assessment of Penalty filed in these cases.

Respondent has not complied with this Order. Respondent has not filed a statement setting forth good cause why it should not be held in default; nor has it signed and filed the original Joint Motion to Approve Settlement.

Accordingly, it is found that Respondent is in default, and it is ORDERED that Respondent pay a civil penalty of \$33,947.


Avram Weisberger
Administrative Law Judge

Distribution:

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 5 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 96-38
Petitioner : A.C. No. 15-17044-03573
v. :
 : Docket No. KENT 95-785
THE PITTSBURG & MIDWAY COAL : A.C. No. 15-17044-03570
MINING COMPANY, :
Respondent :
 : Sebree #1 Mine

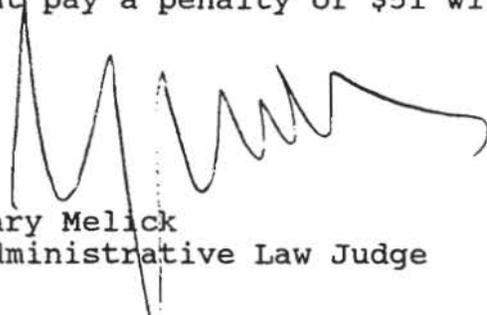
DECISION

Appearances: Arthur J. Parks, Conference & Litigation
Representative, U.S. Department of Labor,
Madisonville, Kentucky, for Petitioner;
John H. Miller, Esq., The Pittsburg & Midway
Coal Mining Company, Englewood, Colorado, for
Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). During hearings the parties moved to approve a settlement agreement and to dismiss the cases. Deletion of the "Significant and Substantial" findings from Citation No. 4061992 and a reduction in penalty from \$228 to \$51 were proposed. I have considered the representations and documentation submitted, including testimonial and documentary evidence received at hearing, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$51 within 30 days of this order.


Gary Melick
Administrative Law Judge

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/jlf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 6 1996

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-597-D
on behalf of RONNIE GAY, :
Complainant : BARB CD 95-08
v. :
: Perry County No. 1 Strip
IKERD-BANDY CO., d/b/a : Mine ID 15-08038
COCKRELL'S FORK MINING :
Respondent :

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee for
the Complainant;
William I. Althen, Esq. and Donna C. Kelly, Esq.,
Smith, Heenan and Althen, Washington, D.C.
and Charleston, West Virginia, respectively on
behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Ronnie Gay under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Ikerd-Bandy Company, Inc. (Ikerd-Bandy) violated Section 105(c)(1) of the Act when it did not hire Mr. Gay, an applicant for employment, in early July 1994.¹ In a

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and

preliminary motion to dismiss Ikerd-Bandy argues that Mr. Gay failed to meet the filing requirements under Section 105(c)(2) of the Act in that he "unjustifiably failed to file the charge of discrimination within (60) days of the date of the alleged violation, and the delay results in some specific prejudice to Respondent".

Motion to Dismiss

In relevant part, Section 105(c)(1) of the Act prohibits discrimination against a miner or applicant for employment because of his exercise of any statutory right afforded by the Act. n.1, *supra*. If a miner or applicant for employment believes that he has suffered discrimination in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with Section 105(c)(2) of the Act.² The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). In those decisions the Commission cited the Act's legislative history relevant to the 60-day time limit:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable

Footnote 1 Continued

potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceedings, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

² After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this Commission on behalf of the miner or applicant for employment if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he is required to so inform the individual complainant and that person may then file his own complaint with the Commission under Section 105(c)(3) of the Act.

circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time-limit because he is misled as to or misunderstands his rights under the Act. (citation omitted).

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

It is undisputed in this case that the alleged act of discrimination commenced on July 2, 1994, when Ikerd-Bandy did not hire Gay and that Gay did not file his complaint with the Secretary until December 13, 1994. His signed complaint is dated December 14, 1994.

Gay testified at hearing as justification for the delay that he was unaware of his rights to file a complaint of discrimination under the Act until a coincidental meeting with Federal Mine Inspector Dash on December 12, 1994. Dash was purportedly investigating an unrelated matter at the subject mine in which rock from an explosives blast struck nearby homes. A conversation ensued with Gay in which Gay related his experience at the Whitaker mine operation (predecessor to Ikerd-Bandy) concerning safety reports he prepared regarding the absence of a guard for the cooling fan on his bulldozer. Dash purportedly advised Gay of his right to file a complaint with the Mine Safety and Health Administration (MSHA) and the next day Gay filed the complaint at issue with the Hazard, Kentucky, MSHA office.

Gay's testimony on this issue is not disputed and, indeed, provides justification for the relatively brief delay in the filing of his complaint. Accordingly Gay's late filing may be excused.

The Merits

In his amended complaint filed at hearing the Secretary alleges in relevant part as follows:

The Complainant, Ronnie Gay, was employed as a bulldozer operator by Whitaker Coal Company ("Whitaker") until June 30, 1995 and was a "miner" within the meaning of Section 3(g) of the Act [30 U.S.C. 802(g)].

Between June 15 and June 27, 1994 Ronnie Gay communicated safety complaints to Whitaker through its agent, Superintendent Carson Sizemore ("Sizemore").

On or about June 20, 1994 Sizemore, as Whitaker's superintendent ordered Ronnie Gay, through Whitaker's foreman Raymond Walker, to stop communicating his safety complaints to Whitaker.

Ronnie Gay continued to communicate safety complaints to Whitaker.

On June 30, 1994 all Whitaker miners, including Ronnie Gay, were laid off by Whitaker.

As of July 1, 1994 mine operations were purchased by respondent, Ikerd-Bandy Co., Inc.

Ikerd-Bandy Co., Inc. used the same equipment, same employees, and same methods of mining to extract coal from the same coal seam mined by Whitaker. Ikerd-Bandy Co., Inc. was a successor operator to Whitaker.

Ikerd-Bandy Co., Inc. hired Sizemore as its superintendent as of July 1, 1994.

On July 2-3, 1994 all Whitaker miners who had filed applications for work with Ikerd-Bandy were interviewed by Sizemore and another representative of Ikerd-Bandy Co., Inc.

On July 1, 1994 Ronnie Gay filed an application for work with Ikerd-Bandy and on or about July 2, 1994 was interviewed by Sizemore and another agent of Ikerd-Bandy. Ronnie Gay was an applicant for employment within the meaning of the Act.

Ronnie Gay was discriminated against on or about July 2, 1994, when he was denied employment by Ikerd-Bandy because, prior to this date, he had communicated safety complaints to Ikerd-Bandy's agent Sizemore while both Ronnie Gay and Sizemore were employed by Ikerd-Bandy's predecessor, Whitaker. The safety complaints related to the condition of the bulldozer Ronnie Gay operated for Ikerd-Bandy's predecessor, Whitaker.

The Secretary is seeking, *inter alia*, an order directing Ikerd-Bandy to pay "damages in an amount equal to full back pay, all employment benefits, all medical and hospital expenses and any and all other damages suffered by Ronnie Gay as a result of the discrimination from the date of the discrimination until the date Gay was reinstated to full employment status with Ikerd-Bandy, i.e. until June 23, 1995, and a civil penalty of \$6,000."

This Commission has long held that a miner or applicant for employment seeking to establish a *prima facie* case of

discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on 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, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity 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 Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

There is no dispute in this case that Gay filed numerous safety complaints during his four years while working for Whitaker, including as many as 200 pre-shift driver's reports citing equipment defects and the more recent pre-shift reports citing the absence of a guard over the radiator fan on his bulldozer (Joint Exhibit No. 1). It is not disputed that Gay continued to file such reports through his last day of work for Whitaker on June 30, 1994, when Whitaker closed down operations at the subject mine and released all of its workforce. Considering this undisputed evidence it is clear that Gay had in fact thereby engaged in protected activity.

The second element of a *prima facie* case of discrimination is a showing that the adverse action (in this case the decision of Ikerd-Bandy not to hire Gay on or about July 2, 1994) was motivated in any part by the protected activity.³ As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected

³ Gay was subsequently hired by Ikerd-Bandy and began work on June 23, 1995.

activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case".

In this regard it is undisputed that former Whitaker Mine Superintendent Carson Sizemore was Gay's supervisor while Gay worked at Whitaker as a bulldozer operator until Whitaker ceased operations on June 30, 1994. Gay testified that he began filing pre-shift driver's reports on the missing fan guard as early as April or May 1994, and continued through June 30, 1994. According to Whitaker foreman Raymond Walker, it was the practice for the pre-shift reports to be completed by the equipment operators before each shift to notify management of mechanical and/or safety defects. Walker would collect these reports from the operators on his shift and turn them over to Robert Baker in the mine office. According to Walker, Baker then made a list of the reported problems and provided that list to Sizemore.

Gay testified that although Sizemore had never talked to him directly about these reports, Raymond Walker, who was his foreman, told him on June 7, 1994, that Sizemore did not want him to continue reporting the absent bulldozer fan guard. Gay testified that he told Walker that he would nevertheless continue to write the reports.

In his testimony Walker confirmed that, following complaints to Sizemore about the missing fan guard on Gay's bulldozer, Sizemore told Walker to tell Gay not to report this problem any more. Walker confirmed that he reported Sizemore's response to Gay. This corroborated and credible testimony may reasonably be considered evidence not only of knowledge by Sizemore of Gay's protected activity but also of animus toward that activity. Sizemore's contrary testimony is also accordingly afforded but little weight. The Secretary alleges that Sizemore, as successor Ikerd-Bandy's new superintendent, thereafter retaliated against Gay when he presumably rejected Gay's July 1994, application for employment with Ikerd-Bandy.

The record shows that on July 1, 1994, Whitaker sold substantially all of the assets of the subject mine to Ikerd-Bandy, an unrelated business entity. According to William Rich, Ikerd-Bandy's president, two or three weeks prior to that date he told the Whitaker miners at meetings at the mine that he intended to hire from among the miners who were already working and did not intend to bring miners in from other jobs. While there is some disagreement over the precise words used by Rich, even one of the Secretary's own witnesses, Daryl Baker, agrees that Rich did not say he would hire all of Whitaker's employees. I, therefore, find Rich's testimony to be the most credible. Indeed, Rich projected that of Whitaker's work force of about 155

employees (110 of whom worked on the mine site) he planned on retaining only 65. Rich nevertheless invited all Whitaker miners to apply for jobs with Ikerd-Bandy and more than one hundred Whitaker miners, including Gay, did apply.

As noted, Ikerd-Bandy hired Whitaker's former superintendent, Sizemore, on July 1, 1994 to help with the transition. Around July 2-3, 1994, Ikerd-Bandy's operations manager, Stephen Huey, and Sizemore interviewed every Whitaker miner who applied for work with Ikerd-Bandy, including Gay. Within a week of Whitaker's closing, Ikerd-Bandy commenced mining operations at the same site but with only about sixty-five miners, not including Gay.

Indeed, while some circumstantial evidence, including knowledge of protected activity and timing, may suggest an illegal motivation for not hiring Gay in July 1994, I find that such evidence is neutralized by other credible evidence, the absence of credible evidence of disparate treatment, and, on balance that the Secretary has failed to sustain her burden of proving such unlawful motivation.⁴ I have considered, in this regard, the long history of Gay and co-workers, Durscle Stephens and Prentiss Baker, for filing safety complaints while employed by Whitaker and working for Sizemore but without evidence of previous retaliation. Indeed, several of these former Whitaker employees with long histories of filing safety complaints were offered jobs and hired by Ikerd-Bandy. I also find credible the testimony of Ikerd-Bandy's president, William Rich, as to the hiring procedures followed in July 1994, based upon unprotected rationale (Tr. 229-235), and that he planned to and did retain only 65 of the 155-man workforce maintained by his predecessor, and the evidence that Sizemore had no input as to Ronnie Gay (Tr. 204, 217).

It is also noteworthy that Gay himself admitted that he has no knowledge as to how Ikerd-Bandy chose its employees and was only speculating that he was not hired because he had filed pre-shift reports. Finally, there is no credible evidence of disparate treatment of Gay based upon his protected activity and, indeed, there is no credible evidence that anyone less qualified than Gay was hired by Ikerd-Bandy before Gay himself was hired.

⁴ I have also considered the subsequent purported statement on January 3, 1995, of Huey that they would not hire Gay because he filed the instant proceedings. While this statement, if made, would clearly show animus toward Gay's protected activity of filing the instant discrimination case and could very well provide grounds for an independent cause of action, I do not, in any event, find this evidence to be sufficiently connected to the claim in this case to have any decisive bearing.

It should be noted that even assuming, *arguendo*, the Secretary had established a *prima facie* case of discrimination, the above evidence would nevertheless establish an affirmative defense that Ikerd-Bandy would not have hired Gay in July 1994, for unprotected reasons alone.

Under the circumstances this discrimination proceeding must be dismissed.

ORDER

Discrimination Docket No. KENT 95-597-D is hereby dismissed.

A handwritten signature in black ink, appearing to read "Gary Melick". The signature is written in a cursive, somewhat stylized font.

Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 7 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-451
Petitioner : A.C. No. 15-16508-03594
v. :
: Docket No. KENT 95-671
J B D MINING COMPANY, INC., : A.C. No. 15-16508-03600
Respondent :
: Docket No. KENT 95-728
: A.C. No. 15-16508-03601
:
: Mine: Harlan No. 1

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee;
Tommy D. Frizzell, Conference and Litigation
Representative, Mine Safety and Health
Administration, Barbourville, Kentucky;
Ronnie R. Russell, Conference and Litigation
Representative, Mine Safety and Health
Administration, Barbourville, Kentucky, for
Petitioner;
Jefferson B. Davis, President, J B D Mining,
Pathfork, Kentucky, Pro Se, for Respondent.

Before: Judge Amchan

Docket No. KENT 95-451

On November 17, 1994, MSHA representative Billy Parrott conducted an inspection of Respondent's No. 1 Mine in Harlan County, Kentucky. When he arrived at the mine's only working section, Parrott noticed that a center line, drawn on

the roof of a crosscut to guide the continuous mining machine, extended inby the last row of bolts (Tr. I: 14-16).¹

This line could not have been drawn without a miner walking under an unsupported portion of the roof (Tr. I: 23). Going into an area in which the roof is unsupported is very dangerous and could result in a miner being killed or seriously injured by a roof fall. Parrott issued an imminent danger order and Citation No. 4246900. The citation alleges a violation of MSHA regulation 30 C.F.R. §75.202(b). This regulation generally forbids work or travel under unsupported roof.

The citation alleges a significant and substantial (S&S) violation due to moderate negligence on the part of the Respondent. It also alleges that it was highly likely that an injury resulting in permanently disabling injuries might occur due to the violation. MSHA proposed a \$2,000 penalty for the violation.

Respondent does not deny that the violation occurred. It argues that the proposed penalty is much too high given the circumstances. When proposed penalties are contested, the Commission assesses civil penalties independently of the proposal made by MSHA. Section 110(i) of the Act requires that the Commission assess civil penalties after giving consideration to six factors. These are the size of the operator, the gravity of the violation, whether the operator was negligent, whether the operator demonstrated good faith in promptly abating the violation, the operator's history of previous violations and the effect of the penalty on the operator's ability to stay in business.

Respondent is a small operator and it has not offered evidence that payment of the proposed penalties would affect its ability to stay in business. Respondent appears to have been cooperative in trying to prevent recurrences of the violation (Exh. G-2, Block 17). As to Respondent's prior history of violations, the Secretary's computerized list of

¹I will refer to the transcript for Docket No. KENT 95-451 as Tr. I, the transcript for Docket No. KENT 95-671 as Tr. II and the transcript for Docket No. KENT 95-728 as Tr. III.

citations between November 17, 1992 through November 16, 1992 (Exh G-1), reveals no reason to assess either a higher or lower penalty. It does indicate that Respondent pays few of the uncontested penalties proposed by MSHA. However, I do not regard this as a basis for increasing the penalty for the instant violations. The mechanism for addressing a failure to pay civil penalties is the institution of a collection proceeding in U.S. District Court pursuant to § 110(j) of the Act.

The record in this case requires resolution of conflicting evidence regarding the negligence of the operator in violating the Act and the gravity of the violation. As to negligence, Charles Farmer, a repairman and sometime section foreman, admits he drew the center line in the area cited by Inspector Parrott (Tr. I: 66). He stated that he thought he was still under supported roof because he did not realize that the person installing roof bolts had not finished the row of bolts closest to the face (Tr. I: 69, 72, also see Respondent's Answer of May 23, 1995).

Farmer contends that there were two bolts on the right side of the unfinished row of bolts in the crosscut and that the red reflective marker was on the one closest to the middle of the crosscut (Tr. I: 67, 69; Exh. R-1). Inspector Parrott contends that the marker, which indicates the last row of bolts, was attached to one of the bolts in the last completed row (Tr. I: 38; Exhibit R-1). Moreover, he states that only one bolt had been installed in by that row (Exh. G-5)².

I credit the testimony of Inspector Parrott and find that the reflective marker was in the last full row of bolts and that there was only one bolt in front of this row. I do so because he is likely to have focused his attention much more on the location of the bolts and marker than did Farmer, who was also

²Exhibit G-5 was drawn on acetate and used on an overhead projector at hearing. It was also copied on paper. The paper version of G-5 contains marks made by the witnesses which are not on the acetate version.

concerned with his production responsibilities. Moreover, Parrott committed his recollections to paper by making a sketch of the area within 10 or 15 minutes of his observations (Tr. I: 39, 43).

Since I conclude that Farmer went beyond the red reflective marker, I find his negligence to be somewhat greater than if the marker had been on the bolts closest to the face. Nevertheless, I accept Respondent's claim that the violation was due to inadvertence.

The coal seam at this point is only 30 inches high. Miners are not able to stand up, and it is thus more likely that Farmer did not appreciate the fact that the row of bolts closest to the face had not been completed. On the other hand, it is incumbent upon Respondent to insure that all its employees are trained sufficiently so they recognize when a row of bolts has not been completely installed.

I therefore conclude that this violation was due, in part, to a moderate degree of negligence on the part of Mr. Farmer in failing to determine whether the roof under which he traveled was supported. Mr. Farmer's negligence is imputed to Respondent for liability and penalty purposes. He generally was given supervisory responsibilities and there is nothing in the record which indicates that Respondent had taken reasonable steps before this incident to avoid such a violation, Nacco Mining Company, 3 FMSHRC 848, 850 (April 1981).

I also find Respondent was negligent for creating a situation in which a miner might not realize that the row of bolts closest to the face had not been completely installed. Nothing in the record indicates that there was anything unprecedented in the circumstances leading to the violation. The bolts were apparently left out of the row closest to the face due to the presence of cap coal (coal left on the roof by the continuous miner). The record does not indicate that Respondent had taken any precautions to insure that miners would not travel under a portion of the roof where bolts had not been installed for this reason. Thus, I conclude it was foreseeable that they might do so.

MSHA considered the instant violation to be highly likely to result in an accident, in part because the Harlan No. 1 Mine has 2 to 12 inches of draw rock in many places and has experienced a number of roof falls (Tr. I: 54-61). Mr. Farmer, on the other hand, does not recall encountering any draw rock in the cited area (Tr. I: 70).

Regardless of whether this area contained draw rock, I find that the violation was "S&S" as alleged by the Secretary. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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.

The Commission, in United States Steel Mining Co., Inc., FMSHRC 1573, 1574 (July 1984), held that S&S determinations are not limited to conditions existing at the time of the citation, but rather should be made in the context of continued normal mining operations. Applying this test, I conclude the violation was as reasonably likely to occur in an area with draw rock as in one with no draw rock. Therefore, I conclude that a serious accident was reasonably likely, and thus the violation was properly characterized as "S&S." Further, given the considerations discussed herein, I conclude that a \$500 civil penalty is appropriate for this violation.

Docket No. KENT 95-671

MSHA representative Roger Dingess inspected the Harlan No. 1 mine on April 19, 1995 (Tr. II: 5-7). After inspecting the face area he walked outby four crosscuts along the belt line and found a fresh cigarette butt. He continued walking approximately 300 feet outby to a power center where he found a second fresh cigarette butt (Tr. II: 6-8).

As a result of these discoveries, Dingess issued citation No. 4478078 to Respondent alleging a violation of 30 C.F.R. §75.1702. The cited regulation prohibits anyone from smoking underground or carrying any smoking materials underground. It also requires a mine operator to institute a program, approved by the Secretary, to insure that nobody carries smoking materials underground.

The citation alleges this standard was violated in that the operator did not comply with its smoking program (Exh. G-8, Block 8). MSHA characterizes the violation as S&S and due to the operator's moderate degree of negligence. A penalty of \$2,500 was proposed for this violation.

The only evidence of fault on Respondent's part is Inspector Dingess' testimony that Charles Farmer, Respondent's foreman, was working only 100 feet inby from the location of the first cigarette butt found and therefore should have immediately detected the smoke from this cigarette (Tr. II: 13-14). However, there is no direct evidence that Farmer knew anyone was smoking in the mine, and insufficient evidence to infer such a fact.

The airflow along the belt line is of relatively low velocity, but it would have carried cigarette smoke outby and away from Farmer, rather than towards him (Tr. II: 17-18). Moreover, it is not certain that the cigarettes were smoked at the locations at which they were found (Tr. II: 18).

There is also no evidence that Respondent's smoking program was defective or improperly implemented (Tr. II: 13,17,21). Negligence on the part of J B D management cannot be inferred simply from the fact that smoking materials were found underground. Further, the negligence of non-supervisory personnel in bringing smoking materials into the mine cannot be imputed to the Respondent for purposes of assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982).

Despite the fact that Inspector Dingess has never detected methane at the No. 1 mine, I conclude that the instant violation is S&S. Congress would not have specifically prohibited the presence of such materials and provided for penalties for individual miners unless it considered that such materials are reasonably likely to result in serious injury.

Nevertheless, in spite of the high gravity of the violation, I assess only a \$200 civil penalty. Paramount in this decision is the absence of evidence of Respondent's negligence and its good faith abatement of the violation. Respondent took steps to prevent a recurrence of the violation by discharging the miner who most likely brought the smoking materials into its mine (Tr. II: 22-24).

Docket No. KENT 95-728

On April 20, 1995, while inspecting the surface area of the Harlan No. 1 mine, Mr. Dingess observed Bobby Taylor get out of his haul truck and load coal into it with a front end loader (Tr. III: 5-7, 12). Inspector Dingess asked Taylor for documentation regarding his hazard training at this mine. While Taylor had training slips for other mines he had worked at, he did not have any for Respondent's mine (Tr. III: 7, 10).

Taylor was employed by Kincaid Coal Co., a contractor operating on Respondent's property (Tr. III: 7, Answer). Nevertheless, since MSHA deems it the operator's responsibility to insure that all contractor employees have the requisite site-specific training, Dingess issued Citation No. 4478079 to Respondent.

The citation alleges an S&S violation of 30 C.F.R. §48.31(a). MSHA has proposed a \$2,000 penalty. It contends that the violation was highly likely to result in a fatal injury (Citation, block 10). This conclusion is predicated on the fact that the No. 1 mine is located on the side of a mountain and that coal is dumped into a chute that sits on a 200 foot embankment (Tr. III: 11-13).

The area in which Mr. Taylor was observed loading his truck is located next to the bottom of the chute. Inspector Dingess believes miners in the area could be injured by objects coming through the windshield of their vehicles (Tr. III: 13).

Respondent argues that this is simply a paper violation. Taylor has worked at this site intermittently for four years (Tr. III: 23). Moreover, he had received training from two other operators (Tr. III: 17). Finally, Respondent contends that it abated the violation in 15 minutes merely by reviewing information of which Taylor was already aware and completing the MSHA form 5000-23.

I conclude that the Secretary has not established an S&S violation with regard to this citation. Given Mr. Taylor's familiarity with the worksite and recent training by other operators it would be unlikely that his lack of training would result in an injury. For the same reasons, I deem the gravity of the violation to be relatively low.

However, I find Respondent negligent in not complying with the training requirements for Mr. Taylor. In conjunction with the other penalty criteria in section 110(i), I conclude that a civil penalty of \$200 is appropriate.

ORDER

Docket KENT 95-451: Citation No. 4246900 is affirmed and a \$500 civil penalty is assessed.

Docket KENT 95-671: Citation No. 4478078 is affirmed and a \$200 civil penalty is assessed.

Docket Kent 95-728: Citation No. 4478079 is affirmed and a \$200 civil penalty is assessed.

The total civil penalties of \$900 shall be paid within thirty (30) days of this decision.



Arthur J. Amchan
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 7 1996

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| CONSOLIDATION COAL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. WEVA 93-82-R |
| | : | Order No. 3109526; 11/09/92 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Blacksville No. 1 Mine |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | I.D. No. 46-01867 |
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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 93-146 |
| Petitioner | : | A.C. No. 46-01867-03938 |
| v. | : | |
| | : | Blacksville No. 1 Mine |
| CONSOLIDATION COAL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia on
behalf of the Secretary of Labor;
David J. Hardy, Esq., Jackson and Kelly,
Charleston, West Virginia on behalf of
Consolidation Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge Order No. 3109526 issued by the Secretary of Labor on November 9, 1992, pursuant to Section 104(d)(1) of the Act.¹ The Secretary maintains that

¹ Section 104(d)(1) of the Act provides 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

Consolidation Coal Company (Consol) violated the mandatory standard at 30 C.F.R. § 77.201-1, presumably on March 18 and 19, 1992 and is seeking a civil penalty of \$12,000 for the alleged violation. The general issue is whether Consol violated the cited standard as charged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The order at issue charges as follows:

Methane tests were not being conducted in the 6,000-ton capacity raw coal silo prior to or during a silo cleaning operation. The cleaning operation was being performed on March 18 and 19, 1992 by employees of Mole Master Services Corporation, an independent contractor, I.D. No. V2T. The coal stored in the silo had evidence of heating and this condition was observed by Consolidation Coal Company (Consol) mine management. Mole Master was contracted to clean the coal from inside of the silo. Prior to commencing the cleaning operation, Mole Master employees were advised of the conditions in the silo. An open flame kerosene-fired area heater was operated on top of the silo by the Mole Master employees during their work activities. The cleaning activities were conducted without examinations for methane having been made at any time. The Mole Master

Footnote 1 Continued

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.

employees were not qualified to perform methane examinations nor did the independent contractor have methane gas detection equipment.

Failure to conduct the tests or ensure that the tests were being conducted placed the Mole Master employees in jeopardy. The failure of Consol to perform or require methane tests at the raw coal silo is consistent with Consol's written and stated policy not to provide safety and health assistance to independent contractors working on mine property. Failure to conduct the tests or ensure that the test were being conducted also placed Consol employees on or near the silo in jeopardy. This violation was determined from information gathered during the investigation of the explosion at the Production shaft of the Blacksville No. 1 Mine that occurred on March 19, 1992, which resulted in four fatalities.

The cited standard requires that "tests for methane in structures, enclosures, or other facilities, in which coal is handled or stored shall be conducted by a qualified person with a device approved by the Secretary at least once during each operating shift and immediately prior to any repair work in which welding or an open flame is used, or a spark may be produced."

There is no dispute that the cited coal silo was within the category of "structures, enclosures or other facilities, in which coal is handled or stored" within the meaning of the cited standard. Consol maintains, however, that the standard is inapplicable because the shifts in question were not "operating shift[s]" within the meaning of the standard nor was "repair work" being performed within the meaning of the standard. Even assuming, *arguendo*, that repair work was being performed, Consol argues that the repair work did not involve "welding or an open flame" or a situation where "a spark may be produced." Finally, Consol argues that, in any event, the order should be dismissed because the Secretary has not met his burden of proving that Consol did not, in fact, take methane readings in the subject silo as required. Since I agree that the Secretary has indeed failed to meet his burden of proving Consol did not take the required methane readings, it is not necessary to reach the other issues.

The record shows that Mole Master Services Corporation (Mole Masters) contracted with Consol to clean the subject coal silo at the Blacksville No.1 Mine using a process not involving welding or an open flame nor from which a spark may be produced. According to Mole Masters Job Superintendent Phillip Proctor, Mole Masters moved all of their equipment to the top of the subject silo on March 17 and began working on the cleaning process that night.

Consol's preparation plant superintendent, B.C. Hall, had provided the required hazard training for the Mole Masters workers. Proctor advised Hall that his employees had no training in taking methane tests and that, if there were to be a methane problem, Consol would have to perform the testing. Proctor testified that none of his employees had methane detectors and that he did not see anyone conduct methane tests during the three days he was at the site. Proctor acknowledged, however, that he did not work with the cleaning crew on the silo roof. Mole Masters employees Randy Sturm and Steve Oldaker worked the day shift and three others worked the night shift. These were 12 hour shifts.

The silo has a capacity of 6,000 tons and Proctor was told at the beginning of the cleaning process that about 2,000 tons of coal then remained. By 10:15 a.m. on March 19 they had cleaned and removed approximately 1,500 tons so that accordingly only about 500 tons remained. Proctor noted that there were hot spots of coal in the silo with some of the coal clinging to the sides. He could see steam emanating from the coal as it dropped onto the belt below and was cooled with water.

Consol employee James Carper testified that he was maintaining the belts beneath the subject silo on March 18 and 19, 1992. Although qualified to take methane tests he was not asked and did not perform any such tests during this time. Further, he did not see anyone taking methane readings at his work location. Carper noted, however, that his supervisor, Preparation Plant Superintendent, B.C. Hall, "regularly checked on things" while Carper was working there. Indeed, according to Carper, Hall made regular checks at his worksite "fairly often" and showed concern for Carper's well-being.

John Morrison, the safety supervisor at the Blacksville No. 1 Mine during relevant times, testified that, although he was periodically in the vicinity of the subject silos, he personally did not perform any inspections of the cleaning work. Morrison did, however, take methane examinations beneath the silo around the feeder pockets near the belts. His methane tests on March 18 and 19, 1992, at around 6:00 a.m. showed no methane. He did not test for methane inside the silo or from the top of the silo.

Morrison testified that since the air flowed downward toward the basement of the silo 90 to 95 percent of the time it would, in any event, make no sense to test for methane at the top of the silo. You would be testing only fresh incoming air. He also noted that his primary concern was for methane near potential ignition sources at the electric motors on the belt line. He admitted, however, that hot coals in the silo could also become an ignition source.

Within this framework of largely undisputed evidence it may reasonably be inferred that none of the contractor (Mole Masters) employees were conducting methane tests in the subject silo on March 18 and March 19, 1992. On the other hand Safety Supervisor John Morrison was, according to the undisputed evidence, performing methane tests below the silo in the basement area where, because of the direction of air flow, any methane produced in the silo would ordinarily be detected.

Significantly, however, there is evidence that Preparation Plant Superintendent B.C. Hall was regularly present in the vicinity of the subject silo on March 18 and March 19 and that he could very well have been performing the requisite methane tests in the silo.

It is also undisputed that doors on the sides of the silo permitted access for methane tests as well as openings on the roof. Indeed, Mole Masters superintendent Proctor stated that he specifically told Hall that any required methane tests would have to be made by Consol. Such tests can also be made in only 15 seconds. Accordingly, even if the Mole Masters employees did not observe Hall taking methane readings on the roof, he could very well have taken them at other locations in the silo. It is noted that Hall died prior to the hearings in this case and that no statements had been obtained from him regarding this matter.²

In addition, the Secretary did not call any of the Mole Masters employees who were actually performing the cleaning work from the silo roof. These witnesses were possibly in the best position to have observed whether Consol had been taking methane readings within the silo. The recorded statement of one of these witnesses, Randy Sturm, was introduced at trial. Sturm maintains therein that he did not see anyone taking methane readings while he was working. While this statement in itself is insufficient to prove that Consol was not performing the requisite methane tests, the statement is, in any event, entitled to but little weight. The inability of Consol to have confronted and cross examined this witness, either in his statement or at hearing and to thereby test his recollection and the accuracy of his statement and explore possible motives, is reason alone for allocating such little weight.

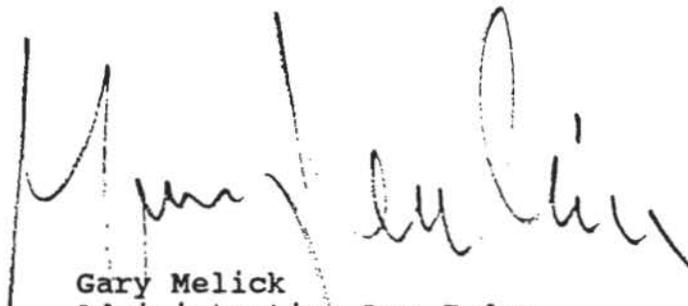
Under the circumstances I find that, while the Secretary has certainly raised suspicions, he has not sustained his burden of proving the violation as charged. Indeed, the Secretary in his post hearing brief acknowledges the difficulties of proving a

² According to the Secretary, Hall declined to provide a statement, citing his Fifth Amendment protections against self incrimination. No inferences can properly be drawn from Hall's exercise of this Constitutional privilege.

violation of the cited standard which requires no recordation of the required methane readings. He states "[i]t is impossible to conclusively prove a negative" and "[i]t would be virtually impossible for the Secretary to prove that at no time someone may have made a methane test". Without any regulatory requirement for the recordation of such tests it may indeed be a difficult violation to prove. This case has proven to be illustrative of that difficulty.

ORDER

Order No. 3109526 is hereby vacated, Contest Proceeding Docket No. WEVA 93-82-R is granted and Civil Penalty Proceeding Docket No. WEVA 93-146 is dismissed.



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

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MAR 7 1996

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 93-146-A |
| Petitioner | : | A.C. No. 46-01867-03938 |
| v. | : | |
| | : | Blacksville No. 1 Mine |
| CONSOLIDATION COAL COMPANY, | : | |
| Respondent | : | |
| | : | |
| | : | |
| CONSOLIDATION COAL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. WEVA 93-81-R |
| | : | Citation No. 3109525; 11/09/92 |
| | : | |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Blacksville No. 1 Mine |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | |

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor,
U.S. Dept. of Labor, Arlington, Virginia for the
Secretary of Labor;
David J. Hardy, Esq., Jackson & Kelly, Charleston,
West Virginia for the Consolidation Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge Citation No. 3109525 issued by the Secretary of Labor to the Consolidation Coal Company (Consol) on November 9, 1992, for an alleged violation of Section 103(j) of the Act and to challenge the proposed civil penalty of \$50,000. The general issue before me is whether Consol violated Section 103(j) of the Act and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Section 103(j) provides in relevant part that "in the event of any accident occurring in any coal or other mine the operator shall . . . take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof."

The citation at bar charges as follows:

The mine operator altered evidence which would assist in the accident investigation of the fatal methane explosion that occurred on March 19, 1992 at Consolidation Coal Company's (Consol) Blacksville No. 1 Mine. A Consol vehicle assigned to Rod Baird, Environmental Engineer, was located in the blast area near the Production shaft and was damaged by the explosion. This vehicle contained items related to the work area that would assist the investigation. Specifically, a methane detector and a Consol closable metal clipboard, which Baird reportedly used to attach routine work notes and records, were in the subject vehicle.

On March 21, 1992, Consol employees Walter Scheller and John Morrison entered Baird's vehicle and took Baird's assigned methane detector and clipboard without permission along with a cloth bag of other items. Scheller and Morrison had obtained MSHA's permission to retrieve only training records and Baird's personal effects from the vehicle. Upon being observed and stopped by MSHA accident investigation team member Joseph Vallina, Scheller returned the methane detector to the vehicle. Scheller at the time of this violation was Consolidation Coal Company's Corporate Counsel for MSHA and OSHA affairs. Morrison was the Blacksville No.1 Mine Safety Supervisor.

Upon subsequent written inquiry from MSHA, the operator through counsel represented that the cloth bag contained an empty metal clipboard, along with items of Baird's personal effects.

As clarified at hearing the Secretary is not charging any violation herein with respect to the "metal clipboard", "Baird's personal effects" or the "cloth bag of other items" noted on the face of the citation. The Secretary also made clear at hearing that the location of the noted methane detector within the Baird vehicle was not material to his investigation and that, accordingly, the movement of that methane detector was not, in itself, considered a violation in this case.

Preliminarily I find that the allegations within the four corners of the citation do not state a violation of Section 103(j) of the Act. The citation does not allege that Consol failed to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes" of the accident at issue. Rather it alleges only that the operator "altered evidence which would assist in the accident investigation". Accordingly the citation must be dismissed for failure to charge a violation of Section 103(j) of the Act.

However, even assuming, *arguendo*, that a violation of Section 103(j) was properly charged, the Secretary has not met his burden of proving that Consol failed to "take appropriate measures to prevent the destruction" of the methane detector at issue in this case. While not specifically germane to the violation charged herein, I note that the Secretary has also not shown in this case that any material evidence was, in fact, ever altered or destroyed. Moreover, even assuming, *arguendo*, that a violation of Section 103(j) was properly charged, the credible evidence shows that the Consol officials charged in the citation conducted their search of the subject vehicle (during which the methane detector was found) only after receiving specific authorization to do so from the Secretary's agent, his chief on-site investigator, and only after being told in effect that the vehicle was no longer within the scope of the Secretary's investigation. Finally, the actions of Consol officials in removing the subject methane detector from the Baird vehicle may reasonably be construed, under all the circumstances, to have been an effort to preserve evidence rather than destroy it.

In this regard, Ronald Wooten, Consol's Vice President for Safety, testified that he, along with company counsel, Walter Scheller, arrived at the Blacksville No. 1 Mine around 8:00 a.m. on March 21, 1992, as part of the continuing investigation of an explosion at the mine on March 19, 1992. A request had been made from the widow of Rodney Baird to recover certain personal effects. Baird, who was killed in the explosion, had been employed as an environmental engineer for Consol. Wooten and Scheller were also continuing to search for certain training records requested by MSHA.

Wooten and Scheller accordingly requested permission from the Secretary's chief on-site investigator, James Rutherford, to enter the company vehicle assigned to Baird to search for these items. According to Wooten, Rutherford responded "that's okay we're through with it" and indicated that he was "done with the vehicle". Based on this authorization to search and remove items from the Baird vehicle and upon Wooten's understanding that they would not otherwise have been permitted to do this, Wooten concluded that the vehicle had already been inventoried by MSHA.

Walter Scheller, then in-house lawyer for Consol, had subsequently been promoted to superintendent at several Consol mines. He was at the Blacksville No.1 Mine site on March 19, 1992, shortly after the explosion and returned on March 21, 1992, between 8:00 and 9:00 a.m., along with Ron Wooten. Informed that certain training records and personal effects of the deceased Rodney Baird were in the subject vehicle, Scheller and Wooten sought permission from Rutherford to search the vehicle and retrieve those items. According to Scheller, Rutherford responded in reference to the requested search "okay we're done with it" -- words to the effect that MSHA had completed its

investigation of the vehicle. Scheller also recalls that Rutherford then gave them permission to search the vehicle and presumably retrieve Baird's personal effects and any training records.

Scheller testified that he, along with John Morrison, then proceeded to the Baird vehicle at around 10:00 that morning. There were several MSHA officials and numerous union and Consol officials in the area who they passed en route to the vehicle. It was covered with a blue tarpaulin held by bungee cords. They moved the tarpaulin and Scheller entered the driver's side. He recalled observing a metal clipboard, a small bible, a pop can, keys, a wallet and a methane detector with a charger. Scheller recalled telling Morrison when he found the methane detector to "remember where we found it". Scheller maintains that he was still inside the vehicle when MSHA Inspector Joseph Vallina approached and asked what they were doing. Scheller testified that he told Vallina that Rutherford had given permission to search the vehicle and he had discovered a methane detector. Vallina purportedly told Scheller to return the detector to the vehicle and not to go inside the vehicle again. According to Scheller they then stopped their search, reattached the tarpaulin and returned to the mine office accompanied, at Vallina's direction, by Vallina's colleague, MSHA Inspector Teaster.

Scheller, Morrison and Teaster then returned to the mine office with the cloth bag containing items collected from the car. At the office Rutherford confirmed to Teaster that he had approved of the search. Scheller recalled asking Rutherford whether there was a problem and Rutherford responded "no". Scheller noted that the contents of the bag were emptied on a table in the supervisor's office in plain view of Rutherford and other personnel. He also noted that Inspector Vallina never requested to look in the bag. Scheller further testified that he had planned on giving the methane detector to Rutherford because he thought it could be important to the MSHA investigation. He reaffirmed that he had not destroyed anything taken from the vehicle. He was charged in the instant citation on November 9, 1992, more than seven months after this incident and, according to Scheller, only after MSHA investigators became hostile to Consol.

John Morrison, then safety supervisor at the Blacksville No. 1 Mine, was present when Scheller asked permission from Rutherford to search the Baird vehicle for personal effects and training records. Rutherford consented to this. Morrison recalled that it was around 9:30 or 10:00 in the morning in "broad daylight" when they arrived at the vehicle and MSHA inspector Joe Vallina and two other inspectors were standing in plain view on the bank above them. Scheller opened the driver's side door and found, among other things, Baird's wallet, a bible, a key ring and some wrestling club papers, along with a hand held

methanometer. Inspector Vallina then came down to the vehicle and asked what they were doing. Scheller responded that Rutherford had authorized the search to look for personal effects and hazard training records and volunteered "I found this as well" showing Vallina the methanometer. Morrison recalled that Scheller was then standing by the open door of the vehicle and, on Vallina's request, returned the methanometer to where he found it. Upon returning to the mine office, they dumped the contents of the bag of items collected from the Baird vehicle on a table in the superintendent's office. The office door was open.

MSHA Inspector Joseph Vallina corroborates this testimony in essential respects. He and Inspector Teaster were at the time only 25 feet from the Baird vehicle. He first noticed Scheller as he was exiting the vehicle. Scheller told Vallina that Rutherford had given them permission to retrieve training records from the car. When asked if he had anything else, Scheller reportedly responded that he had found a methane detector and asked if he should return it to the car.

Within this framework of corroborated and credible evidence I conclude that, indeed, Scheller had not only been given specific permission by the Secretary's authorized agent to search the Baird vehicle and to remove certain articles but that he was also told that the vehicle, in essence, was no longer within the scope of the Secretary's investigation. I further find credible Scheller's explanation that he intended to hand the methane detector over to the Secretary's chief on-site investigator, James Rutherford, as possible material evidence. Indeed, the most rational explanation under the circumstances is that Scheller intended to protect and preserve evidence rather than destroy it.

If anyone were serious about secreting or destroying such evidence, it is highly unlikely that he would have done so in broad daylight in plain view of Federal investigators. Moreover, it is unlikely that he would have waited two days after the accident to search for such evidence. If, indeed, there was any intention to secrete or destroy evidence, one would also not expect the perpetrator to first ask permission from the chief Federal investigator to search the vehicle in which the evidence was located. A more likely scenario of a perpetrator with such intent would be a surreptitious night search, without permission and well before investigators had several days opportunity to have searched the vehicle. It may also reasonably be inferred that, at that early stage of the investigation of a possible methane explosion and before the Secretary had charged any violations, the presence of a methane detector in the vehicle of a Consol official could be considered exculpatory. Consol officials would accordingly be motivated to preserve rather than destroy such evidence. Under the circumstances I do not find that the Secretary has met his burden of proving that Consol

failed to take "appropriate measures to prevent the destruction" of the methane detector or that, in fact, any material evidence was altered or destroyed.

In reaching these conclusions I have not disregarded the testimony of MSHA investigator Rutherford. He was, indeed, the ranking MSHA investigator on the scene. He was then also in charge of all MSHA engineering departments including accident investigation and had a total of 31 years experience with Federal mining programs. Rutherford recalled that at the time of Scheller's request he was "pretty busy" dealing with many investigative concerns. He recalled, however, that he did, in fact, give Scheller permission to remove training records from the subject vehicle which he, Rutherford, had previously requested from Consol and to retrieve the deceased's wallet and keys for his widow. Rutherford testified that he had no recollection of telling Scheller and Wooten that MSHA was "through with the vehicle". He subsequently denied making such a statement.

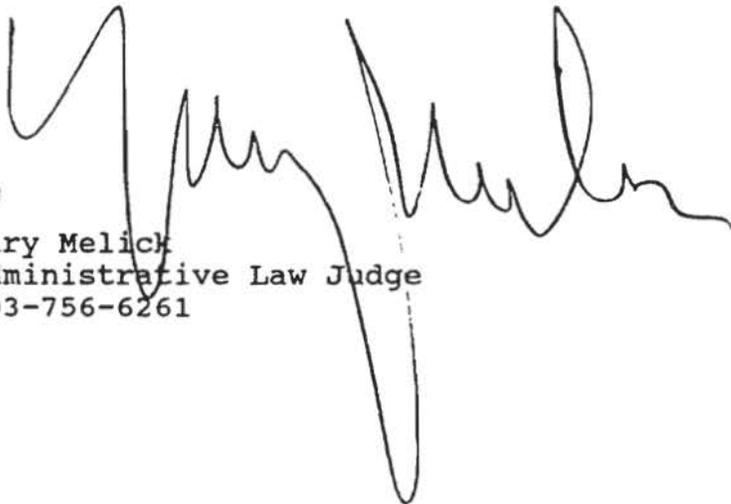
However, because Rutherford was admittedly "pretty busy" at the time, dealing with many aspects of the serious multiple fatality investigation he was directing, I conclude that his recollection of the conversation may not have been as clear as could otherwise be expected. Indeed, I note in this regard that Rutherford even omitted from his earlier more contemporaneous notes a significant part of the conversation with Scheller and Wooten which he subsequently recalled. Moreover, I find it highly unlikely that such a skilled and experienced investigator would have permitted Consol employees to search and/or remove anything from a vehicle at the scene of a major investigation unless he was confident that his investigators had already searched it.

In addition, the testimony of Scheller and Wooten that Rutherford told them MSHA was "through with the vehicle" is certainly consistent with Rutherford's granting permission to search and remove certain articles from that vehicle. This is further corroborated by Morrison, who also testified that Rutherford consented to the search. I also note that Rutherford testified that, on the day before this incident, he had instructed his investigators to inventory all of the vehicles within the affected area. This would suggest that Rutherford may indeed have then believed that the Baird vehicle had already been inventoried. In any event, even Rutherford acknowledges that he consented to the search by Scheller of the Baird vehicle.

Under all the circumstances, I find that there has been no violation of Section 103(j) of the Act and Citation No. 3109525 must accordingly be vacated.¹

ORDER

Citation No. 3109525 is hereby vacated, Contest Proceeding Docket No. WEVA 93-81-R is granted and Civil Penalty Proceeding Docket No. WEVA 93-146-A is dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

¹ Since it has been found in this case that an authorized agent of the Secretary consented to Scheller's search of the Baird vehicle, there likewise could be no violation of the standard at 30 C.F.R. § 50.12 as suggested in the Secretary's post hearing motion to amend. It is noted that the Secretary had specifically declined, at hearing, to amend the citation to charge a violation of that standard. His subsequent belated motion filed with his post hearing brief to charge "alternatively" a violation of 30 C.F.R. § 50.12 was denied. That motion is accordingly now moot.

Distribution:

David Hardy, Esq., Jackson and Kelly, P.O. Box 553, Charleston,
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Robert S. Wilson, Esq., Office of the Solicitor, U.S. Dept. of
Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203
(Certified Mail)

/jif

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 1996

| | | |
|------------------------|---|------------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 95-114 |
| Petitioner | : | A. C. No. 46-03408-03501 EHH |
| | : | |
| | : | Mine No. 1 |
| | : | |
| v. | : | Docket No. WEVA 95-122 |
| | : | A. C. No. 46-03141-03505 EHH |
| OPPORTUNITY TRUCKING, | : | |
| INCORPORATED, | : | Chesterfield Prep Plant |
| Respondent | : | |

ORDER OF DEFAULT

Before: Judge Merlin

These cases are before me pursuant to Commission order dated September 11, 1995.

On September 1, 1995, the operator filed a motion to set aside default requesting relief from orders of default that were issued on August 2, 1995, in these cases. The operator stated that it thought it had filed answers with the Solicitor. The operator further asserted that it was not given ample opportunity to formally answer the charges or citations which led to the assessments. On September 11, 1995, the Commission remanded the case for a determination of whether relief from default was warranted.

On September 18, 1995, an order was issued directing that within 30 days the operator provide copies of the answers it alleged it sent to the Solicitor and explain why it failed to respond to the orders of show cause. The Solicitor was also ordered within 30 days to review his files to determine whether answers were received from the operator. The file contains the return receipts showing that the September 18 order was received by operator's counsel on September 21, 1995, and by the Solicitor on September 20, 1995.

No response was received from either party. On January 16, 1996, an order to show cause was issued directing the operator to provide the information requested in the September 18 order and stating that if it failed to comply it would be held in default. The Solicitor again was directed to review his files to determine whether answers were filed and advise the undersigned.

On January 23, 1996, the Solicitor filed its response to the January 17 order. The Solicitor advises that he did respond to the September 18 order, but that due to clerical error it was incorrectly mailed to the Office of Administrative Law Judges for the Department of Labor. The Solicitor has attached a copy of his response to the September 18 order in which the Solicitor states that he has reviewed his files and that he did not receive answers from the operator.

To date no response has been filed by the operator. Therefore, since the operator has failed to comply with the show cause order, it is in default.

In light of the foregoing, it is ORDERED that the operator be held in DEFAULT for the penalty amounts totaling \$1,056 and that it PAY this sum immediately

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in black ink and is positioned above the printed name and title.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Charles Stanford West, Esq., 155 E. 2nd Avenue, Williamson, WV 25661

/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 13 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 93-15
Petitioner : A. C. No. 36-07270-03526
v. :
: Garmantown Mine
L & J ENERGY COMPANY, INC., :
Respondent :

DECISION ON REMAND

Before: Judge Weisberger

On February 24, 1994, I issued a decision in this civil penalty proceeding sustaining six of the seven violations charged. L & J Energy Company, Inc., 16 FMSHRC 424 (February 1994). L & J Energy Company, Inc. (L & J) filed a petition for discretionary review and/or motion for remand for correction of the record, arguing, *inter alia*, that a stipulation which was recounted in my decision did not reflect the parties' agreement. The Secretary also moved for remand. The Commission denied the motion, but granted the petition for review, and remanded the matter to determine whether the stipulation in question correctly represented the agreement of the parties, and to reconsider the decision, if necessary. On remand, I took cognizance of the parties' agreement, but declined to reconsider the initial decision. The Commission denied L & J's petition for review.

Subsequently, L & J filed its appeal in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1995, the Court issued its decision remanding the case to the Commission "for a new determination based on the full record." L & J Energy Co., Inc. v. Secretary of Labor, 57 F.3d 1086 (D.C. Cir. 1995). The Court determined that my legal conclusion "disclaiming reliance on anything but expert testimony," rendered

"irrelevant" my statement that I reviewed the testimony of other witnesses. 57 F.3d, supra, at 1087, citing 16 FMSHRC at 441. The Court further stated that if, on remand, the Commission reaches the same conclusion, "it must simply explain why the eyewitness [i.e., non-expert] testimony is discredited or disconnected in whole or in part." *Id.*, at 1087. Finally, the Court held that the Commission should address each of the six statutory criteria for determining civil penalties "before assessing a fine." *Id.*, at 1088, citing Sellersburg Stone Co., 5 FMSHRC 287, 292-93 (March 1983); 30 U.S.C. § 820(i). On August 8, 1995, the Court issued its Mandate and Judgment in this matter, returning the case to the Commission's jurisdiction. On September 5, 1995, the Commission issued an order remanding this matter to me, "... for a new determination based on the entire record." (L & J Energy Co., Inc., 17 FMSHRC 1515, 1517 (September 1995)).

On November 30, 1995, my decision on remand was issued. L & J filed a petition for review which was denied by the Commission on January 11, 1996. The Secretary filed a motion for reconsideration of the denial, and the motion was granted in part on January 25, 1996.

On February 13, 1996, the Commission issued a decision remanding this matter to me. The Commission set forth its conclusion as follows.

We conclude that the judge has not adequately explained his reasons for discrediting or discounting the eyewitnesses' testimony. The "experience" and "expertise" of the experts upon whose testimony the judge relies do not explain why he discredited the eyewitnesses' testimony. Further, the judge's reliance on the discussion of testimony in his earlier decision, which the court of appeals found to be insufficient, does not fulfill the remand instructions set forth by the court and this Commission that he explain the basis for his treatment of testimony. In addition, if the judge is of the view of that the inspector's testimony regarding loose material on the highwall on February 6 renders the eyewitness testimony not credible, he must explain why. The judge must also explain the significance, in terms of his evaluation of the

eyewitness testimony, of his reference to lay and expert witness' recognition of loose materials in photographs taken on February 6. 17 FMSHRC at 2134. Finally, the judge must reach a determination on the record in light of his explanations.

Why the eyewitnesses' testimony is discredited

In essence, Respondent's witnesses testified that they did not observe any loose or hazardous materials on the highwall on February 5. However, MSHA and DER inspectors, who observed the site the next day testified that they observed numerous loose materials, cracks, mudslips, and material falling from the highwall. I observed their demeanor, and found their testimony credible. There is no evidence of any bias or interest on the part of these witnesses which would dilute the credibility of their eyewitness testimony. Also, their testimony regarding conditions they observed on February 6 finds corroboration in the recognition by Scouazzo, Todd, and Woods, of loose materials in photographs taken on February 6. For these reasons I accept the testimony of Petitioner's eyewitnesses regarding the conditions of the highwall on February 6. Given this conclusion, the testimony of Respondent's eyewitnesses must be considered to be lacking some credibility. Further, the eyewitness testimony of the conditions on February 5 can be considered trustworthy only if it is more likely than not that the conditions observed on February 6 occurred between when the site was observed by Respondent's witnesses, and when it was examined by the inspectors on February 6.

The parties elicited opinion testimony from non-expert witnesses regarding the likelihood of a significant change in the condition of the highwall between February 5 and February 6. These witnesses discussed in subjective terms the weather conditions in the relevant time period and their impact upon the highwall. Since the lay witnesses did not base their opinions upon empirical data, I choose to not accord these opinions any weight. In contrast, the expert witnesses, Scovazzo and Wu, based their opinions upon detailed empirical weather data set forth in the testimony and records maintained by Krise. I thus accord more weight to the testimony of the experts that the conditions observed on February 6, could have been caused by the freeze-thaw effect. The weather data does not indicate that a

significant thaw had occurred overnight on February 5, or that there was any dramatic weather change in the 24 hour period preceeding February 6 (See, 15 FMSHRC 424 at 443). Indeed, Krise's data indicates that the high temperatures for February 3, 4 and 5 were 50 degrees, 56 degrees, and 58 degrees, respectively. The temperatures throughout these days were all above freezing. I thus accept Wu's opinion that, in essence, since there was not an extreme change between a freeze and a thaw in the two days preceeding February 6, it was not probable that the conditions depicted in photographs taken on February 6 had developed in one day. I thus find that it is more likely than not that the hazardous conditions observed on February 6 did not occur overnight, and that at least some of those conditions were in existence on February 5. I thus discredit the eyewitnesses' testimony regarding conditions observed on February 5.

Accordingly, I reiterate my initial findings regarding the citations and orders at issue, and penalties to be imposed (16 FMSHRC, supra, 444-451).



Avram Weisberger
Administrative Law Judge

Distribution:

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 1996

| | | |
|------------------------------|---|---------------------------|
| SAMUEL B. AND NANCY SANDERS, | : | CONTEST PROCEEDING |
| on behalf of JOSEPH MARTIN | : | |
| SANDERS, | : | |
| Complainants | : | Docket No. WEST 95-538-RM |
| | : | |
| v. | : | |
| | : | |
| SECRETARY OF LABOR, | : | Smokey Valley Common |
| MINE SAFETY AND HEALTH | : | Operations of Round |
| ADMINISTRATION, (MSHA), | : | Mountain Gold |
| Respondent | : | Corporation |

ORDER OF DISMISSAL

Before: Judge Merlin

On August 18, 1995, the Commission received a letter from Samuel and Nancy Sanders (hereafter referred to as the "complainants"). This letter was assigned the above-captioned docket number.

In their letter, the complainants state that they represent their deceased son who suffered fatal injuries at the Smokey Valley Common Operation. They request that the Commission review the decision of the Mine Safety and Health Administration (MSHA) to drop Citation Nos. 4140328, 4140327 and 4140322. They further seek verification of Citation No. 4140322 which they say was included in 4140321. Finally, they allege that a water truck of Christensen Boyles Corporation, their son's employer, should be cited for a mechanically unsafe transmission.

There was no indication that complainants had sent a copy of their letter to the Solicitor of the Department of Labor who represents MSHA before the Commission. Therefore, on September 20, 1995, an order was issued directing complainants to serve the Solicitor with a copy of the letter. The order also directed the Solicitor to file a response to the letter. On December 18, 1995, complainants filed a copy of a certified mail return receipt showing that the Solicitor received a copy the letter.

On January 16, 1996, complainant, Mrs. Sanders, filed a letter with the Commission, enclosing several documents. These

documents included a letter dated December 20, 1995, from MSHA to complainant, explaining the status of the citations and complainant's reply. Also included in the enclosures were statistics compiled by complainant with respect to accidents in Nevada.

The Solicitor failed to respond to the September 20 order. Accordingly, another order was issued on January 24, 1996, again directing the Solicitor to file a reply to complainants' August 18 letter.

On February 26, 1996, the Solicitor submitted his response. The Solicitor advises that the citations referred to by complainants were vacated. According to the Solicitor, it was necessary to vacate citations because some of them were duplicative. The Solicitor asserts that the Secretary has authority to vacate citations. In addition, the Solicitor states that the Secretary has the responsibility to investigate mine accidents to determine their cause and any health or safety violations. Lastly, the Solicitor maintains that Congress has not provided that relatives or survivors of victims have legal standing to contest a citation or order issued under the Mine Act.

It is well established that the Commission as an administrative agency has only the jurisdiction which Congress gives it. Lyng v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993). The Commission has long recognized that it cannot exceed the limits of its authority as enacted by Congress. Kaiser Coal Corp., 10 FMSHRC 1165, 1169, (September 1988). It appears from the materials in the file that the complainants are concerned about citations which MSHA has issued and then vacated. Section 105(d) of the Act, 30 U.S.C. § 815(d), sets forth how and under what circumstances Commission review may be obtained of actions taken by MSHA. An examination of section 105(d) discloses that there is no provision for a miner or a miner representative to contest a citation. The Commission has held that there is no such right under the Act and stated that while it might be desirable for a miner or miner representative to have such a right, it is up to Congress to provide for it. UMWA v. Secretary of Labor, 5 FMSHRC 807 (May 1983). UMWA v. Secretary of Labor, 5 FMSHRC 1519, 1520 (September 1983). The Commission has also held that the Secretary has unreviewable discretion to vacate a citation and the Commission has no jurisdiction to review that determination. RBK Construction, Inc., 15 FMSHRC 2099, 2101 (October 1993).

The Commission does not have jurisdiction to consider complainants' other requests for relief. Section 105(d) does not give the Commission general oversight over MSHA's actions. The Commission has no authority with respect MSHA's internal practices and procedures. Wallace Brothers, 14 FMSHRC 586, 587 (April 1992); cf. Mid-Continent Resources, 11 FMSHRC 1015 (June 1989). Moreover, the Commission and the courts have recognized that the Secretary has wide discretion in enforcement. W-P Coal Company, 16 FMSHRC 1407, 1411 (July 1994); See, e.g., Bulk Transportation, 13 FMSHRC at 1360-61; Consolidation Coal, 11 FMSHRC at 1443; Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986). I cannot therefore, consider MSHA's alleged failure to cite a certain piece of equipment or its investigation of the accident. Kaiser Coal Company, supra.

In light of the foregoing, it is ORDERED that this case be DISMISSED.

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

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Mr. Samuel B. and Mrs. Nancy J. Sanders, HC 60, Box CH 210, Round Mountain, NV 89045

Douglas N. White, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 1996

| | | |
|---|---|---------------------------------|
| JIM WALTER RESOURCES, INCORPORATED, Contestant | : | CONTEST PROCEEDINGS |
| | : | |
| | : | Docket No. SE 96-81-R |
| | : | Safeguard No. 4476609; 12/20/95 |
| v. | : | |
| | : | Docket No. SE 96-108-R |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Safeguard No. 4476467; 1/19/96 |
| | : | No. 4 Mine |
| | : | Mine ID 01-01247 |

ORDER OF DISMISSAL

Before: Judge Merlin

On January 16, 1996, the operator filed a notice of contest with respect to Safeguard No. 4476609. This matter was assigned Docket No. SE 96-81-R, captioned as above. On January 29, 1996, the Solicitor filed a motion to dismiss.

On January 23, 1996, the operator filed a notice of contest with respect to Safeguard No. 4476467. This matter was assigned Docket No. SE 96-108-R, captioned as above. On February 12, 1996, the Solicitor filed a motion to dismiss identical to the one previously filed in the first case.

In his motions to dismiss, the Solicitor argues that the Commission does not have jurisdiction to consider a contest of a notice to provide safeguard. On March 1, 1996, the operator orally advised my law clerk that it would not file a response.

Section 314(b) of the Federal Mine Safety and Health Act (hereafter referred to as the "Act"), 30 U.S.C. § 864(b), authorizes the Secretary to issue safeguards to minimize hazards with respect to the transportation of men and materials. Safeguards are issued on a mine to mine basis and have the effect of mandatory standards. Southern Ohio Coal Company, 7 FMSHRC 509, 512 (April 1985). No penalty is assessed for the violation of a safeguard. When the requirements of a safeguard are subsequently violated, a citation is issued for which a penalty is assessed. Southern Ohio Coal Company, 14 FMSHRC 1, 13 (January 1992).

Section 105(d), 30 U.S.C. § 815(d), grants the Commission jurisdiction to review citations, orders, and proposed penalty assessments of the Secretary. There is no statutory provision for review of safeguard notices and the Commission has never reviewed one. Commission decisions regarding safeguards deal only with situations where a subsequent citation has been issued. Southern Ohio Coal Company, 14 FMSHRC 1; Beth Energy Mines Inc., 14 FMSHRC 17 (January 1992); Mettiki Coal Corp., 14 FMSHRC 29 (January 1992); Rochester and Pittsburgh Coal Co., 14 FMSHRC 37 (January 1992); Green River Coal Company, 14 FMSHRC 43 (January 1992); Southern Ohio Coal Company, 10 FMSHRC 963 (August 1988); Southern Ohio Coal Company, 7 FMSHRC 509; Jim Walter Resources, Inc., 7 FMSHRC 493 (April 1985); Commission judges have refused to review a safeguard where there is no subsequent citation. Beckley Coal Mining Co., 9 FMSHRC 1454 (August 1987); Colorado Westmoreland, Inc., 10 FMSHRC 1236 (September 1988). The Commission, as a creature of Congress, is bound by the limits created by Congress and cannot expand them. Lyng v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993); Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988).

In light of the foregoing, it is ORDERED that these cases be DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 150 Chambers Bldg., Highpoint Office Center, 100 Center-view Drive, Birmingham, AL 35216

Mr. James A. Blankenship, President, Local 2245, UMWA, 3500 Culver Rd., Lot #6, Tuscaloosa, AL 35401

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 1996

| | | |
|------------------------|---|-----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. YORK 95-102-M |
| Petitioner | : | A. C. No. 19-00408-05518 |
| v. | : | |
| GENERAL ROAD TRUCKING | : | County Street Mine and Mill |
| CORPORATION, | : | |
| Respondent | : | |

ORDER OF DEFAULT

Before: Judge Merlin

This case is now before me pursuant to Order of the Commission dated December 26, 1995.

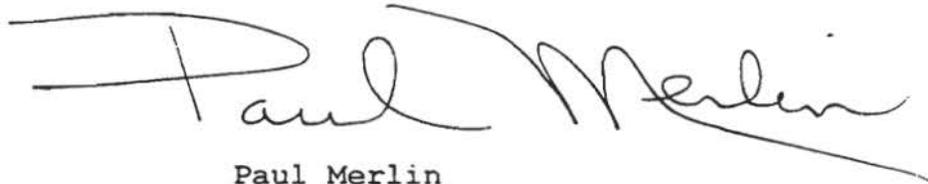
A review of the file shows that an order to show cause was issued to the operator on September 14, 1995. The file contains the return receipt showing that the operator received the order on September 18, 1995. Since the operator failed to respond to the show cause order, an order holding it in default was issued on November 20, 1995. The file contains the return receipt showing that the operator received the default on November 22, 1995. The Commission was unaware that the operator had received the default order, because the return receipt had not been associated with the file at the time the case was before the Commission.

The operator in its letter to the Commission dated November 29, 1995, admits that it received the show cause order, but makes no mention of the default which it had received a week earlier. The operator also alleges it is not liable, because it does not run the facility in question.

On January 25, 1996, an order to submit information and show cause was issued directing the operator to explain (1) the two month delay in its response to the September 14 show cause order, (2) why relief from default should be granted and (3) why its November 29 letter made no mention of the default order it had received. It was noted that in the past two years the operator had been a party in eight other cases before the Commission and that it had been defaulted in four. Docket Nos. YORK 95-94, YORK 95-95, YORK 95-96 and YORK 95-99.

The file contains the return receipt showing that the operator received the January 25 order on January 31, 1996. To date no response has been received. Since the operator has failed to comply with the January 25 show cause order, it is in default.

In light of the foregoing, it is ORDERED that the operator be held in DEFAULT for the penalty amount of \$1,200 and that it PAY this sum immediately.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Ralph R. Minichiello, Esq., Office of the Solicitor, U.S. Department of Labor, One Congress Street, 11th Floor, P.O. Box 8396, Boston, MA 02114

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E. Irene Anthony, Secretary, General Road Trucking Corporation, P. O. Box 14277, E. Providence, RI 02914

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAR 25 1996

| | | |
|---------------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 93-462-M |
| Petitioner | : | A.C. No. 04-04679-05510 |
| | : | |
| v. | : | Montague Plant |
| | : | |
| CONTRACTORS SAND & GRAVEL | : | |
| SUPPLY, INCORPORATED, | : | |
| Respondent | : | |
| | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 94-409-M |
| Petitioner | : | A.C. No. 04-04679-05514 A |
| | : | |
| v. | : | Montague Plant |
| | : | |
| | : | |
| ERIC SCHOONMAKER, owner & agent | : | |
| CONTRACTORS SAND & GRAVEL | : | |
| SUPPLY, INC., | : | |
| Respondent | : | |

SUMMARY DECISION

Before: Judge Cetti

I

Background

Contractor's Sand and Gravel, Incorporated, operates two small portable sand and gravel surface mining operations located near Yreka, California. The Scott River Plant has two employees and produces about 10,000 to 15,000 tons annually. The Montague Plant has two employees and produces about 10,000 to 15,000 tons annually.

Eric Schoonmaker, the company's general manager, oversees both operations. Mr. Schoonmaker's responsibilities include, for example, managing the business, directing sales, marketing and customer relations, organizing production, coordinating equipment maintenance and repair, and making sure that the operations are safe. He is also the company's primary liaison with regulating

authorities such as MSHA. He asserts the plant has been in operation for many years and passed all MSHA's electrical inspections until the grounding citation in question was issued on March 10, 1993, by Inspector Ann (Johnson) Frederick.

II

Mr. Schoonmaker is the 110(c) agent charged in Docket No. WEST 94-409-M with the knowing violation of 30 C.F.R. § 56.1205 at the Montague Plant. That safety regulation 30 C.F.R. § 56.1205 reads as follows:

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

The single citation at issue in both of the above-captioned dockets charges both the operator and the manager Eric Schoonmaker with the unwarrantable failure to comply with the above-quoted safety standard. The citation reads as follows:

The frame of the crusher was being used as the grounding conductor. The ground solid strand copper wire ran from a rod (found +18" below the surface near the van used as a control electrical installation) under the van through an underground pipe and connected directly to the frame of the portable crusher operation. Another jumper (solid copper wire) was found from the upper head pulley frame to the metal of the chute where the crushed rock transferred to the stacker conveyor belt. The wires from both motors found on these belts was SO P123 MSHA 14/3 stamped. No other visible grounds were found at the motors. Effective equipment ground conductors have not been installed as evidenced. The electrical grounding tests performed at the Montague plant and stated to on Sept. 15, 192 (1992) state that the grounding had been found to conform to applicable code. Frame grounding has been forbidden for over fifteen years. This is an unwarrantable failure by operator to comply with the standards.

Respondents do not dispute that the paths to ground for the stacker motor and crusher delivery motor passed through the frame of the crusher. Respondents do, however, dispute that such a grounding system violates the regulatory requirement of 30 C.F.R. § 56.12025.

Respondents' counsel asserts that Petitioner has not even established a prima facie case that the two motors in question were not grounded. Respondent contends that at the time the citations were issued, the two motors in question were effectively grounded. MSHA performed no test and has no other definitive evidence to show that the motors, at the time the citations were issued, were not effectively grounded or were, in any way, in violation of the plain, clear provisions of the cited safety standard.

Both parties agree that there is no dispute as to any material fact and that the matter is ripe for summary decision on the single legal issue of whether Respondent's reliance on the crusher and stacker frames to serve as the path to ground for the electric current violates the provisions of 30 C.F.R. § 56.12025. The parties have cross-moved for summary decision on this single legal issue.

Both parties agree that although the grounding issue is only one issue, among many, in the nine consolidated cases concerning 33 citations, Citation No. 3911909 is the most significant of the citations and has generated, by far, the largest of the proposed penalties in these cases. Although the parties here seek summary decision on only one of many issues in the consolidated cases, the parties agree that the resolution of the grounding issue will allow the remaining citations in the consolidated cases to be resolved by amicable settlement without need for a hearing.

STIPULATIONS

In March 1996, the parties entered into the record the stipulation that the record for summary decision on the grounding issue consists of the following:

1. Citation No. 3911909.
2. All pleadings filed with the presiding judge, including but not limited to, motions, oppositions, and prehearing statements, to show the respective litigation positions of and representations made by the parties.
3. Respondent's Request for Admissions and MSHA's Responses to Respondent's Request for Admissions; Respondent's Interrogatories and MSHA's Responses to Respondent's Interrogatories, Plaintiff's (Petitioner's) Interrogatories and Respondent's Responses to Petitioner's Interrogatories.
4. The affidavit of Eric Schoonmaker.
5. The declarations of Paul Price and Gordon Vincent.

6. The deposition transcripts of Paul Price, Ann (Johnson) Frederick, Eric Schoonmaker and Frank Casci.

7. Article 250 of the 1993 National Electrical Code (NEC), to show the NEC's definitions of "grounded" and "grounded, effectively."

8. Article 250 of the 1993 National Electrical Code (NEC), to show the electrical grounding requirements of the NEC.

9. Order No. 3913901, issued subsequent to Citation No. 3913895 and under contest in Docket No. WEST 93-141, to show that Order No. 3913901 was terminated.

10. Photographs A-1, A-2, A-3 and A-4 to show the equipment used at the Montague Plant.

11. August 3, 1995, letter from Paul Price to Mark Ode, to show that MSHA requested an interpretation of Article 250 of the 1993 National Electrical Code from the National Fire Protection Association.

12. August 14, 1995, letter from Mark Ode to Paul Price, to show the National Fire Protection Association's unofficial interpretation of Article 250 of the 1993 National Electrical Code as it applies to the hypothetical scenario set out in Mr. Price's August 3, 1995, letter.

The February 29, 1996, letter transmitting the above stipulations also states "the stipulated record contains a few items that have not been previously cited by the parties and attached to prior motions or pleadings. These items are being included to make the record complete for appeal purposes."

Both parties in their pleadings and arguments have stated their respective cases very well. Upon careful review of the record, I am persuaded that the undisputed material facts in this case do not establish a violation of 30 C.F.R. § 56.12025.

The cited standard 30 C.F.R. § 56.12025 plainly and clearly requires that "metal enclosing ... electrical circuits shall be grounded." The regulation is specific and not broadly worded. 30 C.F.R. § 56.12025 is a "performance standard." It does not specify or require that the operator achieve an effective ground in a specific manner.

I find that Respondent complied with the requirement of the cited standard by intentionally grounding the stacker conveyor and crusher discharge conveyor motors by using the stacker and crusher frames as conductors in carrying ground fault current to earth. Part 56 which sets forth the mandatory safety standards for surface nonmetal mines, such as we have here, clearly pro-

vides that "electrical grounding means to connect with the ground to make earth part of the circuit." 30 C.F.R. § 56.2. The company's resistivity tests conducted on September 15, 1992, pursuant to 30 C.F.R. § 56.12028 indicated that there was an effective path to ground from both of the motors. Thus, the motors in question were connected with the ground to make the earth part of the circuit. There is no contrary evidence.

The Secretary should not be permitted through interpretation to expand the regulation beyond its plain meaning. The Secretary's purported longtime interpretation of the regulation to prohibit per se frame grounding constitutes an impermissible expansion of the plain meaning of the standard. It constitutes an impermissible avoidance of the rulemaking requirements of section 101 of the Mine Act. Since the Secretary purports to impose additional requirements and prohibitions without proper rulemaking, it lacks the "force and effect of law". Western-Fuels Utah, Inc., 11 FMSHRC 278, 286-87 (March, 1989); see also Asarco Inc., 14 FMSHRC 829, 835 (1992).

If the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rulemaking to achieve its goal rather than attempting to do so by its interpretation of the regulation beyond its plain meaning. (See Mathies Coal Company, 5 FMSHRC 300, 303 (March 1983)).

With respect to the application of the reasonable, prudent person test, I find that a reasonable, prudent person familiar with the mining industry would have recognized that the two motors, which were connected to earth through a series of metal frame and wire connections, were "grounded" and were, thus, in compliance with the requirement of the cited regulation. I base this on the definition of grounding at 30 C.F.R. § 56.2 which specifically states that "electrical grounding means to connect to the ground to make the earth part of the circuit". 30 C.F.R. § 56.2.

In this connection, I also find it noteworthy that in the National Electrical Code, "grounded" is defined as "connected to earth or to some conducting body that serves in place of earth." NEC, Article 100 (definitions) (1993) and that "grounded effectively" is defined as "Intentionally connected to earth through a ground connection or connections of sufficiently low impedance and having sufficient current carrying capacity to prevent the buildup of voltages that may result in undue hazards to connected equipment or to persons. NEC, Article 100 (definitions) (1993).

Also noteworthy in the application of the reasonable prudent person test is the fact the Secretary's purportedly longstanding interpretation has never been published in MSHA's Program Policy Manual and furthermore, MSHA's purported interpretation is contrary to two unappealed, well-reasoned decisions of two Commis-

sion Judges who I believe to be reasonable, prudent persons familiar with the mining industry. See Mulzer Crush Stone Company, 3 FMSHRC 1238 (May 1981) in which Judge Laurenson rejected MSHA's contention that the frame was not a source of grounding. See also McCormick Sand Corporation, 2 FMSHRC 21, 24 in which Judge Michels rejected MSHA's contentions and held that 30 C.F.R. § 56.12025 "fairly read, requires only a "ground" or its equivalent. It does not mandate a particular ground such as that mentioned in the citation ..." I have not been able to find any Commission authority contrary to these two unappealed Administrative Law Judge decisions.

I conclude, primarily on the basis of the plain, clear language of the cited regulation, that Citation No. 3911909 should be vacated. I find nothing in the transcript and declaration of Paul Price, the transcript of Ann (Johnson) Frederick and the other material and arguments on which MSHA relies that persuades me to a contrary conclusion. Such testimony and arguments would be more appropriate in a section 101 rulemaking proceeding.

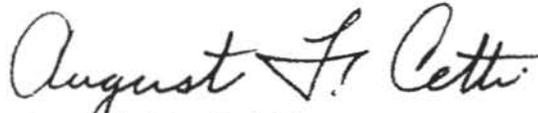
ORDER

Docket No. WEST 93-462-M

Citation No. 3911909 is **VACATED** and its related \$7,000.00 proposed penalty is set aside. I retain jurisdiction of the two remaining citations in the docket.

Docket No. WEST 94-409-M

Citation No. 3911909 is **VACATED**; its related \$6,000.00 proposed penalty is set aside. Docket No. WEST 94-409-M is **DISMISSED**.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 25 1996

| | | |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 94-369-M |
| Petitioner | : | A.C. No. 35-02479-05501 |
| | : | |
| v. | : | Docket No. WEST 94-379-M |
| | : | A.C. No. 35-02479-05502 |
| | : | |
| | : | Docket No. WEST 94-492-M |
| TIDE CREEK ROCK, INC., | : | A.C. No. 35-02479-05503 |
| Respondent | : | |
| | : | Docket No. WEST 94-493-M |
| | : | A.C. No. 35-02479-05504 |
| | : | |
| | : | Docket No. WEST 94-638-M |
| | : | A.C. No. 35-02479-05505 |
| | : | |
| | : | Docket No. WEST 95-48-M |
| | : | A.C. No. 35-02479-05506 |
| | : | |
| | : | Docket No. WEST 95-275-M |
| | : | A.C. No. 35-02479-05507 |
| | : | |
| | : | Tide Creek Rock |

DECISION

Appearances: Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, and Paul A. Belanger, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for Petitioner; Agnes M. Peterson, Esq., Deer Island, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Tide Creek Rock, Inc. ("Tide Creek"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petitions allege 33 violations of the Secretary's safety standards. For the reasons set forth below, I affirm 21 citations and 2 section 104(b) withdrawal orders, and vacate 12 citations and 1 section 104(b) withdrawal order. I assess penalties in the amount of \$640.00.

A hearing was held in these cases in Portland, Oregon. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Tide Creek Rock Mine, owned and operated by Tide Creek, is a very small crushed stone operation in Columbia County, Oregon. The mine consists of a pit and crusher. The mine recorded about 3,000 annual hours worked and it employs three people. It has a history of no citations between January 1990 and January 1994. On January 20 and 21, 1994, MSHA field office supervisor John Widows inspected the mine following a telephone complaint about the mine received at MSHA's headquarters on January 19. (Ex. R-1).

General Defenses

Tide Creek argues that all or most of the citations should be vacated for five reasons, as discussed herein. First, it maintains that the Secretary failed to show that the citations were issued by a person who is authorized to do so under the Mine Act. Tide Creek contends that Mr. Widows was not "qualified by practical experience in mining or by experience as a practical mining engineer or by education." (T.C. Br. at 3, quoting 30 U.S.C. § 954). Further, Tide Creek argues that Mr. Widows does not have five years of practical mining experience and that in assigning him to inspect the mine, the Secretary failed to give due consideration to his lack of "previous experience in the particular type of mining operation" at the Tide Creek Rock Mine. Id. It contends that these qualification requirements are jurisdictional. (T.C. Answer Br. at 1-2). The Secretary argues that Mr. Widows is an authorized representative of the Secretary and is qualified as a result of his experience, training, and education.

Although Mr. Widows' career history is unusual, I find that he was duly qualified to inspect Tide Creek's mine and to issue citations. He has been employed by MSHA for 17 years, first as a health and safety specialist and then as a field office supervisor. (Tr. 11-12). Although he has never been an MSHA inspector, he is a duly authorized representative of the Secretary, as that term is used in sections 103(a) and 104(a) of the Mine Act. (30 U.S.C. §§ 813(a) and 814(a); Tr. 13, 142). He has a degree in mining engineering from the Colorado School of Mines, but he has never worked at a mine except during the summer while in college. (Tr. 13). He was also trained at MSHA's Mine Safety and Health Academy. I find that Mr. Widows does not have five years of practical mining experience. Section 505 provides, however, that the Secretary shall appoint, "to the maximum extent feasible," inspectors with five years of practical mining experience. 30 U.S.C. § 954. Thus, that provision is not jurisdic-

tional. For the same reason, the fact that he never worked at a rock or gravel pit does not disqualify him from inspecting Tide Creek's mine. I find that he meets the qualifications of section 505 as a result of his education, training, and experience at MSHA.

Second, Tide Creek argues that any citations that involve the same safety standard and the same equipment or area of the mine should be combined into a single citation. Tide Creek points to MSHA's Program Policy Manual which includes such a directive. (PPM at Vol. I, Sec. 104, p. 15). The citations that Tide Creek believes should be combined include seven guarding citations and four handrail citations. The Secretary maintains that the PPM is not binding on MSHA but merely provides guidance to inspectors. He also contends that the crusher was a large piece of equipment made up of many separate components and that each of the conditions cited presented a separate hazard.

Section 110(a) of the Mine Act provides that "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. § 820(a). The Secretary did not abuse his discretion in issuing multiple citations alleging violations of the same or similar safety standards. Each citation addresses a discrete area of the crusher. For example, with respect to the guarding citations, no two citations require a guard at the same location. Each citation required a separate abatement effort by Tide Creek to terminate the citation. See, Port Costa Materials, Inc., 16 FMSHRC 1516, 1519-20 (July 1994) (ALJ).

Although the Secretary's Program Policy manual is evidence of MSHA's policies and practices, it is not binding on the Secretary. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536-38 (D.C. Cir 1986); Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir 1989). In addition, the Secretary states that the "multiple violations" in these cases should not be treated as one violation because they were not related to the same piece of equipment or the same area of the mine. Thus, the guideline in the Program Policy Manual was not violated.

Third, Tide Creek argues that the Secretary is equitably estopped from enforcing the citations in this proceeding. It states that the Tide Creek Rock Mine has not changed in any significant way since 1979. It argues that the Secretary should be estopped from enforcing these citations because the cited conditions were observed by MSHA inspectors on previous inspections and no citations were issued. Tide Creek wrote a letter to MSHA after it received two citations in 1979 stating that the inspector was asked to point out any additional "areas of deficiency." (Ex. R-7). The letter went on to state that since he could find no other violations, Tide Creek "has complied with all ... requirements and there is nothing else to be done." Id.

The Commission has long held that equitable estoppel does not apply to the Secretary in Mine Act proceedings. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981). The Commission set forth the reasoning behind its conclusion in King Knob, which I will not repeat here. In some cases, courts have estopped the government where it has engaged in "affirmative misconduct." See, e.g., United States v. Ruby, 588 F.2d 697, 702-04 (9th Cir. 1978), cert. denied, 422 U.S. 917 (1979). I find that MSHA did not engage in "affirmative misconduct" in this case and I hold that the citations should not be vacated on that basis.

Fourth, Tide Creek maintains that because many of the conditions cited by Mr. Widows have been in existence since 1979, this action is barred by the statute of limitations and by the equitable doctrine of laches. The Mine Act does not include a statute of limitations. As stated by counsel for the Secretary, the only limitation is that citations be issued with "reasonable promptness." 30 U.S.C. § 814(a). If an inspector believes that a safety standard had been violated, he must issue a citation with reasonable promptness. There has been no showing that Mr. Widows unreasonably delayed issuing any citation after he determined that a violation existed. For the same reason, there has been no indication that MSHA knew of violations of safety standards at the mine but slept on its duty to issue citations.

Finally, Tide Creek argues that it was denied due process because the inspection was triggered by a telephone complaint that contained false information. In particular, Tide Creek contends that as "an American citizen entitled to due process in some regard, we firmly believe that to allow the use of a secret 'Code-a-phone' system to allow complaints that are false about the department and about an operator without any recourse being allowed amounts to an abuse of process that has been set up to protect miners working in mines." (T.C. Br. 34).

Congress determined that miners should "play an active part in the enforcement of the Act" and that "they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978). MSHA's system for anonymous telephone complaints furthers that objective. In addition, section 103(a) of the Mine Act expressly grants authorized representatives of the Secretary a right to enter all mines for the purpose of performing inspections under the Act. The Secretary possessed the authority to conduct the inspection at issue even if the inspection ensued from a complaint that contained false information. See, Aloe Coal Co., 15 FMSHRC 4, 8 (January 1993). "An inspector has broad discretion to gain entry and to inspect a mine." Id. Accordingly, Tide Creek did not suffer an abuse of process.

General Background and Discussion

The Tide Creek Rock Mine consists of three work areas: (1) the crusher including auxiliary facilities; (2) the stockpile; and (3) the extraction area in the pit. Usually, only three employees work at the mine, but on occasion there are four employees. John A. Peterson is the only person who operates the crusher and he remains at the crusher's control tower at all times when the crusher is operating. One employee loads rock at the extraction area into a truck, drives the truck to the upper hopper of the crusher, and dumps the rock into the hopper. On occasion another employee also performs this task. The third employee loads crushed rock into a truck at the lower hopper (bunker silo) and dumps the rock at the stockpile. At the time of the inspection, the crusher was not operating.

In its brief, Tide Creek asserts that many of the conditions described in the citations did not create a hazard to Mr. Peterson or to the other employees, for the reasons discussed in more detail below. It argues that the citations should be vacated because the conditions did not create a hazard to miners.

The Commission and the courts have uniformly held that the Mine Act is a strict liability statute. See, e.g. Asarco v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." Id. at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. 30 U.S.C. § 814(a). If conditions existed which violated the regulations, citations [are] proper.

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The degree of the hazard is taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

In assessing civil penalties, I have taken into consideration the fact that Tide Creek is a very small family-run business and that, except as noted below, it promptly abated the 33 citations with its limited resources. Except as noted below, I find that Tide Creek's negligence was low with respect to the citations. The conditions cited by Mr. Widows existed for a considerable length of time without receiving citations by MSHA. Mr. Peterson was attempting to run a safe operation and reasonably believed that he was in compliance with the Secretary's safety standards.

Specific Citations

Tide Creek also argues that the Secretary failed to prove the violation alleged in each citation. In order to discuss the allegations in a systematic way, I have grouped the citations by subject area rather than by docket number.

A. ELECTRICAL CITATIONS

1. Citation No. 4339822 alleges that a danger sign was not posted at the electrical shed to warn persons of electrical hazards. The safety standard, 30 C.F.R. § 56.12021, provides that "suitable danger signs shall be posted at all major electrical installations." Mr. Widows testified that the cited shed contained the majority of the mine's electrical components and that it did not have a sign warning people that electrical equipment was in the shed. (Tr. 92-95, 181-84). At the time of the inspection the power was off. Id. Mr. Peterson testified that there was no sign, but there was no person to warn of the danger because he is the only person who goes into the shed. (Tr. 335-36).

Tide Creek argues that the citation should be vacated because the citation did not include a reference to the standard allegedly violated. The Secretary admits that the citation did not set forth what safety standard was violated, but contends that Tide Creek was not prejudiced by the omission. It maintains that Tide Creek knew the material facts that led to the issuance of the citation and that its counsel cross-examined Mr. Widows about the violation. It moves to amend the citation to conform to the evidence.

I find that this omission is a technical defect and the citation should not be vacated on this basis. In making this finding I rely on the fact that "Exhibit A" to the Secretary's petition for assessment of civil penalty in WEST 94-369-M, which lists the citations and penalties, alleges a violation of section 56.12021 with respect to Citation No. 4339822. Thus, Tide Creek had notice of the standard allegedly violated long before the hearing in this matter.

Based on the evidence, I find that the Secretary established a violation. There is no dispute that the shed was a "major electrical installation" and it did not have a danger sign. As stated above, the fact that the condition created little or no hazard to miners is not a defense to the violation. I find that the violation was not significant and substantial ("S&S") and that the gravity was low because all miners knew it was an electrical shed and, with the exception of Mr. Peterson, had no reason to enter it. I also find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

2. Citation No. 4339823 alleges that the motor for the El-Jay gyro was not grounded creating a shock hazard in violation of section 56.12025. The safety standard provides, in part, that all metal encasing electrical circuits shall be grounded or provided with equivalent protection. Mr. Widows testified that all electrical circuits must be grounded back to the source. (Tr. 55-59, 172). He stated that the motor is part of a three-phase 480-volt circuit that required a fourth ground wire. He testified that if one of the wires touched the casing of the motor, the metal could become energized creating an electric shock hazard. Id. Mr. Widows said that frame grounding is not sufficient under the safety standard because "you can never tell how good the frame is" and a buildup of rust or corrosion could interfere with the grounding system. (Tr. 57). Mr. Peterson testified that the cited motor was bolted down to metal and that all metal pieces at the crusher are interconnected with grounding straps including this motor. (Tr. 322-26, 371-73). He stated that the motor was grounded as required by the standard.

The Secretary contends that the standard requires that an operator install a separate ground wire returning to the power source and that frame grounding is unacceptable under the National Electrical Code. He maintains that a fourth grounding wire is required under the standard. Tide Creek argues that the safety standard does not require any particular type of grounding.

I credit the testimony of Mr. Peterson that each piece of metal at the crusher was interconnected with grounding straps, including the cited motor, and that a ground wire was connected to the frame of the crusher and the mine's grounding rod. (Tr. 322-26, 372-73, 411-13). He welds about twice a month using one electrical lead and the frame of the crusher as the ground. Mr. Widows testified that a continuous fourth grounding wire is required by the standard. (Tr. 402-11). Mr. Widows, however, did not conduct any test to determine if the motor was grounded and did not examine Tide Creek's grounding system. He simply concluded that it violated the standard because there was no fourth grounding wire.

The standard does not set forth any particular means of grounding the metal compartment of a motor. "Electrical grounding" is defined as meaning "to connect with the ground to make the earth part of the circuit." 30 C.F.R. § 56.2 In addition, the standard does not incorporate the National Electrical Code by reference. I find that the Secretary did not establish a violation. The Secretary has the burden of proof and he has not shown that the casing for the motor was not connected to the earth. I do not doubt that a fourth wire grounding system is state of the art at the present time and that it offers certain advantages over Tide Creek's grounding system. The Secretary failed to show, however, that the metal encasing the cited motor

was not grounded nor provided with equivalent protection. See, e.g. McCormick Sand Corp., 1 FMSHRC 21, 23-24 (January 1980) (ALJ). Accordingly, this citation is vacated.

3. Citation No. 4339824 alleges that continuity and resistance of the grounding system had not been tested in violation of section 56.12028. The safety standard provides, in part, that continuity and resistance of the grounding system shall be tested at the time of installation, repair and modification, and annually thereafter. Mr. Widows testified that he asked Mr. Peterson whether he had performed such tests and that he replied "No." (Tr. 59-61, 173). He stated that the purpose of the test is to "make sure that all motors, electrical boxes, energized circuits, ... have a good ground path back to the source...." (Tr. 60). The test would disclose any ungrounded motors. Mr. Peterson did not deny that the grounding system had not been tested and stated that the first time that an electrician tested the ground system was after he added a fourth wire ground to abate Citation No. 4339823. (Tr. 371-73). Tide Creek contends that Mr. Peterson's use of the grounding system to operate his welder is a sufficient test under the standard.

I find that the Secretary established a violation. There is no dispute that the test was not done and Mr. Peterson's use of the grounding system to operate his welder does not comply with the standard. I agree with Mr. Widows that the violation was not S&S and was not serious. I also agree that Tide Creek's negligence was moderate. A penalty of \$50.00 is appropriate.

4. Citation No. 4339853 alleges that two cover plates were missing from junction boxes in 110-volt lighting circuits in the shop in violation of section 56.12032. The boxes were about 8½ feet high and no bare copper wire was observed. The safety standard provides that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing and repair. Mr. Widows testified that he observed the condition while inspecting the shop. (Tr. 101-07). Tide Creek argues that the citation should be dismissed because there is "no testimony in the record that the pictured items are 'electric equipment' or 'junction boxes'" (T.C. Br. at 23).

I find that the items cited are "junction boxes," as that term is used in the standard, and that the Secretary established a violation. Mr. Widows did not use the term "junction box" but called them "electrical boxes." (Tr. 101). There is no question, however, that the boxes in which the leads for the lights in the shop were connected to the power source did not have covers. (Ex. P-14). The boxes were junction boxes. I find that the violation was not S&S and not serious. The junction boxes were on the ceiling and the shop was used for storage only. I also find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

5. Citation No. **4340483** alleges that the cover box for the El-Jay gyro motor was missing exposing the insulated connections in violation of section **56.12032**. The citation states that the box was about seven feet high. Mr. Widows testified that the box encloses electrical connections to keep the weather out and that the cover was missing. (Tr. 40-43, 162-62, 193-94; Ex. P-3). He stated that the condition created a hazard because rain could get into the electrical connections, cause a short, and injure someone. Id. Mr. Peterson testified that he took the cover off the box because the motor shakes and jumps causing the wires to rub against the cover. (Tr. 318-321). He was concerned that the wires could short out. Id. He testified that at the time the citation was issued the wires were intact and that the condition did not create a hazard. Id.

Tide Creek contends that removal of the cover plate was a "repair" as that term was used in the safety standard because it was removed to prevent a short circuit caused by vibration of the crusher. It argues that the standard is therefore inapplicable. I disagree and find that the Secretary established a violation. The term "repair" does not include the permanent removal of the box's cover to prevent wires from rubbing against the cover. I construe the exception to refer to repairs to the wires, their connections, and the box itself rather than a permanent solution to a problem. There is no requirement that the cover be metal. I find that the violation was not S&S or serious. Given the location and condition of the wires in the box the hazard was minimal. I also find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

6. Citation No. **4339854** alleges that there was an improper splice on a 110-volt power circuit in the shop in violation of section **56.12013**. The citation further states that the splice was in the corner of the shop where there was little exposure and no bare copper leads were observed. The safety standard provides, in part, that permanent splices and repairs made in power cables shall be mechanically strong, insulated to a degree equal to that of the original and provided with damage protection as near as possible to that of the original. Mr. Widows testified that the two cables had been spliced using a wire nut without additional insulation or a box. (Tr. 69-71, 176-77, 200-01; Ex. P-8). He stated that using a wire nut did not satisfy the requirements of the standard. Id. Mr. Peterson testified that the splice was temporary and that it was not as strong as the original, but that one could not be injured by it because it was insulated to the same degree as the original. (Tr. 326-28).

Tide Creek contends that the citation should be vacated because the standard applies only to "permanent splices and repairs of power cables." Tide Creek argues that the splice was a temporary solution and that the Secretary failed to prove a necessary condition precedent to a violation. Mr. Peterson

testified that the cable went to a new transformer that he had just installed because the old transformer was no longer working. (Tr. 326-27). He said that he attached the wires with a wire nut as a temporary measure and Mr. Widows arrived shortly thereafter. I credit Mr. Peterson's testimony in this regard. I also credit his testimony that it did not present a shock hazard.

The standard clearly states that it applies only to permanent splices and repairs of cables, not to temporary splices. As stated above, the splice was not in an easily accessible area. I find that the splice was temporary and that the cited standard does not apply. Accordingly, the citation is vacated.

7. Citation No. **4340484** alleges that the start and stop switch for the cross belt was not labeled and could not be readily identified by location in violation of section **56.12018**. The safety standard provides that principal power switches shall be labeled to show which units they control unless identification can be made readily by location. Mr. Widows testified that a start/stop switch was not labeled and could not be identified by location. (Tr. 44-46, 163-65, 194-96). He determined that it was for the cross belt by asking Mr. Peterson. Id. At the time of the hearing, he could not remember if there were any markings on or near the switch but testified that he would not have issued the citation if it was properly labeled. Id. Mr. Peterson testified that dust from the crusher would obliterate any label and that he is the only person who uses the switch in any event. (Tr. 321-22). If anything goes wrong, he shuts down the plant at the two main switches and everything is dead. Id. He stated that the crusher is a one-man operation and he is the only one who would have any need to shut off the power.

Tide Creek argues that because Mr. Widows did not have a clear recollection of the switch or any marking on the switch at the hearing the citation should be vacated. It also argues that the switch is identifiable by location since Peterson knows where it is and what it operates, and he is the only person who works at the crusher. I find that the Secretary established a violation. Mr. Widows testified that the switch was not labeled, although he could not remember if there were any markings in the area. Mr. Peterson's testimony indicates that it was not labeled. Accordingly, I find that the switch was not labeled. I also find, based on Mr. Widows's testimony, that it could not be readily identified by location. As stated above, the Secretary is not required to show that a hazard was created to establish a violation.

I find that the violation was not S&S and that it created little or no hazard. I credit Mr. Peterson's testimony that other miners would not be at the crusher when it was operating and would not be in the position of having to turn off the switch

in the event of an emergency. I also find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

B. GUARDING CITATIONS

Tide Creek raises a number of issues that are common to all of the guarding citations. Each citation was issued under 30 C.F.R. § 56.14107, which provides:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The citations involve pinch points of belts and pulleys. Tide Creek contends that each citation should be vacated because only Mr. Peterson travels within eight feet of the cited areas and he does so only when the crusher is not running. The evidence discloses that the other employees drive trucks and do not ordinarily walk past the cited areas when the crusher is operating. The record also reveals that Mr. Peterson ordinarily approaches the cited areas only to grease bearings and he does so only when the crusher is not running.

The Commission held that the most logical construction of a guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." Thompson Brothers Coal Co., Inc., 6 FMSHRC 2094, 2097 (September 1984). The Commission stressed that the construction of safety standards involving miners' behavior "cannot ignore the vagaries of human conduct." Id. (citations omitted). Thus, I am required to consider all relevant exposure and injury variables including "accessibility of the machine parts, work areas, ingress and egress, work duties, and ... the vagaries of human conduct" on a case-by-case basis. Id.

Taking these factors into consideration, I find that, as a general matter, the fact that employees do not enter the crusher area when it is running is not a valid defense to the citations. It is not disputed that there is no physical barrier to prevent an employee from walking into the crusher area past the cited pinch points. An employee could stumble and come in contact with a pinch point. The fact that such an event is unlikely relates to the gravity of the violation and not whether a violation occurred. I find that it is highly unlikely that anyone would

walk through the crusher while it was running but, given the vagaries of human conduct, I cannot totally rule that possibility out. An employee could decide that he needed to travel through the area; Mr. Peterson could be preoccupied and not see the employee; and the employee could slip, fall and injure himself in a pinch point.

I consider these arguments on a citation-by-citation basis, as discussed below.

1. Citation No. **4339821** alleges that the back side of the V-belt pulleys for the El-Jay gyro were not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulleys were about four feet high and that the exposure was minimal since the front side was guarded. Mr. Widows stated that people walk on the guarded side of the pulley and that if someone slipped and grabbed the guard to brace himself, his fingers could come in contact with the pinch point. (Tr. 88-92; Ex. P-12). Mr. Peterson testified that there was a chain between two posts to keep people out of the area. (Tr. 336-40, 438-49; Ex. R-21). He also testified that the moving part was not within seven feet of a work area, but that it was within seven feet of a walk area. Id. He stated that he walks by the pulley three or four times a day, but that the crusher is not operating at that time. Finally, he stated that if you grabbed the belt while the pulley was running, it would throw you towards the motor not the pinch point. (Tr. 338).

Tide Creek argues that this citation should be vacated because there was no working or walking surface within seven feet. It also argues that the chain was accepted as a guard by an MSHA inspector during a previous inspection. Finally, it contends that there was no chance of an injury because the pulley runs away from the pinch point towards the electric motor.

Based on the evidence, I find that the Secretary established a violation. Unguarded moving machine parts were present within seven feet of where Mr. Peterson walks every day to run the crusher. The pulley is not operating at that time. As discussed above, other employees would not ordinarily walk through this area while the crusher was operating. Given the vagaries of human conduct, however, an employee could walk by the pulley while it was operating to speak with Mr. Peterson in the control tower. Mr. Peterson could be preoccupied with other matters at the control tower and not see the employee. The employee could slip and his fingers could become entangled in the pinch point. He could grab the lower part of the belt by accident. As stated above, the fact that the condition created little or no hazard to miners is not a defense to the violation.

Perimeter guarding of the area around a machine is not an acceptable alternative to site specific guarding of the moving part. See, e.g. Moline Consumers Co., 15 FMSHRC 1954 (September 1993) (ALJ); Brown Brothers Sand Co., 17 FMSHRC 578 (April 1995) (ALJ); Walker Stone Co., 16 FMSHRC 337, 357 (February 1994) (ALJ). Thus, the chain that was supported by two posts along one side of the pulley is not an acceptable guard. To comply with the standard, the guard must prevent an employee from unintentional contact with the moving part. As discussed above, the Secretary is not estopped from issuing a citation for a violation of a safety standard because an inspector on a previous inspection did not cite the condition. In this instance, an MSHA inspector accepted the chain as a guard during an inspection that occurred sometime between 1979 and 1982. I find that this fact does not warrant a dismissal of the citation, but rather indicates that Tide Creek's negligence was quite low. "Although the record reflects some confusion surrounding MSHA's [interpretation of the safety standard], as a general rule, 'those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law'" Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) (quoting Heckler v. Community Health Services, 104 S.Ct. 2218, 2226 (1984)).

Based on the above, I find that the violation was not S&S and that the gravity was low because miners did not travel near the cited area while the machine was running. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of \$20.00 is appropriate.

2. Citation No. **4339855** alleges that the self-cleaning tail pulley for the bunker conveyor was not provided with a guard to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulley was about three feet high and that persons are not normally in the area when the crusher is running. Mr. Widows testified that an employee could accidentally get his hand caught in the pinch points and sustain a serious injury. (Tr. 107-115, 185; Ex. P-15). Mr. Peterson said that nobody would ever be in the area of the tail pulley while the crusher is operating. (Tr. 341-343, 348).

Tide Creek argues that the moving machine part is more than seven feet from a walking or working surface. It states that the evidence shows that it is at least 15 feet from the control tower and at least 15 feet from the other miners driving trucks. It points to Mr. Widows' testimony that "people could go up there but, more than likely, they would not." (Tr. 112). In sum, Tide Creek contends that no one works or walks near the belt when it is operating.

Tide Creek also argues that this citation should be barred by the doctrine of *res judicata*. In John Peterson, d/b/a Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982), Commission Administrative Law Judge George A. Koutras adjudicated several guarding citations at Tide Creek's facility. Tide Creek argues that two of the areas that Mr. Widows cited were previously cited by another MSHA inspector and that Judge Koutras vacated the citations on the merits. Accordingly, it contends that the issues with regard to these citations have been previously adjudicated and that the Secretary cannot relitigate them now.

Based on the evidence, I find that the Secretary established a violation. People did not routinely work in and around the self-cleaning tail pulley and it was not along a normal walkway. Nevertheless, it was in an open area that was easily accessible to anyone at the mine. The pinch point presented a hazard to anyone who walked through the area. Given the vagaries of human conduct, an employee could enter the area without being detected, slip on the mud under the tail pulley, and get his hand caught in the pinch point.

I also find that *res judicata* does not apply. Judge Koutras's description of the conditions at the self-cleaning tail pulley is quite similar to the conditions that prevailed at the time the citation was issued in the present case. 4 FMSHRC at 2255. The safety standard at the time of Judge Koutras's decision was different from the present safety standard. The old safety standard, 30 C.F.R. § 56.14-3, provided that guards at tail pulleys "shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley." The present standard does not include such qualifications. All tail pulleys must be guarded if they are less than seven feet away from walking and working surfaces. Thus, the principal legal issue, the interpretation of the safety standard, differs.

Based on the above, I find that the violation was not S&S and that the gravity was low because miners did not travel near the cited area while the machine was running. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of \$20.00 is appropriate.

3. Citation No. **4339856** alleges that the head pulley and V-belt drive of the "under El-Jay" conveyor was not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulley was about six feet above the ground and that there was little exposure because miners are not in the area. Mr. Widows testified that someone could become entangled in the pinch points and sustain an injury. (Tr. 110-15, 185; Ex. P-15). Mr. Peterson

testified that nobody would ever be in the area of the tail pulley while the crusher is operating. (Tr. 341-343, 348).

The cited area was adjacent to the area cited in the previous citation, No. 4339855. (Ex. P-15). The only significant difference is that the unguarded area was about six feet off the ground in this citation and about three feet off the ground in the previous citation. The parties arguments are the same with respect to both citations.

For the reasons discussed above, I find that the citation should be affirmed. I also find that the violation was not S&S and that the gravity was low because miners did not travel near the cited area while the machine was running. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of \$20.00 is appropriate.

4. Citation No. **4339858** alleges that the V-belt drive for the main screen was not provided with a guard to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the V-belts were about three feet high and that a ladder was present which provided access to the V-belts. It further states that the operator stated that the drive was greased when the crusher was not operating. Mr. Widows testified that it is not likely that the alleged violation would cause an injury because the only access to the area was by the ladder. (Tr. 115-18, 185-86). He testified that "anybody could walk up there, but it was out of the way ... it wasn't a main travelway." (Tr. 116). Mr. Peterson testified that nobody goes up the ladder to the V-belt drive when the crusher is running. (Tr. 295-96, 366).

Tide Creek argues that the alleged pinch point is more than seven feet from a walking or working surface and that a person would have to climb a 12-foot ladder to get to the pinch point. The Secretary contends that because the ladder was "up" at the time of the inspection, it was a working surface and the pinch point was required to be guarded. (Ex. P-18).

I find that the Secretary did not establish a violation because the moving machine part was more than seven feet from a walking or working surface. I credit Mr. Peterson's testimony that he greases the drive when the crusher is not operating. There is no other reason for anyone to climb the 12-foot ladder. Even considering the vagaries of human conduct, I find that a miner would not walk or work within seven feet of the pinch point. Under the circumstances of this case, the ladder was not a walking or working surface. Accordingly, the citation is vacated.

5. Citation No. 4339851 alleges that the air compressor behind the shop had unguarded V-belts in violation of section 56.14107(a). The citation states that the compressor is infrequently used and that minimal exposure is present. It further states that the V-belt pulley was on the back side of the compressor and about three feet high. Mr. Widows testified that an accident was unlikely because the belts were back against the wall in an out-of-the-way area. (Tr. 67-69, 175; Ex. P-7). He also stated that there was an electrical box nearby and that if someone were to throw the switch on the box, he would be close to the compressor. Id. Mr. Peterson testified that the compressor is automatically activated, there is no switch to turn it off or on. (Tr. 267-70, 356-57; Ex. R-4). He also stated that the compressor is about 15 feet from the road and is not within seven feet of a walking or working surface. Id. He testified that no employee goes near the compressor at any time. Id. Finally, he testified that the switch on the electrical box controls a pump in the creek that is seldom used. Id.

Tide Creek argues that the compressor is more than seven feet from any walking or working surface, particularly given its remote location against the back wall of the shop. The Secretary contends that the area around the compressor is a working surface because someone occasionally turns on the electrical switch near the compressor to activate a pump.

Based on the evidence, I find that the Secretary established a violation. The area around the compressor is a working surface on an occasional basis when the water pump is turned on. A person could trip and accidentally get his fingers caught in the pulley for the V-belts, if the compressor was operating. The risk of an injury is low, however, because of the location of the pulleys against the back wall of the shop.

Based on the above, I find that the violation was not S&S and that the gravity was low because a miner would enter the area only occasionally and the pinch points are partially guarded by location. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of \$20.00 is appropriate.

6. Citation No. 4339859 alleges that the tail, head, and V-belt pulleys for the cross belt were not guarded to prevent persons from contacting the pinch points in violation of section 56.14107(a). The citation states that the pulleys were about four to five feet high and that persons pass by the tail pulley on their way to the control tower for the crusher. Mr. Widows testified that one had to pass within two feet of the cited area to get to the control tower. (Tr. 120-24, 134, 136-38; Exs. P-1, P-16). He also testified that a miner would have to climb over the cited area to get to a work platform. Id. He determined that the alleged violation was S&S because anyone walking in the

area would be exposed. Id. Mr. Peterson testified that the cited area is more than seven feet from a walking or working surface. (Tr. 299-301; Exs. R-2, R-18). He stated that no miner walks across the cited area except him to grease fittings and that he greases the fittings before he starts the crusher. Id. He stated that it is not the route he or anyone else uses to go to the control tower.

On February 7, 1994, Mr. Widows issued Order No. 4340486 under section 104(b) of the Mine Act because he determined that Tide Creek had not abated the conditions described in the citation. The order states that the operator built a handrail rather than a guard to abate the citation despite the fact that Tide Creek was advised that a handrail would not be acceptable.

Tide Creek contends that the citation should be vacated because the cited area is more than seven feet from a walking or working surface. In addition, it argues that the alleged violation is not S&S because it was highly unlikely that anyone would be injured. It argues that the section 104(b) order should not have been issued because it installed the handrails in a good-faith attempt to abate the citation. Finally, Tide Creek contends that the record makes clear that more time for abatement was required and Mr. Widows' refusal to provide more time was an abuse of his discretion.

Based on the evidence, I find that the Secretary established a violation. I credit the testimony of Mr. Peterson that the cited area was not along the route that he or other miners take to reach the control tower. Nevertheless, Mr. Peterson testified that he walks along the area to reach fittings. Even though he greases the fittings before the crusher is started, the cited area is within seven feet of a walking surface. As stated above, the Secretary is not required to show that a hazard was created to establish a violation.

I find, however, that the violation was not S&S and that the gravity was low. It is highly unlikely that a miner would walk along the route suggested by Mr. Widows while the crusher was operating, even taking into consideration the vagaries of human conduct. The employees of Tide Creek work in discrete areas and it is highly unlikely that anyone would climb upon the superstructure of the crusher and thereby come in contact with the cited pinch points. The Secretary failed to establish "a reasonable likelihood that the hazard contributed to will result in an injury." Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Accordingly, the violation is not S&S.

An MSHA inspector is authorized to issue an order under section 104(b) of the Mine Act if he determines on a subsequent inspection that: (1) the violation described in the citation has not been totally abated within the period of time originally

fixed in the citation; and (2) the period of time for abatement should not be further extended. It is clear that the violation was not totally abated within the time set in the citation. Whether the time should be extended is subject to the inspector's reasonable exercise of discretion. Tide Creek contends that it was trying to abate about 33 citations in a short period of time with only three miners. Mr. Peterson stated that it took about three weeks to get everything done. (Tr. 364). I find that Mr. Widows did not abuse his discretion in issuing the order. By that time, Mr. Peterson knew or should have known that a handrail would not guard the moving machine parts. Mr. Widows advised him of that fact on January 28. (Tr. 137-38). I appreciate that Tide Creek faced a difficult task, but its actions in this instance did not excuse its failure start working on guards.

I find that the negligence of Tide Creek was low. The violation was not timely abated. Taking into consideration the factors discussed above, including the fact that the violation was not S&S and that the gravity was low, a penalty of \$50.00 is appropriate.

7. Citation No. **4339860** alleges that the tail pulley of the three-inch conveyor was not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulley was about three feet high, but there was little exposure in the area. Mr. Widows testified that the pinch point of this conveyor was close to the area cited in the previous citation, No. 4339860. (Tr. 124-27, 138-40; Ex. P-1). He determined that the exposure was not great because the area is infrequently traveled. Mr. Peterson testified that the cited area is more than seven feet from a walking or working surface. (Tr. 299-301; Exs. R-2, R-18). He stated that no miner walks across the cited area except him to grease fittings and that he greases the fittings before he starts the crusher. Id. He stated that it is not the route he or anyone else uses to go to the control tower.

On February 7, 1994, Mr. Widows issued Order No. 4339827 under section 104(b) of the Mine Act because he determined that Tide Creek had not abated the condition described in the citation. The order states that the operator built a handrail rather than a guard to abate the citation despite the fact that Tide Creek was advised that a handrail would not be acceptable.

The cited area was adjacent to the area cited in the previous citation, No. 4339859. (Ex. P-15). The facts are essentially the same. The parties' arguments are the same with respect to both citations and the section 104(b) orders.

For the reasons discussed above, I find that the citation should be affirmed. The area was within seven feet of a walking surface and a guard was not present. I also find that the viola-

tion was not S&S and that the gravity was low because it was highly unlikely that miners would travel near the cited area while the machine was running.

I also find that the section 104(b) order should be affirmed, for the reasons discussed above. Finally, I find that Tide Creek's negligence was low. Taking into consideration the factors discussed above, including the fact that the violation was not S&S and that the gravity was low, a penalty of \$50.00 is appropriate.

C. OTHER EQUIPMENT CITATIONS

1. Citation No. 4126437 alleges that the Cat 966 loader did not have a back-up alarm in violation of section 56.14132(b)(1). The citation states that the operator of the vehicle had an obstructed rear view and that no one was present to signal when it was safe to back up. The safety standard requires an automatic reverse-activated signal alarm on self-propelled mobile equipment if the operator has an obstructed view to the rear. Mr. Widows testified that he observed the loader backing up without a reverse alarm system or a spotter. (Tr. 75-80; Exs. P-10, P-11). He stated that the operator would not be able to see anyone close behind the loader if he were to back up, because of the obstructed view. Mr. Peterson testified that nobody is ever walking around in the vicinity of the loader. (Tr. 331-37).

Tide Creek argues that the evidence does not establish that the operator had an obstructed view. In addition, it argues that the evidence establishes that only one employee is in the stockpile area and he is the operator of the loader. Finally, it contends that the safety standards are designed to protect miners and not others who may be in the area. (At the time the citation was issued, a customer was in the stockpile area).

I find that the Secretary established a violation. The evidence makes clear that the loader operator had an obstructed view. (Tr. 76; Exs. P-10, P-11). There is no dispute that a backup alarm was not present. While it is true that only one employee ordinarily works in the stockpile area, other employees could be in the area without the knowledge of the loader operator. Indeed, the fact that others are not usually there could give the loader operator a false sense of security.

I also find that the violation was S&S because the Secretary established the elements of the S&S test set forth in Mathies. First, as discussed above, there was a violation of the safety standard. Second, the violation contributed to a measure of danger to safety. Third, there was a reasonable likelihood that the hazard contributed to will result in an injury. Given the noise of the loader and the fact that the operator's vision to the rear is restricted, it is reasonably likely that someone would be

injured as a result of the violation. Mr. Peterson walks around the property and it is unlikely that the loader operator would be able to see Mr. Peterson if he were backing up. Finally, an injury would be of a reasonably serious nature. I find that Tide Creek's negligence was moderate. Based on the above, a penalty of \$100.00 is appropriate.

2. Citation No. **4126439** alleges that Tide Creek was not conducting inspections of mobile equipment used during the shift in violation of section **56.14100(a)**. The safety standard provides that self-propelled equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation. Mr. Widows testified that he knew that safety inspections were not being made because the loader did not have a back-up alarm. (Tr. 81-84). He could not recall if he asked the loader operator if a safety inspection was made or whether he requested any documentation to support a safety inspection. Id. He said that such a document request was standard MSHA procedure. Mr. Peterson testified that the equipment operators tell him if there is any problem with their equipment. (Tr. 334-35).

Tide Creek argues that the Secretary failed to prove that an inspection was not made. I agree. The fact that the back-up alarm was not functioning does not establish that a safety inspection was not made. Mr. Widows could not remember whether he requested to see a safety checklist. The fact that such a request is standard MSHA procedure is not enough to establish a violation. Accordingly, the citation is vacated.

3. Citation No. **4340481** alleges that the red Mack haul truck was not provided with seat belts in violation of section **56.14131**. The citation states that the truck was used on level ground around loaders and on short hauls. The safety standard provides that seat belts shall be provided and worn in haulage trucks. Mr. Widows testified that he looked into the vehicle and could not find any seat belts. (Tr. 127-29). He stated that he did not consider the violation to be S&S because of the manner in which the truck is used. Id. He further stated that Mr. Peterson told him that he thought that older vehicles did not need to be equipped with seat belts. Mr. Peterson testified that the cited haul truck was manufactured in the early 1960s. (Tr. 344-47; Ex. R-23). He said that it is only used to make 400-foot trips over flat ground and that the top speed is 15 miles per hour. He said that the lack of seat belts did not create a hazard because the truck would not tip over on flat ground and it is only used on straight, flat trips.

Tide Creek argues that the Secretary did not establish that the cited vehicle is a haulage truck. I disagree. The vehicle is a dump truck. (Ex. R-23). Although the term "haulage truck" is not defined by the Secretary, I conclude that an ordinary dump

truck is a "haulage truck" as that term is used in the safety standard.

I agree with Mr. Widows that the violation was not S&S and was not serious. I find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

D. TRAVELWAY CITATIONS

1. Citation No. 4339847 alleges that there was no handrail in front of the conveyor at the operator's control tower to prevent persons from falling onto the conveyor in violation of section 56.11002. The safety standard provides, in part, that crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Mr. Widows testified that there is a conveyor that runs along the side of the control tower for the crusher. (Tr. 97-101; Ex. P-13). He stated that one of the duties of the crusher operator is to pick pieces of wood off the conveyor. Id. He testified that the lack of a handrail created a risk of falling onto the belt, which was about 18 inches high. Id. Mr. Peterson testified that he stands all day in the control tower when the crusher is operating. (Tr. 293).

Tide Creek argues that the control tower is not a crossover, elevated walkway, elevated ramp, or a stairway. It contends that the control tower is a platform and that the safety standard does not apply. Tide Creek states that Mr. Peterson is the only person who works at the control tower and that he operates the controls for the crusher from there. (R-17). The Secretary did not address this issue.

The safety standard applies to "crossovers, elevated walkways, elevated ramps, and stairways." Although a work platform could be construed as a walkway under many circumstances, I find that the platform cited here is not a walkway. The term "walkway" is not defined by the Secretary, but "travelway," a similar term, is defined as "a passage, walk or way regularly used ... for persons to go from one place to another." 30 C.F.R. § 56.2. The control tower was not a route miners would take to go from one place to another. It was not a route that maintenance personnel would use to gain access to equipment. Rather, it was a work station for Mr. Peterson. I find that the Secretary failed to prove that the control tower was covered by the subject safety standard. Compare, Moltan Co., 11 FMSHRC 351, 355-36 (March 1989)(ALJ). Accordingly, this citation is vacated. It is important for Tide Creek to understand, however, that another safety standard, 30 C.F.R. § 56.11027, requires handrails on work platforms.

2. Citation No. 4339849 alleges that the work platform along the second screen was not provided with handrails to

prevent a person from falling in violation of section 56.11002. The citation states that the platform was about six feet high and that it is used to change the shacker screens. Mr. Widows testified that Mr. Peterson told him that he needed to get on the platform to perform periodic maintenance. (Tr. 26-31, 148-51, 153-55, 191-93; Ex. P-1). Mr. Widows said that Mr. Peterson could fall six feet into a puddle of water without the handrails. Mr. Peterson testified that the cited platform is not a walkway, crossover, ramp, or stairway, and that it is not used to get from one place to another at the crusher. (Tr. 317-18).

Tide Creek argues that the cited area was not subject to the cited standard. For the reasons set forth above, I agree. Indeed, Mr. Widows referred to the area as a "work platform." Although a work platform may also be an elevated walkway in many instances, in this case the Secretary failed to establish that it was. Apparently, Mr. Peterson, on an infrequent basis, stands on the platform to change a shaker screen. There is little evidence as to the use of this platform. Accordingly, the citation is vacated.

3. Citation No. 4339846 alleges that the elevated walkway along the bunker silo was not provided with handrails to prevent persons from falling, in violation of section 56.11002. The citation states that the walkway was about ten feet high on one side and that persons are required to be on the walkway to load trucks. Mr. Widows testified that the walkway was where someone would stand when trucks are loaded. (Tr. 61-66, 173-75, 198-99; Ex. P-6). He said that the walkway is along the bunker silo and, after a truck backs in under the silo, an employee stands on the walkway and pulls down a lever to release rock into the truck. Id. He said that there is a danger that an employee could fall while pulling on the lever. He also said that the walkway is a wooden plank about ten feet long. Mr. Peterson testified that the cited area was not a crossover, walkway, ramp, or stairway. (Tr. 301-07, 364).

Tide Creek argues that the cited area was not covered by the safety standard. It contends that the standard was designed to protect individuals from falling from elevated areas that are used as walkways and that the board by the bunker silo was not used in such a fashion. The Secretary did not address this issue.

The cited area is only used when a truck is under the silo and is ready to be loaded. A worker steps up on the board and pulls down on the handle to release material into the truck. It is not a means of walking to any other location at the mine and no person would be in the area unless a truck was ready to be loaded. The Secretary failed to establish that the board was a walkway, crossover, ramp, or stairway. A platform may be covered by this safety standard in many situations, but the Secretary

failed to establish that this platform was a walkway. In addition, it appears that the cited area would be covered by section 56.11027, which requires handrails on scaffolds and work platforms. Accordingly, this citation is vacated.

E. OTHER CITATIONS

1. Citation No. **4126433** alleges that the mine operator failed to notify MSHA of the opening of the mine in violation of section **56.1000**. The safety standard provides, in part, that the operator of any metal or nonmetal mine shall notify the nearest MSHA office before starting operations. The standard also requires such operators to notify MSHA if it intends to close the mine on a temporary or permanent basis. The citation states that Mr. Widows told Mr. Peterson three years ago to notify MSHA when he starts operating. Mr. Widows testified that MSHA never received any notice from Tide Creek that the mine was operating. (Tr. 23-26). He further testified that he told Mr. Peterson that if he wanted to get started in the mining business, he had to notify MSHA in advance.

Mr. Peterson testified that the mine has been in operation since at least 1979 and has had an MSHA identification number since that time. (Tr. 307-12, 368-69). He stated that the mine was previously inspected by MSHA. He stated that at the time of Mr. Widows' previous visit to the mine, the crusher was not running. Apparently, Widows told Peterson on that date that whenever he comes by he cannot find anybody at the mine. He also told Peterson that if "you're not running, I'm going to take your name out of my book." (Tr. 309). Mr. Peterson testified that the mine was operating on that date, but the crusher was not operating. He further testified that MSHA inspectors came by on subsequent dates, but they did not inspect the mine because the crusher was not running. Mr. Voris Probst, who was familiar with the mine, testified that the mine has not been closed for the past 20 years. (Tr. 393-94, 399-400). He further testified that the crusher operates about half of the time.

The Secretary failed to establish a violation of the standard. I credit the testimony of Peterson and Probst with regard to this citation. It is clear from the record that Tide Creek is a small family-run business. Mr. Peterson operates the crusher and oversees other operations at the minesite. Agnes M. Peterson is the president, keeps the books, takes care of the paperwork, and acts as Tide Creek's counsel. Mr. Peterson also is engaged in logging and farming and Ms. Peterson practices law in St. Helens, the county seat. If Mr. Peterson is not at the mine, the crusher does not operate because he is the only person who operates the crusher. The safety standard does not require Mr. Peterson to notify MSHA every time he decides to operate the crusher. Apparently, there are significant periods when the crusher is not operating, but the mine is still open. The fact

that Mr. Widows decided to take the mine out of his "book" does not establish a violation. Tide Creek must have notified MSHA that it was operating at some point in the late 1970s because it had an MSHA identification number at the time of the inspection. There is no evidence that it ever notified MSHA that it was closed. Accordingly, this citation is vacated.

2. Citation No. **4339852** alleges that several compressed gas cylinders were not secured in a safe manner in violation of section **56.16005**. The safety standard provides that compressed and liquid gas cylinders shall be secured in a safe manner. The citation states that no mobile equipment traveled in the area. Mr. Widows testified that two of the cylinders were in the shop and one was outside the shop. (Tr. 85-88, 181). He stated that they were lying on the ground and the floor, and that Mr. Peterson told him that they were empty. Mr. Peterson testified that he keeps cylinders that are full tied up or secured in a cart. (Tr. 270-77, 357-58; Exs. R-8, R-9). He further stated that the cited cylinders were empty.

Tide Creek argues that the cylinders should not have been cited because they were empty. It contends that Mr. Peterson secures empty bottles by opening the valve and laying them on the ground. Tide Creek maintains that this is a safe procedure because it relieves all pressure from inside the cylinder.

Based on the evidence, I find that the Secretary established a violation. The language of the standard makes clear that cylinders must be physically secured whether they are empty or full. Although opening the valve of empty cylinders greatly reduces the safety hazard, such a method does not comply with the safety standard. I agree with Mr. Widows that the violation was not S&S. I find Tide Creek's negligence to be low. A penalty of \$20.00 is appropriate.

3. Citation No. **4340482** alleges that an oxygen gas cylinder was found in the shop in violation of **56.16005**. The citation was issued on February 7, 1994. Mr. Widows testified that the cylinder was lying on the floor and it was not secured. (Tr. 31-37, 151-52, 181, 193). As with the previous citation, No. 4339852, the danger is that something heavy may break the valve and cause the gas in the cylinder to be suddenly released. (Tr. 34). Mr. Peterson's testimony was the same for both cylinder citations. The parties' arguments were also the same.

For the reasons discussed above, I find that the Secretary established a violation. Mr. Widows determined that the violation was not S&S because the cylinder was not located in an area where it was likely that the valve would be broken. At the hearing, counsel for the Secretary sought to amend the citation to allege an S&S violation based on the evidence. I find that the violation was not S&S. The likelihood of an injury contrib-

uted to by this violation was not very great. I also find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

4. Citation No. **4339826** alleges that a competent person was not examining the working place at least once each shift and recording these examinations in violation of section **56.18002**. The safety standard provides, in part, that a competent person shall examine each working place at least once each shift for safety hazards and that a record of such examinations shall be kept. Mr. Widows testified that he asked Mr. Peterson about such examinations and that he replied that they had not been done. (Tr. 95-97).

Tide Creek contends that the Secretary is seeking to prove the violation on the basis that if the examinations had been performed all of the other citations would not have been issued. It contends that this citation constitutes "improper doubling-up" and should be vacated.

Based on the evidence, I find that the Secretary established a violation. The Secretary is not seeking to establish a violation based on the number of citations issued during the inspection. Rather, the Secretary established that the examinations were not being performed and records of them were not being kept. I agree with Mr. Widows' determination that the violation was not S&S or serious. I find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

5. Citation No. **4339845** alleges that fire extinguishers were not being visually inspected at least once a month in violation of section **56.4201(a)(1)**. The safety standard provides, in part, that all fire extinguishers shall be inspected visually at least once a month to determine that they are fully charged and operable. Subsection (b) provides that a record of the inspections must be kept. Mr. Widows testified that the fire extinguishers did not indicate whether monthly examinations were being made. (Tr. 119-20, 133, 135-36, 187-88). He stated that, typically, markings are made at the extinguisher to note the inspections. He further testified that when he asked Mr. Peterson if examinations had been made, he replied that he did not know that extinguishers had to be checked. Finally, Mr. Widows stated that the fire extinguishers were in operating condition.

On February 7, 1994, MSHA Inspector Mike J. Williams issued Order No. 4340180 under section 104(b) of the Mine Act because he determined that Tide Creek had not abated the citation. The order states that no apparent effort was made to visually inspect fire extinguishers every 30 days. Inspector Williams testified that when he talked to Mr. Peterson about the citation, he was told that he did not have time to get to it because he was working on abating the more serious citations. (Tr. 207-09).

Mr. Williams stated that if Mr. Peterson had asked for more time to abate the citation, he would have given it to him. Id.

Tide Creek contends that the citation should be vacated because it was issued for not having the proper documentation to show that the fire extinguishers were inspected. I disagree. Mr. Widows testified that Mr. Peterson told him that they had not been examined. Accordingly, I find that the Secretary established a violation.

The citation was not abated within the time originally set in the citation and Inspector Williams did not extend the abatement time. He believed that Tide Creek had been given sufficient time to inspect the fire extinguishers. I find, however, that the inspector abused his discretion in not extending the abatement time. There is no dispute that the fire extinguishers were operational. It is also clear that Tide Creek was engaged in trying to abate over 30 other citations. Given that the extinguishers were in operating condition, it was reasonable for the operator to give it a lower priority. Inspector Williams testified that he would have given Tide Creek an extension if it had asked.

At the hearing, Mr. Peterson impressed me as being a rather stoic individual. He did not appear to be the type of person who would ask for an extension or offer an excuse for not abating a citation. He simply advised Mr. Williams that he had been so busy with the other citations that he had not been able to get to it. As a general matter, it is the responsibility of a mine operator to ask for an extension. Given the circumstances of this case, however, I find that Mr. Peterson's failure to request an extension should be excused. It only took about 15 minutes to abate the citation. Based on the above, the order of withdrawal is vacated.

I agree with Mr. Widows that the violation was not S&S and was not serious. I find that Tide Creek's negligence was low. A penalty of \$5.00 is appropriate.

6. Citation No. **4339844** alleges that there was an accumulation of combustible waste in the oil storage building that could create a fire hazard in violation of section **56.4104(a)**. The safety standard provides that waste materials, including liquids, shall not accumulate in quantities that could create a fire hazard. The citation states that a 30-inch diameter spillage container contained two to three inches of spilled oil and that persons are required to enter the building to get supplies. Mr. Widows testified that he observed the container with an inch or two of spilled oil in it. (Tr. 37-40, 155-59; Ex. P-2). He further said that the oil could be ignited by someone smoking or by an open flame. He believed that the wooden floor was also saturated with oil. He did not believe that there was any

electricity in the building. He testified that Mr. Peterson told him that employees are not allowed to smoke at the mine.

Mr. Paterson testified that the oil that Mr. Widows saw was in a container that was placed under an oil drum to catch any drips or spills. (Tr. 278-81, 359-61; Ex. R-10). The container was directly under the spout of the oil drum. He determined that oil was an inch and a quarter deep. He testified that the oil was motor oil used in his mobile equipment and that it does not ignite easily. He said that the oil in the container under the drum was not waste because he uses it to lubricate chains and other items at the mine. He did not believe that it created a fire hazard and that he offered to get a torch to show that it would not ignite. Mr. Voris Probst, a former plant manager for Boise Cascade, testified that the flash point of the motor oil at the mine was so high that it did not pose a fire hazard. (Tr. 385-86).

The Secretary argues that the citation should be affirmed because "combustible" is defined as "capable of being ignited and consumed by fire." He argues that the fact that the oil is not easily ignited is not relevant. I disagree and find that the Secretary failed to establish that the oil in the drip pans created a fire hazard. I credit Tide Creek's evidence that the oil was not easy to ignite. I also find that there were no ignition sources in the area. Accordingly, the citation is vacated.

7. Citation No. **4126440** alleges that there was no sign prohibiting smoking and open flame at the oil storage building in violation of section **56.4101**. The safety standard provides that readily visible signs prohibiting smoking and open flames should be posted where a fire or explosion hazard exists. Mr. Widows testified that anytime there is a sufficient amount of materials to create a fire or explosion hazard, a no smoking or open flame sign is required. (Tr. 55, 171-72). He stated that no sign was present. He also stated that he did not observe any smoking or open flames. Mr. Peterson testified that he does not believe that there is a fire or explosion hazard in the shed because it is a long way from any ignition source. (Tr. 281-82).

Tide Creek contends that no fire or explosion hazard existed in the shed. I disagree. As Exhibit P-2 shows, the shed was filled with oil drums, paper, and miscellaneous items that could catch fire. The fact that there were no ignition sources in the shed is not relevant. The standard is designed to warn people not to bring potential ignition sources into the area. A cigarette could ignite paper and rags in the shed, which could propagate a fire. I agree with Mr. Widows that the violation is not S&S or serious. I find that Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

8. Citation No. **4339857** alleges that the shop was not maintained in an orderly fashion in violation of section **56.20003(a)**. The safety standard provides that workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. The citation states that numerous items were a 1 over the floor creating a tripping hazard. It alleges that persons are required to be in the shop to turn on the lights and answer the phone. Mr. Widows testified that there was junk, material, and equipment all over the floor presenting a tripping hazard. (Tr. 72-73; Ex. P-9). Mr. Peterson testified that he goes in and out of the shop on a daily basis, often in the dark, and has never tripped or stumbled. (Tr. 329-31). He stated that he follows the trail shown on Exhibit P-9. He also stated that the shop is for storage of tools only and that there is a phone outside that most people use.

Based on the evidence, I find that the Secretary established a violation. The cited area was not clean and orderly, and a tripping hazard was created. I find that the violation was not S&S or serious. Tide Creek's negligence was low. A penalty of \$5.00 is appropriate.

9. Citation No. **4126436** alleges that berms along the roadway up to the pit were not maintained in violation of section **56.9300**. The safety standard provides, in part, that berms shall be provided and maintained on the banks of roadways where a drop-off of sufficient grade or depth exists that could cause a vehicle to overturn or endanger persons in equipment. The citation states that there was a 20-foot drop-off where a vehicle could overturn and roll down. It also stated that pick-ups and front-end loaders use the road. Mr. Widows testified that the cited roadway was 20 to 30 feet wide and did not have any berms. (Tr. 50-54, 168-71; Ex. P-5). He stated that he could see fresh rubber tire tracks on the roadway. Mr. Peterson testified that the road that was cited went from one level of the quarry to another. (Tr. 283-91, 361-63; Ex. R-11). He stated that this roadway is changed all the time because he uses the Cat to push overburden over the hill and dig a new road around to get the Cat back up. Id. He stated that on the day of the inspection he had just created that road and someone drove a loader down the road. There was no berm because he had been working on it with the Cat. He stated that he would not have put a berm on the roadway because the road was there only temporarily. He also testified that it was not reasonably likely that anyone would drive off the road. Id. He admitted, however, that if someone drove off, he could be injured.

Based on the evidence, I find that the Secretary established a violation. The cited area was a roadway with a drop-off of sufficient grade or depth to cause a vehicle to overturn. The roadway did not have a berm. Although a bench that is not a roadway would not need to be equipped with a berm, I find that

the cited area was a roadway because it was used by a front-end loader on at least one occasion. If only the Cat had been on the bench as part of the mining process, it would not appear that a berm would be required.

The Secretary contends that the violation was S&S. In this case, however, the roadway was infrequently used. The evidence shows that it was only used once by the front-end loader and that the operator did not plan on keeping the road for any period of time. Accordingly, I find that the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury. See, e.g. Skelton Inc., 13 FMSHRC 294, 302-04 (February 1991)(ALJ); Lakeview Rock Products, Inc., 17 FMSHRC 83, 90 (January 1995)(ALJ). I find that the violation was not S&S. Tide Creek's negligence was low. A penalty of \$20.00 is appropriate.

10. Citation No. **4126434** alleges that several large trees were observed along the perimeter of the pit in violation of section **56.3131**. The safety standard provides, in part, that loose or unconsolidated material shall be sloped back for at least ten feet from the top of a quarry wall in places where people work or travel. It also states that other conditions at or near the perimeter of a quarry wall which create a fall-of-material hazard shall be corrected. The citation states that the trees were 20 to 40 feet high and the quarry perimeter was not stripped back at least ten feet. In addition, the citation states that the trees created a falling hazard for persons working in the quarry. Mr. Widows testified that a couple of trees were leaning over near the edge of the quarry and the roots were exposed. (Tr. 46-50, 165-66, 186, 196-97; Ex. P-4). He believed that the trees could fall into the quarry and injure someone. He stated that the area had been recently worked and that the wet conditions could cause the trees to fall. He did not know how long the trees had been there or what kind they were.

Mr. Peterson testified that the cited trees were maple trees that were six to eight feet back from the edge of the bank. (Tr. 314-16, 369-70). He stated that the trees were not leaning towards a work area. He also stated that maple trees are tough to push down because of their extensive root system. He stated that there was no danger of the cited trees falling over into the quarry. Mr. Peterson is an experienced logger. (Tr. 231). Mr. Voris Probst, a former plant manager for Boise Cascade and experienced logger, testified that maple trees do not come down easily. (Tr. 393).

I find that the Secretary did not establish that the trees created a fall-of-material hazard to employees working in the quarry. I credit the testimony of Peterson and Probst in this regard. Exhibit P-4, upon which the Secretary puts significant weight, is not persuasive. There was simply no proof that there

was a risk that the cited trees would fall into the quarry. Accordingly, this citation is vacated.

11. Citation No. **4126431** alleges a violation of **30 C.F.R. § 41.20**, dealing with legal identity reports. At the hearing, the Secretary agreed to vacate this citation. (Tr. 75).

12. Citation No. **4126432** alleges a violation of **30 C.F.R. § 50.30**, dealing with quarterly employment reports. At the hearing, Tide Creek agreed to pay the penalty proposed by MSHA for this citation. (Tr. 6).

13. Citation No. **4340642** alleges a violation of section 103(a) of the Mine Act. At the hearing, the Secretary agreed to vacate this citation. (Tr. 6).

II. CIVIL PENALTY ASSESSMENTS

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties as discussed above:

| <u>Citation Nos.</u> | <u>30 C.F.R. §</u> | <u>Assessed Penalty</u> |
|----------------------|--------------------|-------------------------|
| <u>WEST 94-369-M</u> | | |
| 4126431 | 41.20 | vacated |
| 4126437 | 56.14132(b) (1) | \$100.00 |
| 4126439 | 56.14100(a) | vacated |
| 4339852 | 56.16005 | 20.00 |
| 4339821 | 56.14107(a) | 20.00 |
| 4339822 | 56.12021 | 20.00 |
| 4339826 | 56.18002(b) | 20.00 |
| 4339847 | 56.11002 | vacated |
| 4339853 | 56.12032 | 20.00 |
| 4339855 | 56.14107(a) | 20.00 |
| 4339856 | 56.14107(a) | 20.00 |
| 4339858 | 56.14107(a) | vacated |
| <u>WEST 94-379-M</u> | | |
| 4126433 | 56.1000 | vacated |
| 4339849 | 56.11002 | vacated |
| 4340482 | 56.16005 | 20.00 |
| <u>WEST 94-492-M</u> | | |
| 4339844 | 56.4104(a) | vacated |
| 4340483 | 56.12032 | 20.00 |
| 4340484 | 56.12018 | 20.00 |

WEST 94-493-M

| | | |
|---------|-------------|---------|
| 4126434 | 56.3131 | vacated |
| 4126436 | 56.9300(a) | 20.00 |
| 4126440 | 56.4101 | 20.00 |
| 4339823 | 56.12025 | vacated |
| 4339824 | 56.12028 | 50.00 |
| 4339846 | 56.11002 | vacated |
| 4339851 | 56.14107(a) | 20.00 |
| 4339854 | 56.12013 | vacated |
| 4339857 | 56.20003(a) | 5.00 |

WEST 94-638-M

| | | |
|---------|----------------|---------|
| 4339845 | 56.4201(a) (1) | \$ 5.00 |
| 4339859 | 56.14107(a) | 50.00 |
| 4339860 | 56.14107(a) | 50.00 |
| 4340481 | 56.14131(a) | 20.00 |

WEST 95-48-M

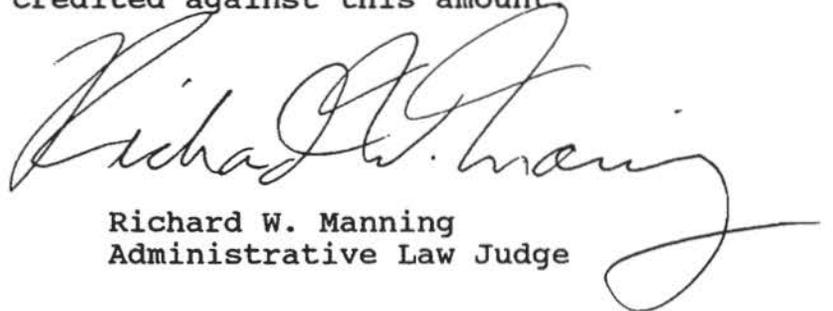
| | | |
|---------|-------|--------|
| 4126432 | 50.30 | 100.00 |
|---------|-------|--------|

WEST 95-275-M

| | | |
|---------|---------------|----------|
| 4340642 | \$103(a) | vacated |
| | Total Penalty | \$640.00 |

III. ORDER

Accordingly, the citations listed above are **VACATED** or **AFFIRMED** as indicated, and Tide Creek Rock, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$640.00 within 30 days of the date of this decision. Any amount previously paid for the settled citation should be credited against this amount.


Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 27 1996

| | | |
|-------------------------------|---|----------------------------|
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. WEST 94-407-M |
| Petitioner | : | A. C. No. 26-02184-05516 |
| v. | : | |
| | : | Bullfrog Mine Underground |
| LAC BULLFROG INCORPORATED, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. WEST 95-320-M |
| Petitioner | : | A. C. No. 26-02184-05524 A |
| v. | : | |
| | : | Bullfrog Mine Underground |
| LORENZO CEBALLOS, Employed by | : | |
| LAC BULLFROG INCORPORATED, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. WEST 95-321-M |
| Petitioner | : | A. C. No. 26-02184-05525 A |
| v. | : | |
| | : | Bullfrog Mine Underground |
| TIMOTHY HARTER, Employed by, | : | |
| LAC BULLFROG INCORPORATED, | : | |
| Respondent | : | |

DECISION

Appearances: Jeanne M. Colby, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California, for Petitioner;
Charles W. Newcom, Esq., and Andrew W. Volin,
Esq., Sherman & Howard L.L.C., Denver, Colorado,
for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against LAC Bullfrog, Inc., Lorenzo Ceballos and Timothy Harter pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated section 57.6375 of the Secretary's mandatory health and safety standards, 30 C.F.R. § 57.6375, and that Messrs. Ceballos and Harter, as agents of the company, knowingly authorized, ordered or carried out the violation. The Secretary seeks penalties of \$1,500.00 against the company and \$1,000.00 and \$1,200.00 against Ceballos and Harter, respectively. For the reasons set forth below, I find that the company violated the regulation, that Ceballos, but not Harter, knowingly carried out the violation and I assess penalties of \$1,500.00 and \$500.00, respectively.

A hearing was held on November 1 and 2, 1995, in Henderson, Nevada. In addition, the parties filed post-hearing briefs in these matters.

FACTUAL SETTING

The Bullfrog gold mine in Beatty, Nevada, has both an open pit and an underground section. The underground section consists of a series of horizontal passages, called "drifts," running off of a main decline, which follow the gold vein. The drifts are identified and distinguished by their elevation in meters and whether they go north or south.

On December 7, 1993, a ground fall of about 40 to 50 tons occurred in the 906 South Drift. It was preceded by a blast in

the 918 North Drift. The blast occurred in a portion of the 918 North Drift which is directly over the area in the 906 South Drift where the ground fall occurred.

Jack Bingham, the General Manager of the mine, Timothy Harter, the General Mine Foreman, and Lorenzo Ceballos, a Production Supervisor, were at the end of the 906 South Drift when the ground fell from the roof. They discovered the fallen ground when they were backing their vehicle along the drift and encountered dust and then the ground fall. The men had to leave their vehicle and climb over the fallen ground to get out of the drift.

MSHA Inspector Henry J. Mall was assigned to investigate the incident. As a result of his investigation, he issued Citation No. 4130929, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), on December 8. It alleged a violation of section 57.6375 of the Regulations because

at approximately 845 [sic] AM 12-7-93 a heading in 918 North was blasted without ample warning given to the (3) employees who had entered 906 South area which was directly under the 918 North heading where the blast was to occur. The distance between the areas is approximately 8 meters (25 ft). When the blast occur[r]ed approximately 40 to 50 tons of material above the anchorage zone supported with 6 ft roof bolts came down in the 906 South travel way. The (3) employees in 906 South were approximately 300 meters (984 ft) from where the fall of ground occur[r]ed. The company has a written policy dated 12-3-92 - 3-23-92 [sic] on clearing the areas effected [sic] from [sic] the blasting that is to take place. On this date 12-7-93 the company failed to follow a safe practice of warning their [sic] employees of the blast in 918 North and did not follow company written policy. This is an unwarrantable failure.

(Govt. Ex. H.)

Special Investigator Dennis J. Palmer conducted an investigation of the incident during April 1994 for the purpose of determining if the violation had been knowingly committed by any agents of the company. As a result of his investigation, the Secretary filed civil penalty petitions against Ceballos and Harter under section 110(c) of the Act, 30 U.S.C. § 820(c).¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 57.6375 is entitled *Loading and blast site restrictions* and requires that: "Ample warning shall be given before the blasts are fired. All persons shall be cleared and removed from areas endangered by the blast. Clear access to exits shall be provided for personnel firing the rounds."²

The issue in this case is whether the three men were in an area endangered by the blast from which they should have been cleared and removed. I conclude that the 906 South was an area endangered by the blast and that the men should have been cleared or removed from the drift prior to the blast.

Was the 906 South an area endangered by the blast?

The Commission has not had occasion to address the issue of what constitutes an area endangered by the blast with regard to this regulation. However, it has discussed section 77.1303(h), 30 C.F.R. § 77.1303(h), having to do with surface coal mining,

¹ Section 110(c) provides, in pertinent part, that:
"Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties"

² This regulation was effective until December 31, 1993. It has since been replaced by section 57.6306(f), 30 C.F.R. § 57.6306(f).

which has a similar requirement.³ With regard to that regulation, the Commission held that:

To establish a violation of the standard, based on a failure to clear and remove all persons from the blasting area, the Secretary must prove that an operator has failed to clear and remove all persons from the "blasting area," as that term is defined in section 77.2(f). This requires the Secretary to establish the factors that a reasonably prudent person familiar with mine blasting and the protective purposes of the standard would have considered in making a determination under all of the circumstances posed by the blasting issue.

Hobet Mining & Construction Co., 9 FMSHRC 200, 202 (February 1987). The Commission went on to say that "[a]n operator's pre-shot determination of what constitutes a blasting area is based not only upon the results of prior shots, but also depends upon a number of variables affecting the upcoming shot." *Id.*

Although section 77.1303(h) uses the term "blasting area" and section 57.6375 uses "area endangered by the blast," they mean essentially the same thing. Thus, it would follow that if the company had not included the 906 South in the area endangered by the blast in the 918 North, the "reasonably prudent person" test would be applied to determine whether it should have been included. However, it is not necessary to go through the requirements of the test in this case because it is undisputed that it was the mine's practice to clear the level above and the level below the level being blasted.

Since the 906 South is the level below the 918 North and since two miners were, in fact, cleared from that area before the blast, the company obviously had determined that it was an area endangered by the blast. Therefore, the Respondents' argument,

³ Section 77.1303(h) provides that: "Ample warning shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting."

in their brief, that the 906 South was not an area endangered by the blast under the "reasonably prudent person" test, is inapposite. The company is bound by its pre-shot determination.

Were the miners in the endangered area at the time of the blast?

Having determined that the 906 South was an area endangered by the blast, the next issue is whether Bingham, Harter and Ceballos were in the endangered area at the time of the blast. They argue that they did not enter the 906 South until sometime after the blast in the 918 North. On the other hand, the Secretary submits that the men were at the end of the 906 South when the blast occurred. Finding the Respondents' statements made at the time of the incident more credible than the testimony at the hearing, I determine that the men were at the end of the 906 South at the time of the blast.

Inspector Mall arrived at the mine on the afternoon of the incident and began his investigation. Nevada State Inspector Edward M. Tomany arrived to investigate the incident the next day. On December 8, they interviewed several of the witnesses together.

According to their notes taken at the time, Louis Schlichting, who did not testify at the hearing, told them that he was the assistant foreman in charge of the blasts in the 918 North and South. He further told them that he cleared two employees out of the 906 South when getting ready to blast the 918 North, but that he did not barricade the 906 South or do anything to prevent anyone from entering it during the blast. Finally, he told them that he assumed that the 906 South was clear when he blasted and that he would not have blasted the 918 North if he had known that anyone was in the 906 South.

According to their notes and testimony at the hearing, Lorenzo Ceballos told them that he knew that both the 918 North and South were going to be blasted and that while on the decline between the 918 and the 906 he heard a blast which he assumed was the 918 North. Additionally, he told them that the three supervisors were at the end of the 906 when the 918 North was blasted. Inspector Mall testified at the hearing that Ceballos later told him that the blast he heard was the first blast

(apparently the 918 South) and that the second blast occurred while he was in the 906.

Tim Harter told the inspectors that he was not aware that the 918 North was going to be shot. There is no indication that either inspector asked him where he was when the blast and the ground fall occurred. However, other employees of the mine gave the inspectors the impression that the blast and the ground fall had happened while the supervisors were in the 906 South.

Inspector Mall concluded that the blast heard on the decline must have been the 918 South and that the 918 North blast occurred while the supervisors were at the end of the 906 South. Consequently he wrote the citation in question. On receiving the citation and at the close-out conference, no one from the company suggested to the inspector that he had his facts wrong.

Inspector Tomany apparently came to the same conclusion as Inspector Mall. His notes state that he notified his boss that "3 employees, J. Bingham, T. Harter, L. Ceballos were at the face of the 906 s when the 918 north blast dropped ground to obstruct exit of the 906 south." (Govt. Ex. V at 5.)

It appears that no one talked with Bingham during the investigation and he evidently was not present at the close-out conference. However, Special Investigator Palmer interviewed him in April 1994. Palmer testified, and his notes indicate, that Bingham, who was no longer working for the company, told him that he felt the second blast while backing out of the drift and that they later came across dust and the ground fall.

Palmer also interviewed Ceballos and Harter. By this time, Ceballos' story had changed somewhat. He said that the blast in the 918 South had to have gone off first; that the blast the supervisors heard while on the decline was in the 918 North. He stated that the 918 South is a long drift and the 918 North a shorter drift and that Schlichting told him in a discussion after Mall's investigation that he had set off the 918 South first because it would be dangerous to light the fuses in any other order.

Harter told Palmer that he assumed that the blast he heard on the decline was the 918 South because that was the only blast that he expected. He claimed that he did not find out that there was a second blast until after he got out of the mine. He further averred that he would not have gone into the 906, or allowed anyone else to go into the 906, if he had known a blast was going to be directly above it.

In December 1994, Ceballos and Harter were informed that MSHA intended to seek civil penalties against them under section 110(c) of the Act. On December 21, they sent a letter to MSHA requesting a conference on the matter and setting out their position. In the letter, they summed up their position as follows:

[W]e believe that MSHA may have the mistaken impressions that three employees entered the 906 south prior to the 918 north blast (the final blast), that the blast caused the ground fall, and that the three employees were non-supervisory. None of these impressions are [sic] accurate. Instead, as the facts recited above show, Ceballos knew there would be blasting in the 918 north, the three of them did not enter the 906 south until after the 918 blast took place, the ground fall did not occur as part of the blast, but took place approximately 15 to 20 minutes later

(Govt. Ex. G at 2.)

By the time of the hearing, the Respondents had added more details to their version of the incident. For the first time, they claimed that the blast in the 918 South was a "slab" round while the blast in the 918 North was a "face" round. The significance of this is that a slab round uses less explosive than does a face round and is, therefore, not as loud. Thus, at the hearing, Ceballos testified, "I knew there was two blasts that were going to go off, but I only expected to hear one." (Tr. 335.)

With regard to what he initially told the inspectors, Ceballos testified as follows:

Q. Did you tell Inspector Mall or Inspector Tomany that you heard a blast while you were on the decline on December 7?

A. Yes.

Q. Did you tell them whether or not you thought that blast was from the 918 North or the 918 South?

A. I don't recall exactly if I told them it was.

Q. Did you tell Inspectors Mall or Tomany that you heard the blast of the 918 North while you were in the 906 South?

A. No, I didn't.

Q. Do you recall whether or not Inspector Mall accused you of mistaking the blast that you heard on the decline for the 918 South blast as opposed to the 918 North blast?

A. I know there was a lot of confusion in there when they were asking a lot of questions. I was really confused in that open discussion.

(Tr. 342.)

Obviously, when an inspector arrives to investigate an accident after it has happened he must rely on what the witnesses tell him and what physical evidence is available. In this case, Inspector Mall did just that and concluded that a violation of section 57.6375 had occurred. While the company argued with him about the citation after he gave it to them, and during the close-out conference, no one asserted that he had the facts wrong.

Now the company alleges that is exactly what happened. However, I do not credit the revised version for the following reasons. The statements given by witnesses at the time closest to the incident, when the details are freshest in their minds, and before they have had the opportunity to formulate statements favorable to their own, or the company's, cause, are more

reliable than the witnesses' later statements.⁴ Further, the Respondents did not raise this new scenario when given the citation or at the close-out conference. Nor did they question the inspectors facts. Finally, Jack Bingham, General Manager of the mine, unequivocally stated that he felt the second blast while at the end of the 906 South.

Respondents have attacked Bingham's credibility on the grounds that his statement is hearsay, that his ability to distinguish sensations is questionable, apparently because he was not wearing his hearing aid underground, and that the slab round in the 918 South was too small to be heard. While it is true that Bingham's statement is hearsay, I credit it because at the time that it was made, it was an admission, or, at a minimum, a declaration against interest, and because Respondents had *subpoenaed* Bingham to testify at the hearing, but announced at the beginning of the second day that they did not intend to call him. Since they had the opportunity to rebut or explain the hearsay statement by the author of the statement, but chose not to, they cannot now argue that the statement is unreliable.

With regard to Bingham's ability to distinguish sensations, I note that he stated that he *felt* the blast, not that he *heard* it. Furthermore, while there is no evidence concerning the extent of his ability to hear, other than that he wore a hearing aid, there is evidence that he, Ceballos and Harter held a discussion in the 906 so that he must not have been totally deaf.

Finally, there is nothing in the record to indicate that the slab round in question could not be heard. In fact, Harter stated that he was expecting a slab round to be used in the 918 South and when he heard the blast on the decline, assumed that was what he had heard.

I find that Bingham, Harter and Ceballos were in the 906 South at the time of the blast in the 918 North and the resulting ground fall. Since the company had determined that this was an

⁴ At the hearing, Ceballos only specifically denied telling the inspector that he heard the 918 North blast while in the 906 South. He either could not "recall" making other statements or was "confused."

endangered area for such a blast, I conclude that the company violated section 57.6375 by not clearing them from the area before blasting.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Applying the *Mathies* criteria, I have already found (1), that the company violated a mandatory safety standard. I further find: (2) That this violation contributed to a measure of danger to safety, *i.e.* blasting is inherently dangerous, those within an area endangered by a blast could be blown up, hit by flyrock, or, as occurred in this case, caught by a ground fall; (3) That there is a reasonable likelihood that a ground fall would result in an injury; and (4) That there is a reasonable likelihood that the injury would be reasonably serious in nature, involving significant cuts and bruises, broken bones or death.

Unwarrantable Failure

The inspector found this violation to be the result of an "unwarrantable failure" on the company's part. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

Ceballos and Harter both stated that they would not have gone into the 906 South if they had known that there was going to be a blast in the 918 North. Thus, they were clearly aware of the danger involved. Ceballos thought that it was safe to go into the 906 because he assumed that the blast he heard on the decline was the 918 North blast.

There is no evidence of intentional misconduct in this case. I believe the Respondents when they state that they would not have gone into the 906 if they had known the 918 was going to be blasted. However, that does not remove this case from the unwarrantable failure category.

Ceballos, a miner with at least 18 years experience, the person normally in charge of blasting operations, knew that plans had changed from blasting the 918 South to blasting the 918 North and South. He knew this because Schlichting told him so just prior to the men going down the decline past the 918s to the 906. He heard one blast and concluded that the 906 was safe. I find that this conclusion was not a reasonable one. Cf. *Wyoming Fuel Co.* at 1628-29.

A supervisor in his position and with his experience should have done more. Knowing that there were going to be two blasts, and hearing only one, made it incumbent on him to verify that both blasts had been performed before entering the 906. While failure to do that does not rise to "intentional misconduct" or even "reckless disregard," it is more than ordinary negligence.

I conclude that the failure to confirm that the 918 North had been blasted before entering the 906 constitutes "indifference" or a "serious lack of reasonable care" and that, therefore, the violation resulted from the company's unwarrantable failure.

Section 110(c) violations

The Secretary has alleged that Ceballos and Harter "knowingly" violated section 57.6375 and are personally liable under section 110(c) of the Act.⁵ Based on the evidence, I find that Ceballos "knowingly" carried out the violation, but Harter did not.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, *supra* at 1630; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, *supra* at 2003-04.

In *Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984), the Commission expanded the test to cover a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure, when it said:

Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted 'knowingly', in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps.

That describes the situation in this case.

⁵ See n.1, *supra*, for the provisions of this section.

As a supervisor, Ceballos was in a position to protect employee safety by not taking the tour into the 906 South until after the blast in the 918 North. He knew, based on what Schlichting told him, that both sections of the 918 were going to be blasted. He knew that if they went in the 906 before the 918 North blast that he would be in an area endangered by the blast. Finally, he failed to take appropriate preventative steps, that is to insure that the 918 North blast had occurred before entering the 906 South.

As set out above, this was aggravated conduct involving more than ordinary negligence. Accordingly, I conclude that Lorenzo Ceballos knowingly carried out the violation of section 57.6375 and is, therefore, personally liable under section 110(c).

The same, however, cannot be said about Harter. He knew only that the 918 South was to be blasted. No one knew that both the North and South were going to be blasted until Schlichting informed Ceballos of that during the tour. While Harter was present when Schlichting told Ceballos of the change, neither Schlichting nor Ceballos could say whether Harter heard the conversation. Both doubted it. Ceballos said that Schlichting spoke directly into his ear because there was a fan in the area.

Ceballos testified that when they passed the 918 on the decline he informed Harter that they could not go into that area because they were blasting. Harter maintained that he did not hear Schlichting tell Ceballos that the 918 North was also going to be blasted and that he did not know that the 918 North was blasted until after he got out of the mine.

Since there is no evidence to contradict it, I credit Harter's claim that he thought only the 918 South was to be blasted and that when he heard the blast he thought it was safe to enter the 906 South. Ceballos' statement about not being able to go into "that area" because they were blasting was not specific enough to put Harter on notice that the situation, as he understood it, had changed. Consequently, I conclude that Timothy Harter did not knowingly carry out the violation of section 57.6375 and is not personally liable under section 110(c).

CIVIL PENALTY ASSESSMENT

The Secretary has proposed civil penalties of \$1,500.00 for the company and \$1,000.00 for Ceballos for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, I note from the pleadings that the Bullfrog mine is a medium size gold mine and that LAC Bullfrog, Inc., is a medium size company. The violation history does not indicate an excessive number of violations. There is no evidence that payment of a civil penalty will adversely affect the company's ability to remain in business. On the other hand, the gravity of the violation is serious and involved a high degree of negligence. Taking all of this into consideration, I conclude that the penalty proposed by the Secretary is appropriate.

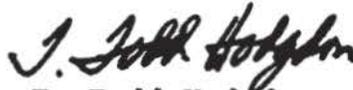
Obviously, except for the gravity of the violation, none of the penalty criteria apply to an individual. However, taking into consideration the gravity of the violation and Mr. Ceballos' position with the company, I find that the penalty proposed by the Secretary is somewhat high. I conclude that a penalty of \$500.00 is appropriate in this case.

ORDER

The civil penalty petition against Timothy Harter is **DISMISSED**. Citation No. 4130929 issued to LAC Bullfrog, Inc. and the civil penalty petition alleging that Lorenzo Ceballos knowingly carried out the violation in the citation are **AFFIRMED**. Accordingly, LAC Bullfrog, Inc., or its successor,⁶ and Lorenzo Ceballos are **ORDERED TO PAY** civil penalties of \$1,500.00 and

⁶ In a subsequent hearing involving this company, counsel for the Respondent advised that the mine was now owned by Barrick Bullfrog, Incorporated.

\$500.00, respectively, within 30 days of this decision. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 29 1996

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|------------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-3 |
| Petitioner | : | A.C. No. 11-00599-03883 |
| v. | : | |
| | : | Mine: Orient No. 6 |
| FREEMAN UNITED COAL MINING, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-262 |
| Petitioner | : | A.C. No. 11-00599-03925-A |
| v. | : | |
| | : | Mine: Orient No. 6 |
| JAMES YANCIK, Employed by | : | |
| FREEMAN UNITED COAL MINING, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-269 |
| Petitioner | : | A.C. No. 11-00599-03926-A |
| v. | : | |
| | : | Mine: Orient No. 6 |
| NEAL MERRIFIELD, Employed by | : | |
| FREEMAN UNITED COAL MINING, | : | |
| Respondent | : | |

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Richard R. Elledge, Esq., Gould & Ratner, Chicago, Illinois, for Respondent;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Fauver

These civil penalty cases were brought under §§ 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The corporation and two of its supervisors, who are qualified engineers, are charged with failure to maintain an elevated walkway in good repair to prevent accidents and injuries to employees. The walkway collapsed and four men were severely injured.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Freeman owns and operates Orient No. 6 Mine in Waltonville, Illinois, where it produces bituminous coal for sales in or substantially affecting interstate commerce.

2. Freeman is a large coal mine operator, producing over 4 million tons a year. Orient No. 6 is a large mine, producing over a million tons a year.

3. In 1968 Freeman engaged Roberts and Schaefer Company, Engineers and Contractors, Chicago, Illinois, to design and build a preparation plant at Orient No. 6 Mine.

4. The plant is 105 feet high, 100 feet long and 100 feet wide. It is a frame structure with steel columns and beams that provide a basis for installing and removing floors as needed for conveyor belts and other equipment used in the plant.

5. Because of the unique properties of the coal at Orient No. 6 Mine, the atmosphere in the preparation plant is very corrosive to metal. This condition hastens the deterioration of steel columns, beams and other metal supports.

6. Because of widespread corrosion and deterioration of steel members in the preparation plant, in 1984 Freeman built a new preparation plant adjacent to the old one. The old plant was abandoned as a preparation plant but kept as a building for certain functions. Walkways and conveyor belts run through the old plant to the new plant, and the plants are connected by pumps and motor controls. In addition, there is a large electric power station in the old plant. The areas of the old plant that are most frequently used are elevated walkways, conveyor belts, the electrical power station, and a drainage system.

7. Once metal deterioration begins, it continues to worsen until rust disintegrates the metal. Steel beams, columns, and metal supports in the old plant continued to deteriorate after the new plant was built. In 1987 a conveyor belt collapsed in the old plant because of deterioration of steel members.

8. The collapse of the conveyor belt in 1987 shut down production and caused Freeman to recognize that it needed to rehabilitate or replace weakened and deteriorated steel members in the old plant. Rehabilitation work moved slowly. In 1989 Freeman engaged Roberts and Schaefer to evaluate the structural condition of the old preparation plant and to make recommendations for its rehabilitation. R & S was chosen because it had designed the old preparation plant, built it, and knew the loads the members could carry and had expertise in diagnosing defective steel members and how to repair them. It also had built the new preparation plant.

9. After inspecting the old preparation plant, R & S submitted a report to Freeman on November 30, 1989, prepared by Engineer Paul G. Meifert. The report is entitled "Report to Determine Structural Integrity of Existing Coal Preparation Plant for Freeman United Coal Company Orient No. 6 Mine." Govt. Exh. 3.

10. The R & S report found many structural hazards. It stated that part of the floor at elevation 454 "is beginning to

collapse and has been roped off above and below per [the R & S engineer's] request. Obviously this area needs attention." An abandoned coal conveyor above elevation 468 was "on the verge of collapse . . . [which would be] life threatening" (p.4). Vertical bracing was "virtually nonexistent due to deterioration and to field removal for access. Bracing should be brought back to original as much as possible" p.4. The report called for "immediate attention" to "beams and columns where holes exist or can be punched out with a hammer." p.3. It also stated that "many beams and columns were tested by hammer blows to determine the extent of rust and deterioration" and that, "although many sections were reduced due to rust scale. . . , in the majority of cases, enough material remains to carry reduced loads." Emphasis added; p.2. To reduce the loads, heavy equipment and other materials were to be removed from a number of floors.

11. The R & S report included the following cautionary notice: "Although the structure appears to be sound in general these findings are based only upon a visual inspection. No load tests or calculations were performed to determine actual stresses. Extent of deterioration and actual safety of structure cannot be determined without extensive measuring, testing, and calculation" (p.5).

June 1993 Collapse of Elevated Walkway

12. On June 8, 1993, Mr. Steve Stanley, the surface manager of the mine, led a crew of two supervisors and two miners to work on a coal belt on the first floor (elevation 454 on the R & S drawing). To gain access to the belt, the men were standing on an elevated walkway parallel to the belt, 17 feet above a concrete floor. Mr. Stanley left to get a bolt. Shortly after he left, the walkway suddenly collapsed and the four men fell to the concrete floor amidst jagged and broken steel and concrete debris. They were severely injured.

13. MSHA began an investigation on June 9. On June 10, Engineers Terence Taylor and Dan Mazzei, from MSHA's Safety and Health Technology Center, inspected the fallen walkway as well as the general plant.

14. Mr. Taylor is a professional engineer and has both a bachelor's and a master's degree in civil engineering with

specialization in structural engineering. He is a member of the American Society of Civil Engineers. Mr. Taylor's supervisor is Dan Mazzei, who has a bachelor's degree in civil engineering and a master's degree with an emphasis on water resources.

15. The Tech Support team observed widespread deterioration of steel members with some remedial work done to some of the columns in the basement. They did not inspect every steel member, but they looked at the supports for the walkway and found widespread corrosion and deterioration of structural members. At the accident site they observed that members that were still dangling or touching the ground were severely corroded. Much of the cross section was missing on some of the dangling members. The failed members were badly deteriorated and one failed beam was almost totally deteriorated.

16. The area where the collapse occurred is delineated by column lines E and F in the north-south direction and 4 and 5 in the east-west direction of the original plant drawings. These four columns are the corners of a 5 by 20 foot bay. The slab that collapsed was supported at its north and south ends by two wide flange beams, along its east edge by a wide flange beam, and its west edge by six-inch wide channel sections. The center of the slab was supported by a wide flange beam and the quarter points by light beams. The three intermittent support beams had fallen along with the west and east edge supports. The north and south beams were still in place. The west or east edge support was the first support to fail. Most likely the beam on the east edge collapsed first, transferring the load to the west edge, shearing the channel sections and bending down the three intermittent beams. The east edge beam was almost completely deteriorated with many holes and extensive corrosion. There was extensive rust on the 20 foot long wide flange beam supporting the edge of the slab. The bottom flange and parts of the web were deteriorated, reducing the load-carrying capabilities of the section. In the collapsed bay, the connection between the east edge beam and the column was still intact on the column, indicating that the beam sheared right through its cross section.

17. Along the same column line that failed, in the bay to the south of the area of collapse, Mr. Taylor and Mr. Mazzei saw a steel member that was identical in section and dimensions to the beam that failed on June 8, 1993. This member was still in

place, but deterioration holes could be seen plainly. This member is the subject of Govt. Exh. No. 6 and was the support for the walkway farther south of the point of collapse. The unsafe condition of this beam was similar to that of the beam that failed on June 8.

18. The failure on June 8 was caused by excessive corrosion reducing the section-carrying capacity at the edge supports where the shear load was the highest and where it ultimately failed.

19. Before the accident on June 8, the deteriorated steel members supporting the walkway section that collapsed were observable from the floor below, and were visibly in bad repair.

20. Some beams under the walkway in other bays were also visibly in bad repair. The walkway presented numerous hazards of steel corrosion and deterioration.

21. A number of beams had holes in them and were rusted and twisted and deteriorated. MSHA inspector Charles Conaughty observed instances where a hammer struck against a structural member traveled through the member.

22. Government Exhibits 4, 5, and 11 show the area where the June 8 accident occurred. Exhibit 4 shows the beam that failed under the east side of the walkway. Exhibit 5 shows part of the material that was still hanging from the collapsed walkway. Exhibit 11 shows deteriorated vertical bracing that was at the end of the row of columns in the same row in which the collapse occurred.

23. Government Exhibits 6, 7, 8, 9 and 10 show other areas of deterioration adjacent to or near the accident site. The beam shown in Exhibit 6 was in the adjacent or a nearby bay just south of the area that fell, and was in the same column line (column line 4) in which the accident occurred. The steel members that failed would have been exposed to the same corrosive elements as the beam depicted in Exhibit 6.

24. In 1989, when Freeman was removing the floor area described in the R & S report (defined by column lines A to F and 4 and 5), Freeman personnel were within close visual range of the steel members of the walkway section that failed on June 8, 1993.

25. As of the date of the collapse, a number of areas in the old plant still needed rehabilitation and repair work, including the section that collapsed.

26. At the time of the collapse, Mr. Thomas J. Austin had been the safety director of the mine since 1987. There were three employees in the safety department. Mr. Austin's immediate supervisor was Respondent Neal Merrifield. Mr. Austin is not an engineer and has never taken any engineering courses.

27. Prior to the accident, Mr. Austin never received any instructions to have his safety employees look for holes in beams and columns or perform tests with a hammer on any of the beams or columns that supported walkways. Nor did he see or discuss the R & S report before the accident. He first learned about the R & S report during the investigation following the walkway collapse.

28. In 1989, Mr. Steve Stanley was the assistant mine manager of the Orient No. 6 mine. Mr. Stanley became surface manager of the mine in 1991. He is not an engineer, but he was called upon to direct rehabilitation work and repairs in the old plant. He made decisions on a day to day basis as to where to assign employees. Prior to the accident, no one directed Mr. Stanley to put more people to work in the old plant or to give any priority to checking beams and other metal supports that held up the walkways. Nor did anyone instruct Mr. Stanley to have employees look for holes in beams and columns or perform tests with a hammer on any beams or columns that supported walkways.

29. Mr. Stanley had never seen and was not given a copy of the R & S report until after the accident. No one discussed the R & S report with Mr. Stanley until after the accident.

30. On June 8, 1993, when Mr. Stanley directed four employees to work on the conveyor belt by standing on the walkway, he had no knowledge of the R & S report or the dangers observed in the report.

Respondent James Yancik

31. At all relevant times, Respondent James Yancik was manager of quality control and plant maintenance and the

preparation engineer. Mr. Yancik has a B.S. degree in mining engineering and is a member of the Society of Mining Engineering. One of his specialties is structural analysis.

32. Mr. Yancik accompanied Engineer Paul Meifert of the R & S Company during Mr. Meifert's inspection of the old preparation plant in 1989. During their inspection they used three tools: a chipping hammer, a wire brush, and a hammer. They did not take core samples. They were visually looking at steel members and in some cases they would scale and test steel members.

33. Mr. Meifert and Mr. Yancik observed a crack in a floor that was beginning to sag. Mr. Meifert identified the floor as dangerous and had it roped off.

34. When part of the floor at elevation 454 was removed, Mr. Yancik reviewed the work. During the time he was conducting inspections for Mr. Mullins, he remembered seeing several beams in a condition like that of the beam in Govt. Exh. No. 6. At the hearing he stated that some of these were possibly not repaired.

35. Before accompanying Mr. Meifert, Mr. Yancik had personally inspected the old preparation plant. In 1987, when starting the initial rehabilitation program, Mr. Yancik spent eight hours a day there, five days a week, for several weeks. Mr. Yancik did not continue that frequency of inspections after the R & S report. During the period from the issuance of the R & S report (November 30, 1989) until the walkway collapse on June 8, 1993, Mr. Yancik conducted inspections of the old plant "on a periodic basis" depending upon his "available time." His inspections were not frequent.

36. Mr. Yancik read the R & S report several times and was very familiar with its contents. He received his copy of the R & S report from Mr. Mullins, vice president of operations.

37. Before the accident, Mr. Yancik had seen holes in some beams like those that were shown on figures 7 and 9 in the R & S report but never directed anyone to repair or rehabilitate those beams. Mr. Yancik did not personally set priorities for the rehabilitation or repair of the old plant.

38. Mr. Yancik had "expertise in structural analysis." He agreed that when an engineer sees a corroded hole in a steel beam he views it as a potential hazard.

Respondent Neal Merrifield

39. At the time of the collapse in June 1993, Mr. Merrifield was vice president of operations. He is a mining engineer. Prior to becoming vice president of operations, he had been the mine superintendent. As vice president of operations, his responsibilities included safety of the operations of the mine facilities. Mr. Yancik reported to Mr. Merrifield.

40. Mr. Merrifield read the R & S report and, as an engineer, he understood it. After 1991, when he became vice president of operations, Mr. Merrifield set priorities for the rehabilitation work in the old plant. Mr. Merrifield approved the mine's budget and had responsibility for the budget for the old plant. Although he did not have final authority on the budget, Mr. Merrifield's budget recommendations were not normally overruled by his supervisor.

41. The chief engineer of the mine reported to Mr. Merrifield. As supervisor of the engineering department, Mr. Merrifield approved the time spent on rehabilitation efforts. Along with other mine management and the corporate officers, Mr. Merrifield approved the allocation of dollars for those rehabilitation efforts.

42. Mr. Merrifield approved the engineering department's decisions regarding priorities for the rehabilitation of the old plant. The engineering department reported to him regarding its recommendations for sequencing repair work and to get authorization to contract out rehabilitation work. When the engineering department wanted items beyond the budget, it would present its request to Mr. Merrifield and he would approve or disapprove it.

43. Mr. Merrifield had input into the final report in response to Mr. Mullin's memorandum of January 1, 1990 (Govt. Exh. 26) including recommendations regarding replacement of bracing as recommended by the R & S report. Mr. Merrifield

attended a February 1, 1990, meeting with Mr. Mullins regarding corrective actions to be taken.

44. Mr. Merrifield did not give Mr. Jim Hess, his successor as mine superintendent, a copy of the R & S report. Mr. Merrifield also did not give Mr. Steve Stanley, surface manager, a copy of the R & S report. Nor did he give a copy of the report to the mine safety director.

45. Mr. Mullins sent a copy of his letter regarding Mr. Yancik's job responsibilities (Govt. Exh. 18) to Mr. Merrifield. A copy of an October 26, 1988, document regarding inspection of all belt supporting structures on an annual basis, to visually assess the competency of the structural members, went to Mr. Merrifield. Mr. Yancik sent a copy of a memorandum of May 4, 1988 (Govt. Exh. 20), to Mr. Merrifield. A copy of a memorandum of December 17, 1988 (Govt. Exh. 21), regarding areas that required immediate attention and reporting that the second floor was badly deteriorated, went to Merrifield.

46. Mr. Yancik sent copies of a memorandum of January 29, 1990 (Govt. Exh. 22), regarding the R & S report, and a memorandum of August 13, 1990 (Govt. Exh. 23), regarding his inspection of the old plant, to Mr. Merrifield. Mr. Yancik also sent a memorandum of October 2, 1990 (Govt. Exh. 24), in which he informed Mr. Merrifield that "no definitive plan has been formulated to correct the deficiencies" in the old plant.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

I

RESPONDENTS' CHALLENGE OF THE REGULATION

On June 8, 1993, a large section of an elevated walkway -- about 5 by 20 feet -- suddenly collapsed. The four miners standing on it fell 17 feet to a concrete floor amidst jagged and broken steel and concrete debris. They were severely injured.

The Secretary alleges that Respondents violated 30 C.F.R. § 77.200, which provides:

Surface installations: general

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

Respondents challenge the regulation as being vague and ambiguous.

A safety standard must provide adequate notice of the conduct it prohibits or requires, so that the mine operator or other affected persons may act accordingly. Southern Ohio Coal Company, 14 FMSHRC 978,983 (1992). The "appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Ideal Cement Co., 12 FMSHRC 2409, 2416 (1990).

In U.S. Steel Mining Co., 14 FMSHRC 973, 974 (1992), the Commission affirmed a decision in a § 77.200 case, noting the judge's holding that "the primary purpose of § 77.200 was to assure the physical and structural integrity of surface coal preparation facilities . . ." I find that the regulation gives sufficient notice of the safety conduct required. The plain language of the regulation means that surface structures and facilities must be maintained in good repair relative to safety. In dictionary terms, "maintenance" means "The labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . [p]roper care, repair, and keeping in good order . . . [t]he upkeep, or preserving the condition of property to be operated." See Webster's Third New International Dictionary, Unabridged 1362 (1971); A Dictionary of Mining, Mineral, and Related Terms 675 (1968); and Black's Law Dictionary 859 (5th ed. 1979).

II

RULING ON RESPONDENTS' MOTION TO DISMISS

At the end of the Secretary's case, the individual Respondents moved to dismiss the § 110(c) charges. The judge

took the motion under advisement to be ruled upon in the final decision. Respondents then presented evidence on all matters.

The Commission's Rules of Procedure, the Administrative Procedure Act and the Mine Act are silent as to the standards that apply to motions to dismiss at the close of an opposing party's case-in-chief. Accordingly, it is appropriate to consult the Federal Rules of Civil Procedure for guidance. Basic Refractories, 13 FMSHRC 2554, 2558 (1981).

When a party moves for dismissal at the close of the opponent's case, the judge has discretion to take the motion under advisement. Fed. R. Civ. P. 52(c), "Judgment on Partial Findings," provides, in pertinent part:

If during a trial without a jury a party has been fully heard with respect to an issue . . . , the court may enter judgment as a matter of law against that party on any claim . . . or the court may decline to render any judgment until the close of all the evidence.

The notes of the Advisory Committee on Rules to Fed. R. Civ. P. 52(c) specify that a court has discretion to enter no judgment prior to the close of all the evidence. Clifford Meek v. ESSROC Corporation, 15 FMSHRC 606, 615 (1993). Here, as there, the judge exercised that discretion. In making that determination, a court is within its prerogative to weigh all the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies. Local Union 103 v. Indiana Construction Corp., 13 F.2d 253, 257 (7th Cir. 1994).

In his dissent on other grounds in Mathies Coal Company, 5 FMSHRC 300, 307 (1983), Commissioner Lawson stated that "a trial court's reservation of ruling on a motion for involuntary dismissal [under 41(b) Fed. R. Civ. P., the predecessor to 52(c)] is, in effect, a denial of the motion." The Commissioner concluded that: "Respondent had the choice of proceeding or standing on its motion. By presenting evidence, Respondent waived its right to appeal from the judge's 'denial' of its motion."

Here, Respondents presented evidence following the judge's reservation of a ruling. The motion is denied and the case will be decided upon all the evidence.

III

DECISION ON THE MERITS

The first question is whether the walkway was "maintained in good repair to prevent accidents and injuries" as required by 30 C.F.R. § 77.200.

Freeman contends that the old preparation plant had undergone an extensive rehabilitation program to repair or replace deteriorating steel columns and beams and that the particular walkway section had not been observed as requiring repairs.

This argument fails because the steel supports that collapsed were visibly badly deteriorated due to corrosion. Also, a number of other steel members supporting the walkway were visibly deteriorated due to corrosion. Under the R & S report, "immediate attention" was required for "beams and columns where holes exist or can be punched out with a hammer." Without rehabilitation or replacement of the deteriorated members, the walkway clearly was not being "maintained in good repair to prevent accidents and injuries to employees." Freeman was therefore in violation of 30 C.F.R. § 77.200.

The next question is whether Freeman was negligent in failing to maintain the walkway in good repair. I find that it was.

Freeman contends that it had started the rehabilitation program in 1987 and in 1989 engaged the engineering firm (R & S) that built the plant to return to inspect the structural condition of the plant and make recommendations. It states that before the walkway collapsed it had taken corrective action on the specific recommendations in the engineering firm's report and was carrying out an ongoing inspection and repair program on columns and beams in accordance with the engineering report.

However, the walkway collapse occurred more than three and a half years after the R & S report, which had warned Freeman that "immediate attention" must be given to "beams and columns where holes exist or can be punched out with a hammer" and that "for beams, holes near connecting and concentrated loads are critical." Exh. G-3, p.3. The steel supports that collapsed under the walkway were badly deteriorated and were plainly visible before the accident.

In Alabama By-Products, 4 FMSHRC 2128, 2129 (1982), the Commission held:

[I]n deciding whether equipment or machinery is in safe or unsafe operating condition, . . . the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action.

The "reasonably prudent person" test applies to engineers as well as to laymen. This case focuses upon the responsibility of engineer-supervisors to protect the safety of miners using an elevated walkway. Miners and supervisors who are not engineers are not expected to know the structural integrity of steel beams and columns. To a layman, including a supervisor who is not an engineer, deteriorated or corroded steel beams 14 feet above the floor may not seem dangerous if the company engineers indicate that they have carefully checked the structural condition and that the beams are safe. However, the walkway suddenly collapsed because of deteriorated steel beams. The question raised is whether a reasonably prudent engineer would have inspected and repaired or replaced the beams before they collapsed.

The Respondent engineer-supervisors were fully aware of the history of deterioration of steel members in the old plant, including a major collapse of a conveyor belt in 1987 because of deteriorated steel members, and the 1989 R & S report that warned of the need to give "immediate attention" to "beams and columns where holes exists or can be punched out with a hammer." I find that a reasonably prudent engineer having such knowledge and being familiar with the mining industry would have performed or

required careful and frequent inspections of the steel beams of the elevated walkways including hammer tests of suspicious looking beams. By the exercise of reasonable care, the failed beams and steel supports could have been detected and corrected to prevent the collapse that occurred on June 8, 1993. I also find that, before the walkway collapse, a reasonably prudent engineer who observed the other deteriorated steel members later found by the MSHA engineers would have repaired or replaced them.

I now turn to the issue of whether the individual Respondents are liable as corporate agents under § 110(c) of the Act. This section provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection 105(c), any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The individual Respondents were agents of the corporate Respondent within the meaning of § 110(c). Respondent Neal Merrifield was vice president of operations at the time of the collapse of the walkway. He is a mining engineer. Before becoming vice president of operations he had been mine superintendent. As vice president of operations, his responsibilities included safety of the operations of the mine facilities. The safety and engineering departments reported to him. Respondent James Yancik reported to Mr. Merrifield. Mr. Yancik was manager of quality control and plant maintenance and the preparation engineer at the subject mine. He is a mining engineer with a specialty in structural analysis.

In Warren Steen Construction, Inc. and Warren Steen, 14 FMSHRC 1125, 1131 (1992), the Commission held that, "In order to establish § 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law." In Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), aff'd, 689 F.2d 632 (6th Cir 1982),

cert. denied, 461 U.S. 928 (1983), the Commission defined the term "knowingly" as follows:

"Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

A "knowing" violation does not require a showing that the corporate agent "willfully" violated the Mine Act or safety regulations. Rather, the Commission held that:

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

The individual Respondents knew as early as 1984 that the steel members in the old preparation plant were deteriorating. After the new plant was built in 1984, the steel members in the old plant continued to deteriorate. In 1987, a conveyor belt collapsed because of deteriorated steel members. The collapse shut down production and caused Freeman to recognize that the old plant must be rehabilitated. However, progress toward rehabilitation was slow. In 1989, Freeman engaged the engineering firm (R & S) that built both plants to return to evaluate the structural condition of the old plant and make recommendations. After Freeman received the R & S report (November 30, 1989), rehabilitation efforts still moved slowly. More than three and a half years after the report, the cited walkway was still in bad repair, as evidenced by the collapse of the walkway on June 8, 1993, and the deterioration of other steel members disclosed by the MSHA investigation after the walkway collapsed. The three and a half years from the R & S report to the walkway collapse represents about 1,600 workshifts during which miners were exposed to the hazards of the elevated walkway.

Respondents had a legal duty to ensure that the elevated walkway was "maintained in good repair to prevent accidents and

injuries to employees." 30 C.F.R. § 77.200. The R & S report put them on notice that "immediate attention" was needed to repair or replace all "beams and columns where holes exist or can be punched out with a hammer. For beams, holes near connections and concentrated loads are critical."

The individual Respondents were agents of the corporate mine operator and were qualified engineers in positions to protect the safety of miners who used the elevated walkway. Mr. Merrifield prioritized the rehabilitation sequences to carry out the recommendations in the R & S report and Mr. Yancik had the responsibility to inspect the steel members for compliance with the criteria in the R & S report. They knew that the steel members supporting the elevated walkway needed to be inspected carefully and frequently in order to give "immediate attention" to "beams and columns where holes exist or can be punched out with a hammer," as warned by the R & S report. This required hammer testing of any suspicious beams. It is clear that the beams that failed on June 8, 1993, were more than suspicious, but had not been properly tested and remedied before the collapse.

Mr. Yancik testified that he never received any written report that told him or caused him to believe that the plant was not being maintained in a safe condition or that the walkway that collapsed was dangerous. However, Mr. Yancik was the individual charged with making inspections of the plant to create those kinds of reports. In addition, he was aware of the 1987 collapse of the conveyor belt and of the clear warnings in the R & S report.

Mr. Yancik acknowledged that it would have been reasonable to inspect the walkway beams after Freeman removed the floor at elevation 454. When asked why Freeman did not replace any of the steel members under the walkway, Mr. Yancik concluded that the structural condition was not bad enough to require remedial attention. Yet the walkway failed because of advanced deterioration and badly corroded steel beams.

Mr. Merrifield was a decisionmaker responsible for safety of operations of the old preparation plant from the time he was mine superintendent and later vice president of operations. He had a thorough knowledge of the history of deterioration of the steel members, including the 1987 collapse of the conveyor belt and the

1989 R & S report. He made monetary decisions regarding rehabilitative efforts in the old plant. With his knowledge of the R & S report, and his qualifications as an engineer, he had a duty to heed the warnings of the R & S report and see to it that beams, columns, and metal supports for the elevated walkway were carefully and frequently inspected so that "immediate attention" would be given to any beams or columns "where holes exist or can be punched out with a hammer." He had the authority to provide copies of the R & S report to the safety director and surface manager (who both reported to him) and to discuss it with them. However, he failed to do so.

When the surface manager, Mr. Stanley, led a crew of four men onto the walkway on June 8, 1993, he had no knowledge of the R & S report and its warning that "immediate attention" must be given to "beams and columns where holes exist or can be punched out with a hammer." Since he was not an engineer, and had no training in structural analysis, he had to rely upon the individual Respondents to see that the walkway was kept in a safe condition. Respondent Merrifield prioritized the rehabilitation sequences to carry out the recommendations of the R & S report, and Respondent had the responsibility to inspect the steel members for compliance with the criteria spelled out in the R & S report. Both were qualified engineers who knew the significance of the dangers found in the report, but they did not convey them to Mr. Stanley or the mine safety director.

Had they informed Mr. Stanley, the surface manager, of the need to look out for "beams and columns where holes exist or can be punched out with a hammer," Mr. Stanley would have had crucial safety information when he assigned four men to work with him on the walkway that collapsed. This would have alerted him to immediately report any beams "where holes exist or can be punched out with a hammer," and may have alerted him to look at the beams below before placing a concentrated live load on the walkway. Had he looked at the beams, he would have seen the deterioration and corrosion that the MSHA engineers saw after the collapse of the walkway. This probably would have alerted him to call the individual Respondents for an evaluation of the safety of the walkway.

Respondents argue that a number of MSHA inspectors had inspected the old plant before the collapse in June 1993, but did

not cite the walkway as being unsafe. However, MSHA inspectors are not engineers, and the dangers of the walkway were such that only specially qualified persons, such as engineers, could fully understand the hazards involved in the context of the R & S report. Moreover, in Raymer v. United States, 660 F.2d 1136, 1143 (6th Cir. 1981), cert. denied, 456 U.S. 944, 102 S. Ct. 2009 (1982), the court held that MSHA inspectors do not undertake to perform a duty owed by the mine operator to its employees. The court rejected the idea that responsibility for mine safety is shifted to the federal government.

In Joseph B. Necessary, 6 FMSHRC 2567 (1984), Commission Judge Koutras found that an agent with 45 years of experience in the construction business who was supervising the repair of a mine refuse storage bin that collapsed, killing three miners, violated 30 C.F.R. § 77.200. Judge Koutras found that the collapse was caused by a misalignment in the support columns and that the supervisor was aware of the misalignment. In affirming the citation, Judge Koutras found that, in light of the supervisor's experience, "he knew or should have known that the misalignment posed a serious potential safety hazard requiring immediate correction."

I find that Respondents Merrifield and Yancik "knowingly authorized, ordered, or carried out" a violation of 30 C.F.R. § 77.200, within the meaning of § 110(c) of the Act, by failing to take necessary steps within their competence and authority to see that the cited walkway was "maintained in good repair to prevent accidents and injuries to employees." Miners and supervisors who are not engineers cannot be expected to judge the structural integrity of steel beams and columns. However, when a mine operator engages the engineering firm that constructed a building to return to evaluate its structural condition after years of corrosion of steel members, it is incumbent upon the operator's own engineers to exercise due diligence and reasonable care in implementing the builder's repair and rehabilitation recommendations. The individual Respondents patently failed to do so with respect to the walkway that collapsed on June 8, 1993.

The collapse was not an unforeseen accident. There had already been a major collapse in 1987. As rehabilitation work progressed in the old plant, beams that were repaired or replaced were painted yellow. As of the date of the collapse, yellow

horizontal beams were in areas where weight had been removed from the floor and where holes had been covered to prevent falls through the floor. Apparently there were no yellow beams supporting the elevated walkway. The MSHA engineers found a number of beams and supports that were deteriorated, similar to the beams that collapsed on June 8, 1993. This indicates that the walkway was in overall bad repair, that the collapse on June 8 could readily have occurred in many dangerous places in the walkway, and that a concentrated live load (several miners) was critical, as predicted by the R & S report.

This was not a situation in which a claim of "unforseen accident" could be reasonably asserted. Rather, it was a collapse ready to happen.

I find that the violations of § 77.200 by the individual Respondents were due to high negligence and their negligence is imputed to the corporation. In reaching this conclusion, I have considered a number of factors. These include: their expert knowledge as engineers of the history of deterioration of steel members in the old plant, the 1987 collapse of the conveyor belt, and the clear notice in the 1989 R & S report of the steps necessary to maintain the elevated walkway in good repair; their failure to heed the R & S report by taking necessary action to inspect and repair the walkway that collapsed; their failure to advise the safety director and the surface manager of the need to look out for holes and weak spots in the beams under the walkway; and the great risk to the miners who regularly used the elevated walkway, including the four miners who were injured.

IV

CIVIL PENALTIES

The key to the Mine Act is prevention of mining hazards by compliance with safety and health standards. This requires diligence in monitoring changing mine conditions to see that the mine is in compliance.

As found in the Discussion, Freeman and the two individual Respondents were highly negligent in failing to maintain the walkway in good repair to prevent accidents and injuries to employees. Their violations of § 77.200 are aggravated by the

fact that they had a supervisory and professional responsibility to protect laymen who were dependent upon their expert knowledge.

In Roy Glenn, 6 FMSHRC 1583, 1587 (1984), the Commission repeated its holding in Kenny Richardson, supra, that "a supervisor's blind acquiescence in unsafe workings would not be tolerated," and that "supervisors . . . could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance." Similarly, in passing the 1977 Mine Act, Congress was particularly concerned over the high number of mining injuries and fatalities that resulted from inadequate supervision and hazardous "conditions reasonably within the power of management to prevent." H.R. Rep. No. 312, 95th Cong., 1st Sess. 4 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 360 (1977).

Section 110(i) of the Act provides six criteria for assessing civil penalties. Considering each of the criteria, I find that Freeman is a large operator, the civil penalties in this Decision will not affect its ability to continue in business, Freeman has an average compliance history for its size, and after the citation was issued the three Respondents made a good faith effort to achieve compliance with 30 C.F.R. § 77.200. The three Respondents violated that section, as found above. The gravity of the violations was high and the violations were due to high negligence on the part of each Respondent.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that the following civil penalties are appropriate for Respondents' violations of § 77.200:

Respondent Freeman United Coal Mining Company, a civil penalty of \$10,000.

Respondent Neal Merrifield, a civil penalty of \$5,000.

Respondent James Yancik, a civil penalty of \$4,000.

The penalties are higher than the penalties proposed by the Secretary because of Respondents' aggravated conduct in ignoring the clear steps needed to protect the safety of the miners. Through their high negligence in failing to replace defective

beams, the walkway was allowed to deteriorate to the point of a sudden collapse causing severe injuries.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondents violated 30 C.F.R. § 77.200 as found above.

ORDER

1. Citation No. 3537447 is AFFIRMED.
2. Within 30 days of the date of this Decision: Respondent Freeman United Coal Mining Company shall pay a civil penalty of \$10,000; Respondent Neal Merrifield shall pay a civil penalty of \$5,000; and Respondent James Yancik shall pay a civil penalty of \$4,000.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 29 1996

AMAX COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. LAKE 95-403-R
: Order No. 4264060
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Wabash Mine
Respondent : Mine ID 11-00877

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corp., Pittsburgh, Pennsylvania for
Contestant;
Christine M. Kassak, Esq., Office of the
Solicitor, U.S. Dept. of Labor, Chicago, Illinois
for Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 801 *et seq.*, the "Act," and upon the Notice of Contest filed by the Amax Coal Company (Amax) challenging a "failure-to-abate" order issued by the Secretary of Labor under Section 104(b) of the Act.

At 11:30 on the morning of September 11, 1995, Inspector Robert Stamm of the Department of Labor's Mine Safety and Health Administration (MSHA) issued Citation No. 4264057 to Amax under Section 104(a) of the Act alleging a violation of the standard at 30 C.F.R. § 75.400 and charging as follows:

An accumulation of coal and coal fines was present around the tail area of the #3 main West conveyor belt and extending 60 feet outby. The coal measured 4 to 24 inches in depth and was also present inby the tail and in the #34 crosscut with side. The belt was rubbing the coal and heat was present on the tail structure. Also float coal dust (black in color) was present on the mine floor from #2 to 36 crosscut, including the adjacent crosscuts.

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

The citation also provided that these violative conditions were to be abated by 4:00 p.m. that same day. No representative of the Secretary appeared at the stated time, however, to determine whether the conditions had, in fact, been abated. Three days later, around 9:30 on the morning of September 14, 1995, the issuing inspector returned to the scene of the cited violation and found that an accumulation existed within the same area as originally cited in Citation No. 4264057. The Secretary acknowledges that he is unable to prove that the accumulated material found on September 14 was any part of the original accumulation cited on September 11.¹ In any event, Inspector Stamm issued an "extension of time" for abating the condition he found at 9:30 a.m. in a "subsequent action" form issued at 10:30 that morning. That form states as follows:

A portion of the coal was removed from the tail area and for 40 feet outby of the #3 main West conveyor belt. An extension of time is being granted to remove the remaining coal from the tail area and 20 feet outby.

Inspector Stamm returned to this location at 12:25 p.m. on September 14 and, finding an accumulation, issued the section 104(b) order at bar. The order charges in relevant part that "[a]fter a reasonable termination due date and an extension of time, coal was still present under the tail area and extending 20 feet outby the #3 main West belt conveyor." This order was terminated 40 minutes later at 1:05 p.m.

Amax apparently does not dispute that the accumulations found by Inspector Stamm on September 11, 1995, constituted a violation of the cited standard but maintains that those accumulations had been removed, thereby abating the violation before the accumulation found on September 14 was created. Amax argues, therefore, that the September 14 Section 104(b) order was improperly issued.

When issuing a citation under Section 104(a) of the Act, the inspector must "describe with particularity the nature of the violation" as well as "fix a reasonable time for abatement of the violation". In addition, Section 104(b) of the Act provides as follows:

¹ The Secretary, as any litigating party, is bound by his admissions at trial and cannot retract those admissions by simply making contrary statements in a post-hearing brief. Any such contrary statements are accordingly rejected. If, indeed, it was subsequently discovered that the admissions were factually incorrect, the appropriate remedy is by motion for a new trial or similar motion stating appropriate grounds for relief.

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

When the validity of a section 104(b) order is challenged by an operator, the Secretary bears the burden of proving that the violation described in the underlying citation has not been abated within the time originally fixed or as subsequently extended. *Mid Continent Resources, Inc.*, 11 FMSHRC 505, 509 (April 1989) In that case the Commission specifically held that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may, however, rebut the prima facie case by showing that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred. See also *Mettiki Coal Corp.*, 13 FMSHRC 760, 765 (May 1991).

While the Secretary acknowledges that he cannot prove that any part of the coal accumulation found on September 11 continuously existed until September 14, under the *Mid Continent* decision he is apparently not required to prove that the original violative condition continuously existed until the section 104(b) order was issued. In any event, in this case the operator has produced sufficient credible evidence to show that the original accumulation cited in the section 104(a) citation had been cleaned prior to the issuance of the extension and order on September 14. In this regard it is undisputed that Foreman Thompson assigned miners to clean the cited area after the order was issued on September 11 and that miners were continuing to clean at 3:00 p.m. when Thompson left the section. After the initial cleanup, the mine examiners made no entries in the examination book concerning an accumulation for the afternoon shift on September 11 or the following midnight shift on

September 12 (R-25, pp. 70, 72).² While the examiner for the midnight shift noted in the "Remarks" column that the tail should be cleaned, this was not reported as a "violation or hazardous condition" and on the next shift, the day shift for September 12, no condition concerning accumulations or needing cleaning in the area of the citation (tail area plus 60 feet) was noted (R-25, p. 74). On the September 12 afternoon shift it is noted on the record books that the tail to 50 feet outby needed to be cleaned and this was addressed on the next shift (Tr. 57-8; R-25, pp. 76-7). On the September 13 midnight shift, the tail and 75 feet outby were noted as needing cleaning and it appears to have been cleaned on the next shift (R-25, pp. 78-9). This is confirmed by the absence of a notation that the tail area needed to be cleaned in the entry for the day shift on September 13 (R-25, p.80). On the September 13 afternoon shift, the mine examiner noted that the tail and 100 feet outby needed to be cleaned. This was addressed on the next shift, the September 14 midnight shift (Tr. 62, 64-5; R-24, pp. 2-3). In addition, the examiner at the end of the midnight shift observed that the tail area needed to be cleaned (not the 100 feet outby) (R-24, p.4), and cleaning apparently occurred at the end of the shift. (Tr. 63-4, 67-8).

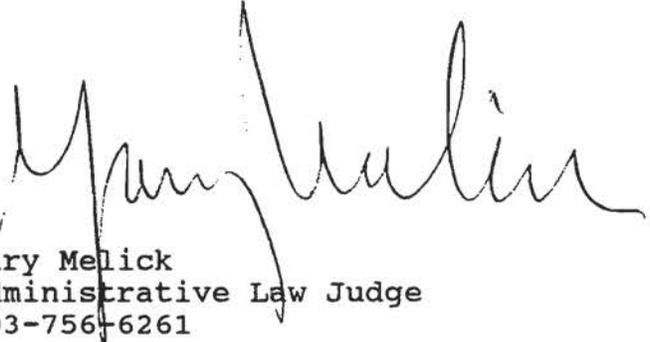
Within the above framework I find that the operator has established that the condition cited on September 11 had been abated before the issuance of the order on September 14. Under the circumstances, the order was not issued within the legal parameters of Section 104(b) and must be dismissed.³

² Page references are to the copies of exhibits with numbered pages as submitted with Respondent's brief.

³ The Secretary's conditional request in his post-hearing brief for permission to amend his pleadings to modify the order to a section 104(a) citation is rejected. A request to modify a charging document is properly made by motion. See *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992) (Citing *Cypress Empire Corp.*, 12 FMSHRC 911, 916 (May 1990)). It would also be inappropriate to modify the 104(b) order to a 104(a) citation *sua sponte*. The necessary findings and related criteria in issuing 104(a) citations are not set forth in the 104(b) order and the operator has not been provided adequate notice. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1794-6 (October 1982).

ORDER

Order No. 4264060 is hereby vacated.

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

Gary Melick
Administrative Law Judge
703-756-6261

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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 29 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
REVIEW COMMISSION, : Docket No. PENN 93-51
Petitioner : A. C. No. 36-02713-03576
v. :
 : Frenchtown
POWER OPERATING COMPANY, INC., :
Respondent :

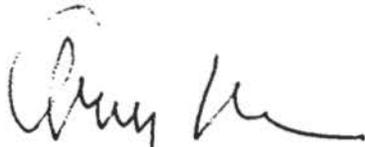
DECISION ON REMAND

Appearances: Linda Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania for Petitioner;
Tim D. Norris, Esq., and Farrah Lynn Walker, Esq.,
Stradley, Ronon, Stevens & Young, Philadelphia,
Pennsylvania for Respondent.

Before: Judge Weisberger

On March 18, 1996, the Commission (18 FMSHRC __, Docket No. PENN 93-51, (March 18, 1996)) issued a decision reversing my initial finding that the cited violation of 30 C.F.R. § 1710(a) (Citation No. 3709644) was not significant and substantial. The Commission remanded for reassessment of the civil penalty.

I reiterate my initial finding that Respondent's negligence was less than moderate (16 FMSHRC 591,607 (March 1994)). Taking cognizance of the Commission's finding that the violation was significant and substantial in that there was a reasonable likelihood of an eye injury of a reasonably serious nature, and considering the remaining factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977, I find that a penalty of \$500 is appropriate.


Avram Weisberger
Administrative Law Judge

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/ml

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 26 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 95-404
Petitioner : A.C. No. 11-00887-04127 A
v. :
: Wabash Mine
KYLE J. WETHINGTON, employed by :
AMAX COAL COMPANY, :
Respondent :

STAY OF PROCEEDING

Petitioner has moved for a stay of the instant proceeding pending Commission review of my decision in Amax Coal Company, Docket No. LAKE 95-267, 17 FMSHRC 1747 (ALJ-October 1995), which arose from the identical facts as the instant case¹. In that decision, I concluded that Amax's violation of its ventilation plan and 30 C.F.R. § 75.370(a)(1) was due to an "unwarrantable failure" to comply with the regulation.

The finding of "unwarrantable failure" in Amax rests on my conclusion that Kyle Wethington, an Amax foreman and the Respondent in this matter, was aware that a line curtain was not close enough to the working face of the mining section to comply with Amax's ventilation plan. This factual finding was inferred from the amount of time Mr. Wethington was in the entry, the obviousness of the violative condition, and his conduct in immediately returning to the section upon encountering MSHA Inspector Robert Montgomery.

Respondent opposes the stay and indicates that it intends to take discovery from MSHA regarding the decision to pursue a civil

¹The Secretary has also moved for partial summary judgment. I defer ruling on this motion pending the outcome of the Commission's review of my finding of "unwarrantable failure" in Amax Coal Company, Docket No. LAKE 95-267.

penalty under section 110(c) of the Act. Respondent's counsel has also indicated an intention to relitigate the issue of Mr. Wethington's awareness of the violation prior to encountering Inspector Montgomery. To this end, he intends to depose Robert Scott, a rank-and-file miner, whose testimony I credited over that of Mr. Wethington, with regard to the length of time Wethington was in the entry prior to seeing Montgomery.

The motion for a stay of proceeding is **GRANTED**. The question in this case is whether Wethington is precluded from litigating the knowledge issue by virtue of my findings in the prior civil penalty proceeding. Often courts resolve this issue by determining whether a litigant was "in privity" with a party to a prior action.

Although Mr. Wethington was not a party in the civil penalty proceeding brought against the operator, his interests are sufficiently congruent to those of Amax that I deem him to be "in privity" with Amax. He is therefore bound by my findings in his employer's case. As the Court of Appeals for the Eighth Circuit observed:

... the general common law rule is that claim preclusion only works against those who had a fair chance to contest the earlier suit...This rule has in recent decades been liberalized, and the focus of the claim preclusion inquiry has in some instances shifted from whether a party itself participated in the prior litigation to whether the party's interests were fully represented in the earlier case, albeit by another.

County of Boyd v. US Ecology, 48 F.3d 359, 361 (8th Cir. 1995); Also see Headley v. Bacon, 828 F.2d 1272 (8th Cir. 1987).

As the Court of Appeals for the Seventh Circuit noted:

Privity is an elusive concept. It is a descriptive term for designating those with a sufficiently close identity of interests. Of course, this definition reveals very little about the kinds of relationships that result in res judicata ...

Matter of L & S Industries, Inc., 989 F.2d 929, 932 (7th Cir. 1993).

It has also been observed that:

[a]s the preclusive effects of judgments have been expanded to include nonparties in more and more situations...it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper. Modern decisions search directly for circumstances to justify preclusion.

18 C. Wright, a. Miller & E. Cooper, Federal Practice and Procedure, §4449, at 418-19 (1981).

In the prior case, Wethington and Amax had a very strong mutual interest in prevailing on the issue of his knowledge of the violation. Even in the absence of a 110(c) case, a supervisor has a strong interest in avoiding the affirmation of an "unwarrantable failure" characterization against his employer when that allegation is predicated on his or her conduct or knowledge. Amax litigated the penalty primarily on the unwarrantable failure issue.

Although they are not conclusive factors, I note also that Wethington was one of, if not Amax's principal witnesses in the civil penalty hearing and that Amax's counsel also represents Mr. Wethington. Upon review of the record, I decided not to credit Wethington's testimony with regard to what he knew before he encountered Mr. Montgomery. I conclude he is not entitled to another opportunity to litigate this issue in the context of the 110(c) proceeding, See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979); Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84, 95 (5th Cir. 1977); but see Benson and Ford, Inc. v. Wanda Petroleum Co., 833 F.2d 1172 (5th Cir. 1987) .

In opposing the stay, Wethington also argues that Commission precedent allows an individual to litigate a Section 110(c) proceeding, irrespective of the outcome of the operator's challenge to the underlying enforcement action, citing Kenny Richardson, 3 FMSHRC 9 (Review Commission, January 1981). Richardson is

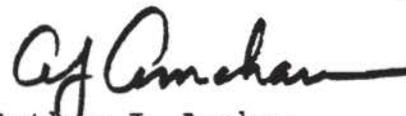
distinguishable in that the operator settled the underlying enforcement action. In this case whether Mr. Wethington was aware of the violative condition was fully litigated in the civil penalty proceeding.

I am also unpersuaded by Respondent's reliance on Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (Review Commission 1980) and Alexander v. Gardner-Denver, 415 U.S. 36, 39 L.Ed 2d 147, 94 S Ct 1011 (1974). The Supreme Court's reluctance in Gardner-Denver to cut off the right to a de novo hearing based on an arbitration decision was predicated on the nature of arbitrations. The Court noted:

... the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited, or unavailable And as this Court has recognized '[a]rbitrators have no obligation to give their reasons for an award.'

415 U.S. 57-58.

No such infirmities exist with regard to the operator's hearing on its challenge to the "unwarrantable failure" order. I can see no unfairness in refusing to allow Mr. Wethington to relitigate the issue of his state of knowledge. Had Amax prevailed on the "unwarrantable failure" issue, I would not allow the Secretary another opportunity to prove that Wethington knew of the violative condition in a section 110(c) proceeding. I conclude that Mr. Wethington was afforded all of the procedural protection to which he was entitled.



Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 7, 1996

| | | |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 95-155-M |
| Petitioner | : | A.C. No. 05-00516-05565 |
| | : | |
| v. | : | |
| | : | Black Cloud Mine |
| ASARCO, INCORPORATED, | : | |
| Respondent | : | |

ORDER DENYING MOTIONS FOR SUMMARY DECISION

Respondent ("Asarco") filed a motion for summary decision in this case pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. The Secretary of Labor opposes Asarco's motion and filed a cross motion for summary decision. For the reasons set forth below, I deny both motions.

Commission Rule 67(b) sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

On March 3, 1994, MSHA Inspector Leo C. Holtz issued to Asarco Citation No. 3904841 alleging a violation of 30 C.F.R. § 57.6131 at its Black Cloud Mine in Lake County, Colorado. The citation states that the explosives storage facility at the mine was about 420 feet from a mine "building in which two miners work on a regular basis" and that this distance is "insufficient to protect the miners from the forces generated should this storage facility explode." The safety standard provides, in subsection

(a)(1), that storage facilities for any explosive material shall be "located so that the forces generated by a storage facility explosion will not create a hazard to occupants in mine buildings"

Asarco argues that the citation should be vacated because MSHA relied on the American Table of Distances in reaching its conclusion that the explosive storage facility was too close to the mine building, an assay laboratory. It contends that MSHA failed to consider the factors set forth in the safety standard and in the preamble to the standard. The Secretary contends that it is not prohibited from using the American Table of Distances as a guideline to determine whether a magazine creates a hazard. In addition, he asserts that the undisputed evidence establishes that Asarco's magazine created a hazard to occupants in the assay laboratory and that he is entitled to summary decision in his favor.

A. Asarco's motion for summary decision

Until recently, the Secretary's safety standard required that explosive magazines be "located in accordance with the current American Table of Distances for storage of explosives." 30 C.F.R. § 57.6020(a) (repealed). The American Table of Distances was developed by the Institute of Makers of Explosives. In 1991, the Secretary proposed to revise its explosive standards to require that explosive magazines be "located in accordance with Appendix I for subpart E -- MSHA Table of Distances." Appendix I was a table of distances that was based on the American Table of Distances. On December 30, 1993, the Secretary promulgated a final rule on safety standards for explosives at metal and nonmetal mines which adopted the current language of section 57.6131. 58 *Fed. Reg.* 69596 (attached as Ex. 4 to Asarco's memorandum).

In the preamble to the new standard, the Secretary described why he changed the standard. *Id.* at 69600-601. The Secretary explained that his incorporation of the American Table of Distances was not acceptable because the table "does not govern the distances between explosive material storage facilities and occupied buildings on mine property; rather, it governs the distances between explosive material storage facilities and structures, roads, and inhabited buildings off mine property." *Id.* at 69600 (emphasis added). The Secretary's initial proposal was to create an MSHA table of distances that incorporated certain portions of the American Table of Distances. This MSHA table was opposed by the metal and nonmetal mining industry because: (1) the distances in the MSHA table as developed by the Institute of Makers of Explosives were not designed to apply to buildings on mine property; (2) it would force placement of storage facilities closer to public roads and structures; and (3)

many mines could not comply with the MSHA table. Id. In addition, the Institute of Makers of Explosives objected to the inclusion of its distances in the MSHA table because it "never intended nor conducted any tests for usage of the distances with respect to occupied structures on mine property." Id.

In the final rule, the Secretary dropped all references to the American Table of Distances and eliminated the MSHA table. The Secretary stated that "safety and hazard data collected over the last 20 years indicate that there have been few unplanned detonations of magazines or explosive material storage facilities and even fewer such detonations that have resulted in injury or death to miners." Id. at 69600-601. The Secretary further stated that "application of the separation distances to occupied buildings and structures on mine property would cause a number of operators to go to considerable expense to relocate explosive material storage facilities within the mine site when the Agency cannot demonstrate supporting data or appreciable benefit at this time." Id. at 69601. Finally, the Secretary stated:

MSHA appreciates that [the adopted] standard uses performance language and each facility will have to be evaluated on a case-by-case basis. Examples of factors which the agency contemplates considering are the types and quantity of explosive materials, the period of time which explosives are stored in the storage facility, and the space restrictions of the particular mine site.

Id.

The citation issued by Inspector Holtz does not mention the American Table of Distances or the proposed MSHA table. Unfortunately, Mr. Holtz has retired and was not deposed by the parties. In making its argument that the inspector issued the citation based on the American Table of Distances, Asarco relies heavily on its deposition of Richard Fisher, a physical scientist with MSHA. Mr. Fisher drafted a report concerning explosives storage at the Black Cloud Mine after the citation was issued and recommended that the subject storage facility be moved. Asarco also relies on the deposition testimony of other MSHA officials including Holtz's supervisor, Royal Williams; and Michael Music, another MSHA supervisor. Based on this deposition testimony, Asarco argues that the undisputed facts "show that in issuing and investigating the Citation, the Secretary exclusively relied on tables of distances which are not enforceable under 30 C.F.R. § 57.6131." (Asarco Memorandum at 5). It also argues that this undisputed evidence demonstrates that the Secretary did not apply the factors adopted in lieu of a table of distances set forth in the preamble. Accordingly, Asarco contends that the MSHA's cita-

tion "ran afoul of the long-settled and well-established principle that a federal agency must adhere to its own rules and regulations.'" (Id. at 1 (citation omitted)).

The Secretary contends that the standard and the preamble do not prohibit the use of the American Table of Distances as a guideline and notes that the table is "widely accepted in industry as a guideline to determine distances of safety for explosives." (Secretary Motion at 4). In addition, he argues that the explosives "magazine was located in such proximity to the assay building as to present a hazard to miners working in that building" Id. The Secretary relies, in part, on the deposition testimony of Mr. Music that, if the magazine exploded, the explosion would cause serious harm or death to miners in the assay building. The Secretary states that the record demonstrates that there was a violation without reference to the American Table of Distances.

I agree with Asarco that MSHA cannot rely on the American Table of Distances to prove a violation of section 57.6131. As stated in the preamble to the safety standard, the American Table of Distances does not govern safe distances between explosive storage facilities and buildings at a mine. As a result, the Secretary deleted all reference to this table and to a proposed MSHA table when the final rule was promulgated. In its place, the Secretary established a requirement that MSHA evaluate the hazard "on a case-by-case basis." 58 *Fed. Reg.* at 69601. The preamble to the standard states that a number of factors should be considered by MSHA inspectors and included, as examples, "the types and quantity of explosive materials, the period of time which explosives are stored in the storage facility, and the space restrictions at the particular mine site." Id. Thus, a citation that alleges a violation of the safety standard on the basis of the American Table of Distances cannot be sustained.

Asarco contends that the record establishes beyond any doubt that "MSHA made no . . . determinations supporting the alleged violation" other than the rejected American Table of Distances. (A. Reply at 2). It argues that MSHA failed to consider the factors set forth in the preamble and failed to perform any calculations or a detailed analysis establishing that the miners in the assay laboratory were at risk. I find that the record, as presented by the parties, does not establish that the Secretary "exclusively relied on the tables of distances" in determining that a violation of the safety standard existed. The citation and Inspector Holtz's notes do not mention the American Table of Distances. (S. Exs. A & B). While it appears that Mr. Fisher relied almost exclusively on this table, it is not clear that Mr. Music did. Mr. Music testified at his deposition that a detailed analysis was not necessary because the assay building was so close to the

magazine. In his opinion, based on his knowledge and experience, the miners in the laboratory would be endangered if the magazine exploded. He stated that "you don't have to be a rocket scientist to figure out that if [the magazine] went off unplanned, ... that would be devastating to that mine building" (S. Motion at 7, quoting Ex. H at 17). Accordingly, the record contains evidence that the Secretary may be able to establish a violation without reference to the American Table of Distances. Thus, the Secretary set forth specific facts showing that there is a genuine issue for hearing.

Because a material fact is in dispute, Asarco's motion for summary decision is **DENIED**.

B. The Secretary's motion for summary decision

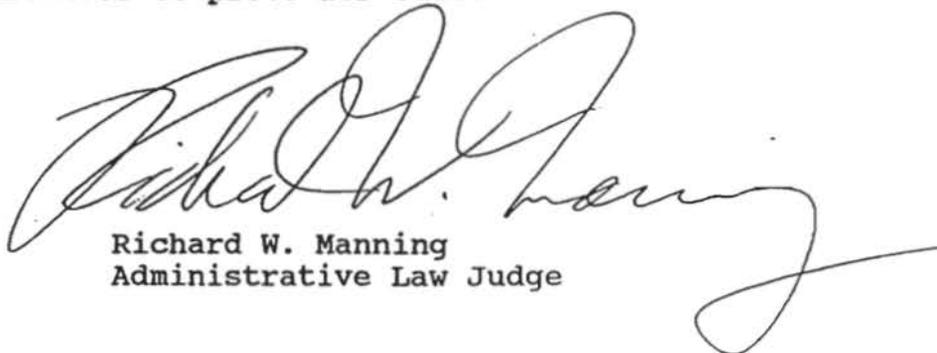
The Secretary contends that he is entitled to summary decision because there is no dispute that forces generated by the storage facility would create a hazard to the occupants of the assay laboratory. Asarco disputes this fact, however. Asarco has not admitted that the explosives storage facility created a hazard and it contends that MSHA did not correctly analyze the requisite factors when it issued the citation. For example, Asarco argues that the fact that the magazine was built into the side of the mountain protected the miners working in the assay laboratory and that MSHA did not take this fact into consideration. Asarco set forth specific facts showing that there is a genuine issue for hearing.

Because a material fact is in dispute, the Secretary's motion for summary decision is **DENIED**.

II. THE HEARING

The hearing in this proceeding will commence at 9:30 a.m. on Tuesday, April 16, 1996, in Denver, Colorado, as previously scheduled. There is no dispute that the explosives magazine at the Black Cloud Mine was a "storage facility" and that it contained "explosive material" as those terms are used in the safety standard. The issues at the hearing will include whether the magazine was located so that the "forces generated" by an explosion at the magazine "will not create a hazard to occupants in mine buildings." The Secretary bears the burden of proving that Asarco violated the safety standard and must establish that MSHA took into consideration such site-specific factors as the types and quantities of explosive materials in the magazine, the period of time that explosive materials are stored in the magazine, and

the space restrictions at the mine. The Secretary cannot rely on the American Table of Distances to prove its case.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 8, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-13
Petitioner : A.C. No. 29-00224-03643
v. :
: :
PITTSBURG & MIDWAY COAL : Cimarron Mine
MINING COMPANY :
Respondent :

ORDER DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The parties filed a joint motion to approve settlement for the two orders of withdrawal in this case. The parties agree that Order No. 3848263 should be withdrawn (vacated) and that the penalty proposed for Order No. 3848264 should be reduced from \$7,500.00 to \$3,750.00.

Order No. 3848263 was issued under section 104(d)(2) of the Act for an alleged violation of 30 C.F.R. § 75.370(a)(1). In the motion, the Secretary agreed to vacate this order. Because the Secretary has the discretion to withdraw or vacate a citation or order of withdrawal issued under the Act, RBK Construction, Inc., 15 FMSHRC 2099, 2101 (October 1993), this part of the joint motion is accepted.

Order No. 3848264 was issued under section 104(d)(2) of the Act for an alleged violation of 30 C.F.R. § 75.362(a)(2). Section 75.362(a)(2) provides:

Hazardous conditions shall be corrected immediately. If these conditions create an imminent danger, everyone ... shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.

The order alleges that the longwall section foreman "failed to immediately correct the hazardous condition of a methane concentration greater than 6 percent just inby the pillar line for the longwall gob shield and the improper air movement of the gob air to the active workings at the longwall tailgate." The

citation further alleges that when the foreman was informed of these conditions, he did not withdraw miners to a safe area but continued mining operations.

The joint settlement motion provides, in pertinent part:

Investigation into this 104(d)(2) order and the inspector's and investigator's factual findings support the issuance of the violation.

The parties agree that Order No. 3848264 should be affirmed in all particulars but that the special assessment of \$7,500.00 should be amended to \$3,750.00. The basis for the mitigation are the Respondent's concession of the violation and Respondent's good faith negotiations. Additionally, Respondent previously paid a penalty assessment of \$17,500 for Citation No. 3589770 and Order No. 3589771 (Docket No. CENT 94-47) which addressed the same period and similar omissions as Order No. 3848264 addresses.

Accordingly, the parties agree that the proposed reduction in the specially assessed penalty is fair, reflects full consideration of the statutory criteria set forth in Section 105(b)(1)(B) of the Act, ... and justly addresses Respondent's culpability.

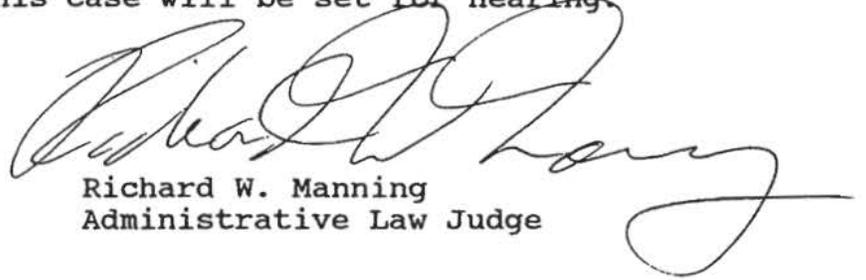
Motion at 3-4.

I cannot approve the proposed settlement of Order No. 3848264. The Commission and its judges are required to review proposed settlements pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 181, 95th Cong., 1st Sess. 44-45 (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 632-33 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based on a consideration of the civil penalty criteria in section 110(i).

It appears that the parties agree that MSHA correctly evaluated the civil penalty criteria when it proposed the \$7,500 penalty. It further appears that they seek a reduction in the penalty based not on a reevaluation of this criteria but on

factors that are not included in section 110(i), such as Respondent's demonstrated good faith during settlement negotiations. In addition, the joint motion does not explain the relationship between the penalty Respondent paid in CENT 94-47 and the proposed reduction in the penalty in the present case.

In light of the foregoing, the joint motion for approval of settlement is **DENIED**. On or before April 9, 1996, the parties shall submit additional information and offer a more complete explanation of their agreement in support of the motion for settlement. Otherwise, this case will be set for hearing.



Richard W. Manning
Administrative Law Judge

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