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APRIL

The following cases were Directed for Review during the month of April:

Council of the Southern Mountains v. Martin County Coal Corporation,
KENT 80-222-D; (Judge Steffey, February 23, 1981).

Secretary of Labor on behalf of Bobby Gooslin v. Kentucky Carbon
Corporation, KENT 80-145-D; (Judge Laurenson, March 18, 1981).

Review was Denied in the following cases during the month of April:

Secretary of Labor, MSHA v. A. H. Smith Stone Company, VA 80-2-M;
(Judge Steffey, December 1, 1980).

Secretary of Labor, MSHA v. Consolidation Coal Company, WEVA 80-160-R,
WEVA 80-379; (Judge Cook, March 20, 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 3, 1981

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), <u>ex rel.</u>	:	
	:	
THOMAS ROBINETTE,	:	
Applicant	:	
	:	
v.	:	Docket No. VA 79-141-D
	:	
UNITED CASTLE COAL COMPANY	:	
Respondent	:	

DECISION

This case raises significant questions under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) concerning the right to refuse work which we announced in our recent decision in Consolidation Coal Company (David Pasula), 2 FMSHRC 2786 (1980), petition for review filed, No. 80-2600 (3d Cir. November 12, 1980). For the reasons set forth below, we affirm the judge's protected activity findings but remand for re-analysis of a narrow, but crucial, aspect of the discrimination issue in light of Pasula.

I.

The Secretary of Labor filed this discrimination complaint alleging, in relevant part, that United Castle Coal Company violated section 105(c)(1) of the Mine Act by discharging Tommy Robinette for engaging in the allegedly protected activity of "complain[ing] about working the belt feeder without an operative cap light." Following an evidentiary hearing, the administrative law judge issued a decision in Robinette's favor and ordered his reinstatement. 1/ We granted United Castle's petition for discretionary review. The judge's decision and the briefs filed with us pre-dated our Pasula decision.

In the following section, we summarize the key evidence and factual findings and set forth additional uncontradicted testimony not discussed in the judge's decision. Tommy Robinette was employed by United Castle as a "miner's helper" on the continuous mining machine. In February 1979, Robinette received his first warnings for unsatisfactory job performance--one for "substandard work" and the other for "substandard work and insubordination." At the start of work on Wednesday, May 30, 1979,

1/ The judge's decision is reported at 2 FMSHRC 700 (1980).

Robinette was informed by Percy Sturgill, his section foreman, that Isaac Fields, another miner, was being given Robinette's job as miner's helper, and that Robinette was being assigned Fields' job as conveyor belt feeder operator, a lower paying position. 2/ Sturgill testified that Robinette told him he would take the feeder work "under protest" and "[a]nytime" Robinette had "to do something [he did not] like," he "usually mess[ed] it up." Tr. 130-131, 145. After leaving work on May 30, Robinette filed a complaint with MSHA under section 105(c) of the Act alleging that his job transfer was discriminatory.

When Robinette reported for work on Thursday, May 31, Sturgill informed him that, beginning Monday, June 4, Robinette would be assigned to driving a shuttle car at his previous rate of pay. Robinette told Sturgill that he had filed the discrimination complaint. Sturgill responded that if Robinette "want[ed] to play it that way," Sturgill "could play it that way too." Tr. 11. 3/ That day, Robinette worked for about two hours on the miner and spent the rest of the shift on the belt feeder. While operating the miner, Robinette "let a shuttle car get on a miner cable and ... also let the miner ... [destroy] the line curtains." Tr. 132-133. Sturgill reprimanded Robinette for these incidents, but did not issue any formal warnings or complaints. Sturgill testified that Robinette stated that "[e]verybody else [ran] over [the cable]" and that they "[did not] need the damn [curtains] [any]way." Tr. 133. Sturgill ended the section shift early because the belt feeder's tail shaft broke. Sturgill and United Castle vice-president Jack Tiltson inspected the tail shaft and concluded that failure to grease the shaft had caused a "gobbing out" of the piece by coal and rock. 4/ The belt feeder, which ran about 16 hours per day, required daily greasing by the feeder operator. Robinette admitted to Sturgill that he had not greased the tail shaft, and Tiltson reprimanded Robinette.

2/ Fields had recently filed a complaint with MSHA against United Castle alleging that in January 1979, United Castle had demoted him from miner's helper to feeder operator when he had refused to operate the miner when he claimed there was a lack of air and water. After May 30, Fields and United Castle signed a settlement in which he agreed to withdraw his complaint and United Castle promised not to interfere with miners' rights under the Act. The judge found (2 FMSHRC at 703), and we agree, that Robinette was switched as part of United Castle's effort to resolve Fields' MSHA complaint.

3/ The judge credited Robinette's, rather than Sturgill's, version of this conversation. 2 FMSHRC at 703.

4/ A gobbing out is a filling or choking up with coal, rock, or other debris. The gobbled out conveyor equipment consisted of the feeder, the conveyor belt's tail piece, and the continuously moving belt itself, or beltline. Coal from the face is discharged from shuttle cars onto the receiving end of the 30 foot long feeder. The feeder's dumping end dumps coal onto the tail piece, the 14 foot long receiving end of the beltline. The coal is moved out along the three foot wide beltline. The beltline is suspended from the roof by chains and ropes and is guided and moved by an idler system of regularly spaced sets of rollers. There are top rollers for the "top" belt and bottom rollers for the "return" belt. Each top set consists of three aligned rollers: two side rollers positioned at 27° angles on opposite sides of the top belt, troughing the belt, and a middle or bottom roller underneath.

Sturgill testified that on Friday morning, June 1, Robinette told him that he "did [not] like being put on the feeder" and that the "[miner's helper] job ... was all [he] cared about." Tr. 135.

Robinette testified that while he was working on the feeder the afternoon of June 1, the conveyor belt went out of line along the belt-line and the belt's tail piece and caused a gap on the tail piece through which coal and rock could fall. Tr. 13-15, 18. That day both coal and rock were running through the feeder. Tr. 15, 41-44, 150. Ordinarily, the feeder operator is required to remove or break up rocks moving on the belt to permit coal to pass and to avoid gobbing out. Occasionally, the feeder and belt must be shut down to remove larger rocks.

Robinette testified that while the beltline was running, he attempted to "train" (realign) it by tapping the top beltline rollers with a small hammer. Tr. 13, 28-29. He was wearing a standard cap lamp with an insulated electrical conducting cord running over his shoulder and down the front of his body to his belt battery. Robinette testified that while he was bending over the beltline trying to realign it, his cap lamp cord became caught in a roller, his cap was yanked off his head, and the cord was completely severed, cutting off his light. Tr. 13-14, 26-29. There was no other illumination in the area.

Robinette felt his way down the rib towards the tail piece. He called to the shuttle car operator "to tell Sturgill that [he] needed a light [because] his cord had [been] cut in two." Tr. 14. 5/ At the time, Sturgill was working about a break away on repair of a shuttle car. Robinette waited about 5 or 10 minutes, but there was no response. When the shuttle car operator returned, Robinette repeated his request that Sturgill be informed of his need for light. Robinette saw the operator stop by Sturgill and heard Sturgill yell to the operator to tell Robinette to sit down and that Sturgill would come over when he could. 6/

At that point, Robinette shut off the feeder and belt. Robinette testified that while waiting for assistance, he heard coal and rock falling off the belt and gobbing out near the gap caused by the belt misalignment on the tail piece. He testified he was concerned that he could not see what was happening and that the gobbing out could cause a break in the belt or a friction fire. Tr. 14-15, 17-18.

Within a few minutes, Sturgill arrived. He testified that he saw Robinette disconnect the mine phone--the only one in the immediate area. Tr. 138. At the hearing, Robinette denied disconnecting the phone. Tr. 172. Sturgill repaired Robinette's cap lamp and also, as he testified,

5/ The judge found that Robinette also told the shuttle car operator to inform Sturgill that Robinette "would have to shut down the feeder." 2 FMSHRC at 704. However, there is no evidence to that effect in the record.

6/ Robinette testified that Sturgill "holler[ed] [to the shuttle car operator] to tell [Robinette] [to] just sit up there; there [isn't anything] going to get him and [Sturgill would] be up there when [he] could." Tr. 14. Sturgill testified that he told the operator to "[t]ell [Robinette] to sit down at the [mine] phone and I'll be there in just a few minutes." Tr. 137-138.

the mine phone. The two men engaged in heated conversation about Robinette's actions. Sturgill testified that Robinette told him that his lamp cord had been cut when he "fell down at the beltline getting a rock off" (Tr. 139); that he disconnected the phone because he "did [not] want to hear ... Tiltson['s] and [mine administrator Denver Cook's] bull shit" (Tr. 141); in response to Sturgill's criticism that disconnecting the phone could be hazardous if there were a fire, that "[t]his mine could [not] burn; it [was] too wet and muddy" (Tr. 141-142); and that foremen "[have] come and gone; ... [we will] get you too" (Tr. 142). 7/ Robinette testified that when they turned on the conveyor machinery again, they had to shut it down because it was gobbled out (Tr. 16); Sturgill testified that there was "some spillage" which he instructed Robinette to shovel up (Tr. 140). Sturgill instructed Robinette to report to the mine office at the end of the shift.

After the shift, Robinette left when Tiltson was unable to meet with him. After Robinette's departure, Sturgill discussed the day's incidents with Tiltson and mine administrator Denver Cook. Tiltson and Cook reviewed Robinette's file containing the two February warnings. 8/

On Monday morning, June 4, based on Sturgill's information, Cook prepared and signed another "employee warning record" for Robinette, and, after reviewing it, Tiltson decided to discharge him. The form states:

Employee became disobedient with section foreman.
[Employee] [w]as not maintaining the belt feeder in a clean and safe condition[;] the job requires the feeder to be greased and shoveled at all times. [Employee] [d]isconnected the mine phone interrupting mine communications.

...

Dismissed from the Company after thorough examination of his past ... record of warnings and and present attitude and workmanship [on] his job.

When Robinette arrived at work, Cook told him to come with him to Tiltson's office. Robinette took along another miner, Teddie Joe Fields. At the office, Tiltson informed Robinette that he was fired. Tiltson stated that the discharge was "for what happened that Friday and what had happened in the past." Cook raised a question about his operating equipment without a cap lamp. Tr. 40-41. Tiltson stated that it had been "unnecessary for [Robinette] to stop production" because of the incident and that "[he] could have got[ten] out of the way and the tail piece would have [taken] care of itself." Tr. 41. 9/

7/ Sturgill's testimony is not discussed in the judge's decision. The judge merely found that the two men "exchanged harsh words" and that Robinette was "belligerent and uncooperative." 2 FMSHRC at 704, 706. Robinette's initial testimony regarding the exchange was summary (Tr. 15-16, 36-37); on rebuttal, he was not asked about, and did not contradict Sturgill's version.

8/ Sturgill suffered a heart attack on June 2, and did not participate further in the Robinette matter.

9/ Cook's and Tiltson's comments about the lamp cord were testified to only by Teddie Fields. Robinette did not mention these statements; Tiltson did not testify at the hearing; and Cook, who did testify, was not asked about the June 4 meeting.

On June 4 Robinette filed another discrimination complaint with MSHA, based on his discharge. MSHA filed an application for temporary reinstatement, which was issued on September 24. On October 11, 1979, the Secretary filed the instant complaint under section 105(c), alleging that Robinette had been discharged for "complain[ing] about working the belt feeder without an operative cap light."

The judge credited Robinette's testimony concerning the belt misalignment and the accidental severing of his lamp cord; he discredited evidence introduced by United Castle to show that the cutting of the cord was deliberate, not accidental. 2 FMSHRC at 704. The judge found that Robinette's ceasing to operate, as well as his shutting off the conveyor equipment when he lost his cap lamp, constituted a "bona fide" refusal to work under conditions which Robinette believed, and the judge agreed, were hazardous. Id. at 704, 705, 706. The judge held that Robinette's work refusal was protected activity under the Mine Act. Id. at 706.

The judge treated the case as involving a "mixed motivation"--not pretextual--discharge. He credited Sturgill's testimony that Robinette disconnected the mine phone shortly after he shut off the conveyor equipment. 2 FMSHRC at 704. The judge also found that Robinette's work was "less than satisfactory" and that he was "obviously belligerent and uncooperative with ... Sturgill as a result of his change in job classification." Id. at 706. The judge concluded, however, that the "effective" cause of Robinette's discharge was his protected work refusal. Id. at 705, 706. Omitting reference to the phone disconnection, the judge stated that "[t]he other reasons given for the discharge--insubordination and inferior work--were not the primary motives for discharge." Id. at 705. On the basis of these findings, the judge concluded that Robinette's discharge violated section 105(c) of the Mine Act, and he ordered reinstatement and payment of back pay.

II.

In Pasula, we established in general terms the right to refuse to work under the Mine Act, but did not attempt at that time to define the specific contours of the right. 2 FMSHRC at 2789-2796. This case requires us to set some of the contours and to determine whether Robinette's conduct falls within the zone of protected activity.

United Castle's concessions narrow the issues before us. Anticipating Pasula, United Castle "agrees" that the Mine Act grants miners a right to refuse work in the face of conditions which they believe "in good faith" place their "health or safety in immediate danger." Petition for Discretionary Review (PDR) 7. United Castle further "concedes" that the right may in some cases extend to "self help by taking some affirmative actions other than merely refusing to work." Id. Assuming for the sake of argument that the severing of Robinette's cap lamp cord was a genuine accident, United Castle "readily concedes" that once Robinette lost his light, "it would have been hazardous for [him] to ... perform his duties without [it]." PDR 23. Thus, assuming a genuine accident, United Castle admits that Robinette's mere ceasing to operate the feeder was a protected work refusal and that he could not have been lawfully discharged for that

conduct alone. Rather, United Castle focuses on Robinette's additional behavior in shutting down the conveyor equipment--an action characterized by the judge as an integral part of Robinette's protected work refusal and by United Castle as an unprotected form of "affirmative self-help."

As a threshold matter, we consider whether the right to refuse work includes such "affirmative" forms of self-help as shutting off or adjusting equipment in order to eliminate or protect against hazards, for it is precisely such conduct which is in issue here. By treating Robinette's shutting down of the conveyor as an integral part of his protected work refusal (2 FMSHRC at 704, 705, 706), the judge answered this question in the affirmative. ^{10/} We agree with that view. Occasions will arise where mere ceasing of work will not eliminate or protect against hazards, while adjusting or shutting off equipment will. In these cases, such affirmative action may represent the safest and most responsible means of dealing with the hazard. Affirmative self-help may also reduce possible loss of time and of productivity. Taking this case as an example, if we accept Robinette's good faith and his claim that there was a danger of friction fire on the gobbled-out conveyor and feeder, his shutting down the equipment seems both responsible and praiseworthy. Such prophylactic action may have saved United Castle from a worse threat to health and safety--and to productivity. Approving this affirmative dimension to the right is consistent with Pasula. Effective and timely protection of miners is the essence of the Pasula work refusal doctrine:

The successful enforcement of the ... Act is ... particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction. The right to do so would be hollow indeed, however, if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent. [2 FMSHRC at 2790.]

Since, as discussed above, affirmative self help may often represent the most effective and responsible means of protecting miners from hazards, the right to refuse work "would be hollow indeed" if it did not embrace such means. Accordingly, we hold that the right to refuse work may extend to shutting off or adjusting equipment in order to eliminate or protect against a perceived hazard.

United Castle contends, however, that Robinette's work refusal was void from its inception because he caused the unsafe condition in question by deliberately severing his own cap lamp cord. Thus, United Castle charges him with a general failure of good faith and reasonableness. Unlike the Pasula case (see 2 FMSHRC at 2790-2793), the evidence regarding these issues is sharply disputed and cannot be resolved unless the underlying questions of whether good faith and reasonableness are

^{10/} As noted above, United Castle has also conceded that, in proper circumstances, the right to refuse work may include affirmative self help.

required for the activity to be protected are also answered. By emphasizing that Robinette's work refusal was "bona fide" (2 FMSHRC at 705), the judge implicitly found that good faith was a prerequisite to a valid work refusal, and we agree.

A good faith requirement is supported by Pasula, the Act's legislative history, analogous sources of occupational safety and health law, and sound policy. Pasula approvingly refers in several passages to the good faith of the miner involved in that case. 2 FMSHRC at 2793, 2796. In the legislative history set forth in Pasula, and quoted below, 11/ Senators Williams and Javits pointedly described the meaning of the right to refuse work in terms of the miner's "good faith" belief and action. Both the Secretary of Labor's work refusal regulation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (the OSHAct), 12/ and section 502 of the Labor Management Relations Act (LMRA),

11/ MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.

The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.

MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

[2 FMSHRC at 2792, quoting from Senate floor debate on S. 717, June 21, 1977, reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1089 (1978) ("Leg. Hist.").]

12/ 29 CFR §1977.12(b)(2), the Secretary of Labor's OSHAct work refusal regulation, provides:

[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

As noted in Pasula (2 FMSHRC at 2793 n. 7), the Supreme Court approved these OSHAct criteria in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1979). United Castle urges us to define the scope of the right to refuse work by wholesale adoption of these criteria. Such a step would be inconsistent with our Pasula approach favoring gradual, case-by-case development of the law in this area. See 2 FMSHRC at 2793. Moreover, we agree with the Secretary that such incorporation would be ill-advised

(footnote 12 continued)

29 U.S.C. §143, 13/ also require good faith for a valid work refusal. A policy of not requiring good faith would appear anomalous, seemingly condoning irresponsible or deceptive work refusals. We note that the Secretary makes no argument here that good faith is not required.

Good faith belief simply means honest belief that a hazard exists. The basic purpose of this requirement is to remove from the Act's protection work refusals involving frauds or other forms of deception. Lying about the existence of an alleged hazard, deliberately causing one, or otherwise acting in bad faith could endanger other miners and disrupt production--and, not least, squander scarce administrative

fn. 12/ cont'd.

as a substantive matter. The Secretary observes (Br. 9-12 & nn. 1 & 3) that he has not promulgated an identical regulation under the Mine Act because of the differences in the two statute's legislative histories and regulatory purposes. As the Whirlpool decision noted (445 U.S. at 13 n. 18), the Mine Act's relevant legislative history--set forth in Pasula at 2791-2793--shows that Congress expressly intended the Mine Act to guarantee a broad right to refuse work. In contrast, the OSHAct's legislative history is silent on any similar right. See 445 U.S. at 13-21. More significantly, the OSHAct regulation must apply nationally to a wide range of typical jobs and work settings, while the Mine Act applies more narrowly to one of the nation's most hazardous occupations and working environments. While these considerations may be thought to justify the relatively restrictive definition of the right in the OSHAct regulation, they support a broader and simpler definition of the right under the Mine Act. This is not to say that we will develop the right without concern for the operators' legitimate interests in productivity, economy, and discipline. The concerns of miners and operators will be best served by a straightforward approach which steers clear of subtle refinements and complicated exceptions. Proper administration of the Mine Act requires a simple, yet supple, right which miners and operators can understand and practically apply without confusion and torrents of litigation.

We also find unpersuasive United Castle's suggestion that Whirlpool viewed the OSHAct regulation as "a correct statement" of what should be considered protected activity under the Mine Act. In the passage upon which United Castle relies (445 U.S. at 13 n. 18), the Court merely indicated that the Secretary's interpretation of the OSHAct to support a right to refuse work conforms to the same interpretation which Congress wished to be placed on the Mine Act's anti-retaliation provisions. The Court did not state that the details of the OSHAct regulation necessarily defined the scope of that right under the Mine Act.

13/ Section 502 provides in part:

[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

and judicial resources in resolution of any resultant complaint under the Act. Such behavior has no place under the Act. 14/

Good faith also implies an accompanying rule requiring validation of reasonable belief. Such a validation rule is implicit in the judge's findings. See 2 FMSHRC at 704, 705, 706. Unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection in light of Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 385-387 (1973). In interpreting section 502 of the LMRA (n. 13 above) in that case, the Court squarely rejected the contention that "an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of §502." Reasoning that "[i]f the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers" (414 U.S. at 386), the court held that "a union seeking to justify a contractually prohibited work stoppage under §502 must present ... ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists...." Id. at 386-387. Pasula also referred approvingly to the miner's "reasonable [belief] ... supported by objective, ascertainable evidence." 2 FMSHRC at 2793.

Although Gateway arose in a section 502 and contractually-prohibited work stoppage context and is explicable in terms of the national policy favoring arbitration (see 414 U.S. at 386), the reluctance to rely on the "slender ... thread [of] subjective judgment" weighs against resolving work refusal cases under the Mine Act on the basis of the miner's good faith alone. Several possible reasonableness rules suggest themselves, but only one convincingly accords with the purposes of the Mine Act.

The relatively stringent "objective, ascertainable evidence" test mentioned in Gateway is usually satisfied only by the introduction of physical evidence, "disinterested" corroborative testimony, and--not infrequently--expert testimony. Cf. NLRB v. Fruin-Conlon Construction Co., 330 F.2d 885, 890-892 (8th Cir. 1964), cited approvingly in Gateway, 414 U.S. at 387 (construing section 502). We think that such a test may be better suited to the broad scope of section 502, particularly where, as in Gateway, a union's contractually prohibited strike is involved. For while "objective, ascertainable" evidence is always welcome, it may not be readily obtainable in mining cases. Unsafe conditions can occur

14/ We are not suggesting that in work refusal litigation the Secretary or miner must demonstrate an absence of bad faith. Ordinarily, the miner's own testimony will expose the credibility of his good faith. Operators may use cross-examination or introduction of other evidence to show that, in reality, good faith was lacking. Thus, in a practical sense, the real evidentiary burden occasioned by the rule will be on operators to prove the absence of good faith.

suddenly and in remote sections of mines; the miner in question may be the only immediate witness; and physical evidence may be elusive. Situations are also bound to arise where outward appearances suggest a dangerous condition which closer subsequent investigation does not confirm. Furthermore, we believe that such a test would chill the miner's exercise of the right to refuse work, an outcome inconsistent with the Act's legislative history favoring a broad right in a uniquely hazardous working environment. Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger. For all these reasons, a "reasonable belief" rule is preferable to an "objective proof" approach under this Act.

More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. ^{15/} Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

Finally, reasonableness has a similar role to play with respect to any affirmative self-help undertaken by the miner. The same reasons which justify a good faith standard also support a reasonableness rule in this context. Irresponsible reaction to a good faith, reasonable belief in a hazard has no more place under the Act than bad faith belief itself. For example, if Robinette had deliberately set about wrecking the feeder in response to his problems with it, extended analysis would not be necessary to show that his "affirmative action" was beyond the Act's pale. As with reasonable belief, a miner need only demonstrate that his affirmative action was a reasonable approach under the circumstances to eliminating or protecting against the perceived hazard.

In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well. We next apply these criteria to the evidence in this case.

^{15/} As noted above, the OSHA regulation approved in Whirlpool (n. 12 above) meets the validation problem by requiring that an employee's apprehension of a hazardous condition must be one that the mythical "reasonable person" would have shared under the circumstances. While the "reasonable person" standard avoids the problems associated with "objective proof," it lends itself to the interpretation that there is only one reasonable perception of any given hazard--that of the "reasonable person." But the reasonable person is never there. Clearly, reasonable minds can differ, particularly in a mine setting where conditions for observation and reaction will not be clinically aseptic.

Robinette's good faith in general presents a close issue. Robinette was the only eyewitness to the severing of his lamp cord. The judge, who observed Robinette's demeanor, credited his testimony that the cord was accidentally cut when it became snared on a belt roller, and rejected United Castle's claim that Robinette deliberately cut the cord. Under the good faith principles discussed above, if Robinette did deliberately cut his cord, he set in motion the hazardous condition complained of and his "work refusal" should not be protected by the Act. United Castle points to several aspects of this case, analyzed below, which we acknowledge cast some doubt on Robinette's veracity. Nevertheless, a judge's credibility findings and resolutions of disputed testimony should not be overturned lightly. For the following reasons, we are not persuaded that the evidence requires us to take the exceptional step of reversing the judge's crediting of Robinette's testimony on the accident.

As United Castle correctly points out, Robinette flatly denied disconnecting the mine phone. Tr. 172. The judge's finding, in which we concur, that he did disconnect it can mean only that Robinette testified untruthfully regarding that incident. United Castle argues that "if [Robinette] was willing to lie under oath about the phone incident, he would be quite willing to lie under oath about how his lamp cord was cut." PDR 17-18. We do not subscribe to a "false in one, false in everything" rule of testimonial evidence, and such rules are not applied inflexibly in any event. Cf. U.S. v. Spain, 536 F.2d 170, 173 (7th Cir. 1976), cert. denied, 429 U.S. 833; Lozano Enterprises v. NLRB, 327 F.2d 814, 816 & n. 2 (9th Cir. 1964). Where it is apparent that a witness has testified untruthfully in part, the judge should ordinarily explain how that fact affects the credibility of the witness with respect to his remaining testimony. While we would have preferred the judge to supply such an explanation, particularly on so sensitive a subject as good faith, failure to do so is not necessarily reversible error. If the remainder of a questionable witness' testimony is corroborated by other credible evidence (see, for example, Larmay v. Hobby, 132 F. Supp. 738, 740 (E.D. Wis. 1955)), or is otherwise inherently believable, the judge is not foreclosed from accepting it. We therefore reject the contention that Robinette's untruthful phone testimony by itself compels disbelief of the accident testimony. Our resolution of this credibility issue in no way lessens our serious concern, discussed below, over proper evaluation of the role played in Robinette's discharge by his reprehensible disconnection of the phone.

Robinette's testimony about the accident is believable. United Castle introduced demonstrative and testimonial evidence (Tr. 78-87) to show that Robinette's cord could not have been severed in the way it was by getting caught in a roller. United Castle "concedes that [its] testimony did not establish conclusively that it was impossible for [Robinette's] lamp cord to have been severed in the manner in which he claimed," but maintains that "[the] testimony clearly did establish that such an accident is highly unlikely." PDR 15-16. United Castle's witness had held a lamp cord similar to the one worn by Robinette against a moving belt roller, but was able to produce only a "nick" in the cord. Among other things, however, the experiment was conducted outside the mine on equipment other than that involved in the incident, and the witness used a piece of cord lacking the kind of opposing tension caused by a cap and belt at either end. See Tr. 87-96.

Obviously, the experiment did not replicate the conditions present at the time of the alleged accident. While the judge did not explain in detail his conclusion that United Castle's evidence "failed to establish [its] contentions" (2 FMSHRC at 704), we conclude that the foregoing considerations adequately support that conclusion. United Castle's evidence merely raises suspicion about, but does not demolish, Robinette's credibility. 16/ We find, therefore, that substantial evidence supports the judge's finding that there was a genuine accident.

Next, United Castle claims that the judge made no findings, and that the evidence does not show, that Robinette had a reasonable good faith belief in a hazard which would have justified his additional step of shutting off the equipment. 17/ The judge did make findings on these matters. In paragraphs 13, 14, and 15 (2 FMSHRC at 704), he describes in general terms the hazardous conditions Robinette faced and makes clear that Robinette's work refusal included both the ceasing of work and shutting down of equipment. Findings 13 and 14 cover only the conceded hazard in Robinette's continuing to operate the machinery without light. Finding 15, however, deals with the additional problem of whether the belt should have been left on:

The belt feeder operator is required to remove or break up rocks moving on the belt to permit the coal to pass. It is necessary on occasion to shut down the feeder to remove larger rocks. To permit the belt to continue running when the operator has inadequate illumination would create a hazardous situation for the operator and other miners.

16/ United Castle also argues that the rest of Robinette's pre- and post-accident conduct--his poor performance on May 31, his disconnecting the phone, and his insubordination towards Sturgill--shows that he probably lied about the accident. We cannot agree. These are separate incidents and the fact that he may have acted badly otherwise does not prove that he did so in the incident in question. United Castle also points out what we regard as only a minor discrepancy in the testimony of Robinette and Sturgill. As opposed to Robinette's testimonial version of the accident, Sturgill testified (Tr. 139) that when he arrived on the scene, Robinette told him that the cord was cut when he "fell down at the beltline ... getting a rock off." Assuming Robinette did say that, the explanation seems close enough to his trial version of "training" rollers while a gobbing out problem was going on. Both men were also under stress when these words were exchanged. United Castle's additional claim that Sturgill testified that the belt was running in line when he got there is not borne out by the transcript. Sturgill somewhat confusingly stated that "I've seen the belt running in line[;][a] new set, it ought to run in line." Tr. 159. This is not an unequivocal statement that it was then running in line, and, in any event, Robinette's "training" may have substantially realigned the belt.

17/ As stressed above, United Castle concedes that if there was a genuine accident, Robinette was justified in ceasing to operate the equipment. It does not concede, though, that he was justified in shutting the equipment down.

Although the judge did not specify what "hazardous situation" would have obtained had the belt continued to run, he clearly found that shutting it off was justified. The evidence supporting that conclusion is strong.

United Castle emphasizes Robinette's lack of light. PDR 22-23. However, Robinette testified that he stopped working for two reasons: he was concerned that he could not see what was happening (Tr. 17-18) and the belt misalignment on the tail piece caused a gobbing out which could have broken the belt or led to a friction fire. Tr. 15, 18. He shut off the conveyor equipment mainly because of his concern over the second condition. While lack of light alone may not have justified the shutdown, the other perceived hazard, worsened by the darkness, did.

Robinette's testimony concerning misalignment was not convincingly rebutted. His testimony (Tr. 16) that both coal and rock were running through the feeder on June 7 was corroborated by Teddie Joe Fields (Tr. 41-44) and Sturgill (Tr. 150). Robinette also testified that once the equipment was turned back on, it had to be shut down because of the gobbing out. In partial corroboration, Fields testified that he observed Robinette that day cleaning up gob-outs on the tail piece (Tr. 44), and Sturgill admitted that after he reprimanded Robinette for shutting off the equipment, he had to instruct him to shovel up "some spillage" from the beltline (Tr. 140). Furthermore, it was undisputed that United Castle did not want gobbing out to occur; that the feeder operator was required to remove rock because it can cause gobbing out; and that occasionally the feeder and belt were shut down to remove rock. United Castle's standard procedures in this regard conform to the basic principle of mine safety that feeders and belts must be kept clear of debris precisely to avoid the hazards of friction fire or spillage which Robinette testified he feared. In a larger sense, it is probably unsafe to leave an unattended, unlighted conveyor belt running because hazardous rock accumulation can come through at any time. We therefore conclude that there is substantial evidence to show that Robinette's affirmative self-help was founded on a good faith reasonable belief in a gobbing out hazard which was exacerbated by lack of light. 18/

This result also dictates the similar conclusion that Robinette's affirmative self-help was itself reasonable. Merely stopping work would not have completely removed or protected against the gobbing out dangers. Turning off the equipment was entirely consistent with United Castle's standard procedure when there is an accumulation of rock. In short, it would appear that Robinette's action was more than merely reasonable.

United Castle's remaining protected activity contentions--that any perceived hazard was not so severe as to subject Robinette to a risk of serious bodily harm or death; that he had less drastic alternatives

18/ United Castle also argues (PDR 21-22) that Robinette's comment during his subsequent heated exchange with Sturgill that the mine was too muddy to burn undermines any claimed good faith belief in a gobbing out-related fire hazard. While the comment is deplorable, it is not the same as asserting that the conveyor equipment was fireproof in the event of a gobbing out.

for eliminating the perceived hazard; and that he first failed to seek operator assistance to correct the condition--can be disposed of through evidentiary analysis. This case does not require definitive answer as to whether any criteria like these should be adopted.

Regarding "severity of hazard," the hazard here, as in Pasula, was "sufficiently severe whether or not the right to refuse to work is limited to hazards of some severity." See 2 FMSHRC at 2793. As discussed above, the evidence showed a reasonably-based fear of gobbing out on the belt which could have led to friction fire or dangerous spillage of rock and coal. These are hazards of substantial severity and, accordingly, Robinette's reasonable good faith belief was directed to a sufficiently serious danger.

Concerning a "less drastic alternative," our preceding conclusion on good faith rejects any implicit argument that it would have been more reasonable not to shut off the conveyor equipment. United Castle proposes only one positive alternative course of action: that Robinette should have sought immediate assistance from the shuttle car operator in repairing his light. This individual did not testify, and there was no showing that he was competent to fix the broken cord. Moreover, this argument goes to Robinette's ceasing work due to lack of light. Repairing the light would have taken time and, in any event, would not have completely dealt with the danger of gobbing out. We find no evidence that Robinette had a less drastic, reasonable alternative.

Regarding "seeking operator assistance," the evidence is undisputed that, before shutting down the equipment, Robinette repeatedly sought Sturgill's general assistance, waited 10-15 minutes for help, and was finally told either that Sturgill would be there when he could or in a "few minutes." This evidence makes out a reasonable attempt to seek operator assistance whether or not such action is always required where possible. True, Robinette did not inform Sturgill of the specific gobbing out hazard or of any intention to shut off the equipment (see n. 5 above). However, we think that under the exigencies of actual mining conditions and the stress of a possible emergency, a summons for general help would be sufficient. Even if contact is required, we also believe that the obligation would terminate if the situation worsened or, as here, the operator failed to respond with reasonable promptness. 19/

United Castle's final protected activity argument is that even if the work refusal was protected, Robinette "lost the Act's protection" by his subsequent conduct in disconnecting the phone and threatening Sturgill. This position is loosely based on two rules developed under

19/ United Castle appears to argue that in shutting off the equipment, Robinette disobeyed Sturgill's "off-the-scene" instruction to sit by the phone until he could come to help. Such "off-the-scene" instructions should not be binding where, as here, the operator's agent has not observed the conditions facing the miner. A contrary rule would exalt obedience to uninformed orders to the detriment of health or safety.

the National Labor Relations Act, 29 U.S.C. §151 et seq.: that protected activity loses its otherwise protected character if pursued in an opprobrious manner, and that bona fide discriminatees who engage in post-discrimination misconduct can forfeit their entitlement to being made whole. See, for example, Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729-731 (5th Cir. 1970) (opprobrious conduct); Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1385-1386 (8th Cir. 1980) (post-discrimination misconduct). Neither doctrine applies to Robinette's misconduct, which occurred after the work refusal and prior to the alleged discrimination. Rather, this misconduct formed part of the basis for Robinette's discharge and should simply be analyzed along with the other discharge issues.

More importantly, Pasula has already resolved the question of the effect of "subsequent misconduct." There, we had occasion to review an underlying arbitral decision that Pasula had not engaged in a protected work refusal because of several incidents of apparent misconduct after his ceasing of work. We concluded that a "miner's good faith is not 'lost' by his subsequent misconduct...." 2 FMSHRC at 2796. This result is not unfair to operators. The requirements of good faith and reasonableness will guard against work refusals carried out in an opprobrious fashion, and "subsequent misconduct" of the kind involved here will be weighed along with all other relevant discrimination issues.

In sum, we affirm the judge's findings that Robinette engaged in a protected work refusal. We now discuss the question of whether Robinette was discharged because of his protected activity.

III.

In Pasula, we announced the following test for resolving discrimination cases:

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected

conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

[2 FMSHRC at 2799-2800 (emphasis in original).] 20/

There can be no serious question that the Secretary effectively established a prima facie case that Robinette was discharged in part because of his protected activity in shutting off equipment. Sturgill reprimanded Robinette for the shutdown and was obviously upset by it. While the shutdown is not mentioned in the final employee warning record prepared by Cook, Tiltson informed Robinette during the June 4 discharge interview that he was being terminated for the events of June 1 and for past incidents. During the interview, Cook mentioned the cord incident and shutdown, and Tiltson stated that it had been "unnecessary for [Robinette] to stop production" because of the cap light incident and that Robinette "could have got[ten] out of the way and the tail piece would have [taken] care of itself." Moreover, in its brief to the administrative law judge, United Castle argued that the discharge was justified in part by Robinette's "shutting down production after he had been instructed to remove himself from the area of any danger." Br. to Administrative Law Judge 30. On the basis of all this, the judge found that the work stoppage was the primary cause of discharge; we certainly agree it was a cause.

20/ The "ultimate burden of persuasion" on the question of discrimination rests with the complainant and never "shifts." As we indicated in Pasula, above, there are intermediate burdens which do shift. The complainant bears the burden of producing evidence and the burden of persuasion in establishing a prima facie case. The operator may attempt to rebut a prima facie case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut, he may still affirmatively defend in the manner indicated in the quotation from Pasula above. The twin burdens of producing evidence and of persuasion then shift to him with regard to those elements of affirmative defense. If the operator cannot rebut or affirmatively defend against a prima facie case, the complainant prevails. Of course, the complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have been taken in any event for such unprotected activities alone. If a complainant who has established a prima facie case cannot refute an operator's meritorious affirmative defense, the operator prevails. This latter consequence stems from the fact that the "ultimate" burden of persuasion never shifts from the complainant. Cf. Wright Line, 251 NLRB No. 150, 105 LRRM 1169, 1173-1175 (1980) (adopting a discrimination test substantially the same as the one announced in Pasula). In footnote 11 of that decision, the NLRB explained its similar position on the relationship of the intermediate burdens of proof to the ultimate burden:

It should be noted that this shifting of burdens does not undermine the established concept that the [Board's] General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense ... to overcome the prima facie case of wrongful motive. Such a requirement does not shift the ultimate burden.

The more difficult question is whether United Castle, in effect, carried its defensive burden of showing that it was also motivated by Robinette's unprotected activities and would have discharged him for those activities alone. The judge found that Robinette's "insubordination and inferior work" were other reasons for the discharge, but not the "primary motives," and that the work refusal was the "effective cause" of discharge. In view of the evidence of Robinette's wide-ranging misconduct or "inferior" work set forth above in our summary of the facts, we agree that United Castle was also motivated by his "unprotected activities." The Secretary does not seriously argue otherwise. Thus, the only real question is whether Robinette would have been fired for those activities alone, regardless of whether he had shut down the conveyor.

The final warning notice does mention the phone disconnection, Robinette's disobedience, his failure on May 31 to grease the feeder, and his past record of warning. 21/ These are not minor matters. Both the Mine Act and a mandatory safety standard require mine phones 22/ and disconnecting one to avoid "listening to supervisors' bull shit" reveals a flagrant disregard of mine safety.

The judge did not specifically explain what he meant in finding number 23 (2 FMSHRC at 705) that the work refusal was the "effective" cause of discharge. However, in finding number 23 he also employs the term "primary." If "effective" means primary, as seem the most reasonable interpretation of the judge's language, such a finding does not logically rule out the possibility that the other reasons, by themselves, would also have led United Castle to discharge Robinette. All the reasons listed may have been sufficient grounds for termination even if the work refusal was the leading one. If that is the case, United Castle effectively met its Pasula burden. In this regard, we are particularly troubled by the fact that the judge did not specifically analyze the role played by the phone incident in the discharge.

Accordingly, although the judge's findings are consonant with three of the four Pasula evidentiary standards, we remand on the narrow question of whether Robinette would have been fired for his unprotected

21/ We recognize that the notice was prepared by Cook, who had not witnessed the events in question. Nevertheless, Cook prepared the form based on Sturgill's firsthand information, and Sturgill supplied direct testimony on the May 30 - June 1 incidents.

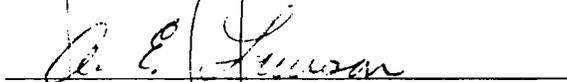
22/ Section 316 of the Act and 30 CFR §75.1600 require installation of phones in designated mine working areas. The phone in question was a required "working section" phone and, indeed, was "the last phone [inby] the face. Tr. 115. See also 30 CFR §75.1600-2(e) ("repairs [on broken phones] shall be started immediately, and the system restored to operating condition as soon as possible").

activity alone. In this regard, the judge should discuss and analyze all of Sturgill's testimony concerning Robinette's relevant comments and deeds between May 30 and June 1, and in particular, Robinette's disconnection of the phone and his specific insubordinate words to Sturgill on the latter date. The judge may permit the parties to file supplemental briefs directed to the issue on remand and, if he determines the need exists, open the record for further testimony and evidence.

For the foregoing the reasons, we affirm the judge's findings in part and remand in part.


Richard V. Backley, Chairman


Frank F. Jestrab, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 7, 1981

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
 :
v. : Docket No. VINC 79-154-PM
 :
CEMENT DIVISION, NATIONAL GYPSUM :
COMPANY :

DECISION

The broad question before us is when may a violation of a mandatory safety or health standard properly be found to "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)(the 1977 Mine Act). That question is important because violations of such a nature, together with a mine operator's "unwarrantable failure" to comply with a mandatory safety or health standard or together with an operator's engaging in a "pattern of violations", will trigger the withdrawal order sequences of sections 104(d) and 104(e) of the 1977 Mine Act, respectively. 1/

1/ Sections 104(d) and 104(e) provide as follows:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(footnote 1 cont'd)

The interpretation of the "significant and substantial" provisions is before us in the context of a civil penalty proceeding. The facts

(footnote 1 cont'd)

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

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

[Emphasis added.]

of the case are briefly as follows. Between April 18, 1978, and May 9, 1978, Mine Safety and Health Administration (MSHA) inspectors issued eleven citations under section 104(a) of the Act to the Cement Division, National Gypsum Company. The citations involved alleged violations of various mandatory safety standards. With respect to each of the citations, the inspectors checked a box on the citation form that described the particular violation as being "significant and substantial".

The Secretary of Labor subsequently filed a petition for assessment of civil penalties with the Commission. Following an evidentiary hearing, the administrative law judge upheld ten of the eleven citations and assessed penalties accordingly. In addition, the judge found that nine of the ten violations were of a "significant and substantial" nature. 2/ In making those significant and substantial findings, the judge reviewed prior Board of Mine Operations Appeals case law and the 1977 Mine Act legislative history, and reluctantly agreed with the Secretary's position that a violation is of a significant and substantial nature if it presents more than a remote or speculative possibility that any injury or illness may occur--only purely "technical" violations or those with only a remote or speculative chance of any injury or illness occurring could not be cited as significant and substantial.

National Gypsum sought Commission review on the ground that the judge's interpretation of the involved significant and substantial provisions is overly inclusive. 3/ It did not, however, seek review

2/ We do not mean to mislead by use of the phrase "significant and substantial"; we use it merely for convenience as a short-hand for the complete statutory language, i.e., 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."

3/ Specifically, National Gypsum sought review of the significant and substantial findings made with respect to each of the following violations:

Citation No. 288294. This citation involved a violation of 30 CFR §56.9-87. The reverse back-up alarm signal on a bulldozer was not operating properly.

Citation No. 288295. This citation involved a violation of 30 CFR §56.4-9. A foreign substance had come into contact with duct insulation, causing the insulation to smolder. The duct was approximately four to six inches away from an adjacent walkway.

Citation No. 288296. This citation involved a violation of 30 CFR §56.12-32. A paddle switch junction box, located near an elevated walkway, was not covered by an electrical plate.

Citation No. 288297. This citation involved a violation of 30 CFR §56.11-1. A walkway adjacent to a conveyor belt contained up to twenty-four inches of spillage and presented a tripping hazard. The walkway was elevated thirty to forty feet above the ground.

Citation No. 288298. This citation involved a violation of 30 CFR §56.12-34. A 200-watt light bulb positioned above an elevated walkway was not protected by a guard.

(footnote 3 cont'd)

of the judge's findings of violation or of the penalties assessed. We granted National Gypsum's petition for discretionary review, and heard oral argument. 4/

Upon careful consideration of the question before us, we hold that the interpretation of the significant and substantial provisions applied by the judge is erroneous. Rather, for the reasons that follow, we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard 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.

The position advanced by the Secretary--that a violation is of a significant and substantial nature, so long as it poses more than a remote or speculative chance that an injury or illness will result, no matter how slight that injury or illness--would result in almost all violations being categorized as significant and substantial. Such an interpretation would be inconsistent with the statutory language and with the role we believe the significant and substantial provisions are intended to play in the enforcement scheme.

The Secretary's mechanical approach would leave little, if any room for the inspector to exercise his own judgment in evaluating the hazard presented by the violation in light of the surrounding circumstances. Yet, the statutory language contemplates more and is comparable to the burden placed upon the inspector when he determines that an imminent danger exists pursuant to section 107. Section 104(d)(1) provides that if an inspector finds a violation "and if he also finds that ... such violation" is of a significant and substantial nature he shall include such finding in the citation. We believe that the inspector's independent

(footnote 3 cont'd)

Citation No. 288826. This citation involved a violation of 30 CFR §56.12-34. A light bulb above a band-saw in the carpenter's shop was not protected by a guard.

Citation No. 288827. This citation involved a violation of 30 CFR §56.4-33. The valves on oxygen and acetelyne cylinders (used for welding) were left open while not in use. There were also ignition sources nearby.

Citation No. 288566. This citation involved a violation of 30 CFR §56.11-1. An accumulation of limestone, up to two feet deep and thirty feet long, prevented safe access to a conveyor belt.

Citation No. 288567. This citation also involved a violation of 30 CFR §56.11-1. A six-inch by eight-inch hole was observed by the inspector in the lower end of an elevated walkway.

4/ The American Mining Congress filed a brief and participated in the oral argument as amicus curiae. In general, it agreed with National Gypsum's position that the judge's interpretation of the involved significant and substantial provisions is too expansive.

judgment is an important element in making significant and substantial findings, which should not be circumvented. 5/

Interpreting the significant and substantial language in sections 104(d) and (e) to encompass almost all violations would render that language virtually superfluous. The language could be eliminated altogether with nearly no change in the categories of situations that would give rise to withdrawal orders under sections 104(d) and (e). We do not believe that Congress intended the significant and substantial provisions to be mere surplusage. Section 101(a) of the Act provides that the Secretary is to adopt mandatory health and safety standards "for the protection of life and prevention of injuries." Thus, the violation of a standard presupposes the possibility, however remote, of contribution to an injury or illness. The language of section 104(d) clearly indicates, however, that a significant and substantial finding is to be made in addition to a finding of a violation; something more than the violation of a standard itself is required. 6/ Thus, the interpretation urged by the Secretary, which would result in virtually all violations that may contribute to an injury being categorized as significant and substantial, would be inconsistent with the two-fold finding required by section 104(d). On the other hand, the interpretation we have made gives substantive meaning to the significant and substantial language, rather than rendering it superfluous, and is consistent with the two-fold finding required by section 104(d).

The interpretation argued by the Secretary would have an untenable effect on the implementation of section 104(e)'s "pattern" provisions. Sub-section (e)(1) provides that an operator can be subjected to withdrawal orders if it has a pattern of significant and substantial violations and is so notified by the Secretary. If a violation of a significant and substantial nature is found within 90 days of that notice, a withdrawal order is to be issued. If that occurs, any other violation of a significant and substantial nature found thereafter likewise results in the issuance of a withdrawal order. Thus, under the Secretary's interpretation of the significant and substantial provision, once found to have a pattern of violations (of almost any nature), an operator would face continual

5/ This contrasts sharply with MSHA's current practice. Inspectors involved in this case testified that they automatically marked all violations significant and substantial except technical violations. This practice is in accord with the instructions issued to them by MSHA's Administrator for Metal and Nonmetal Mine Safety and Health in a memorandum dated July 5, 1979, that provides in part: "MSHA's position on 'significant and substantial' violations continues to be that all violations of mandatory standards are 'significant and substantial' except those violations posing no risk of injury at all, purely technical, or bookkeeping violations, or those violations which pose risks having only a remote or speculative chance of happening."

6/ Section 104(d) says that if the inspector finds a violation and "if he also finds" that violation to be of a significant and substantial nature, he shall include that additional finding in the citation.

shutdown for almost all subsequent violations that occur in its mine, until the pattern notice is lifted. Yet, subsection (e)(3) provides that the pattern is terminated only upon an inspection of the entire mine that discloses no violations of a significant and substantial nature. If the Secretary were correct that almost all violations are of a significant and substantial nature, most mines would never be relieved of withdrawal order liability under the pattern provisions, particularly large mines, no matter how diligent in improving safety practices, for as a practical matter an inspection of the entire mine will rarely, if ever, disclose no violations. No matter how hard an operator worked to eliminate and prevent violative conditions, it would rarely be totally successful. Section 104(e) would, in such circumstances, take on a wholly punitive character; it would serve as continued punishment for a pattern having occurred in the first instance, rather than serving as an incentive to improve safety conditions. We simply do not believe that section 104(e) is intended to operate in such a manner.

The interpretation we have placed upon the significant and substantial provisions is, we believe, consonant with the statutory language and with the overall enforcement scheme. The provision involved applies to violations that "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Although the Act does not define the key terms "hazard" or "significantly and substantially", in this context we understand the word "hazard" to denote a measure of danger to safety or health, and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. ^{7/} In other words, the contribution to cause and effect must be significant and substantial.

^{7/} Webster's Third New International Dictionary, unabridged, 1971, in part defines "hazard" as follows:

... 2a: an adverse chance (as of being lost, injured, or defeated): DANGER, PERIL ... b: a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty ... c: a condition that tends to create or increase the possibility of loss....

Black's Law Dictionary, 5th ed., 1979, refers to "hazard" in part as "a danger or risk lurking in a situation which by change or fortuity develops into an active agency of harm...." The word "significant" is defined in Webster's in part as follows:

... 3a: having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE ... c: probably caused by something other than mere chance

"Substantial" is defined in part as "... lc: being of moment: IMPORTANT, ESSENTIAL ... 4a: being that specified to a large degree or in the main." Id.

Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger. (An "imminent danger" is a condition "which could reasonably be expected to cause death or serious physical harm" before the condition can be abated. Section 3(j)). At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes--mere existence of a violation, and existence of an imminent danger, the latter of which contains elements of both likelihood and gravity. As already noted, this interpretation does not render the significant and substantial language superfluous, is consistent with the two-fold finding required by section 104(d), and requires a meaningful judgment by the inspector in each case. It also is consistent with a sensible enforcement scheme under section 104(e).

Our interpretation is also more consistent with the Act's overall enforcement scheme, which generally provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior. For example, the violation of any mandatory standard requires issuance of a citation and assessment of a monetary penalty. Sections 104(a) and 110(a). If, after having the violation brought to its attention by issuance of the citation, the operator does not abate the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and an even greater monetary penalty may be assessed. Sections 104(b) and 110(b). Under section 104(d), if a violation occurs as to which significant and substantial and unwarrantable failure findings are made, further unwarrantable failure violations will trigger automatic withdrawal orders--the shutdown is immediate; the operator will not first be given an opportunity after citation to abate. Similarly, the same consequences occur under section 104(e) if, after a pattern of significant and substantial violations is established, further violations of a significant and substantial nature occur. We believe that the more severe sanctions under these sections are aimed at more serious conduct by operators who have demonstrated a less than diligent regard for compliance with the mandatory safety and health standards under the Act. 8/ Interpreting the significant and substantial provisions as we have is more consistent with this enforcement scheme than the interpretation advanced by the Secretary.

Finally, in interpreting the significant and substantial provisions to apply to violations where there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature, we have carefully examined the relevant

8/ If a condition exists that is so serious to safety or health so as to constitute an imminent danger, section 107 provides for an immediate shutdown, regardless of the operator's behavior and without an opportunity to first abate.

legislative history, including the Senate Report. 9/ We found those references contradictory, at times directly at odds with the Act's language, and thus not helpful in resolving the issue before us. On

9/ The Senate Committee in relevant part stated:

Unwarranted failure closure orders

Section [104(d)] contains another sanction, carried over from the Coal Act ...; the unwarranted failure closure order. Like the failure to abate closure order of section [104(b)], the unwarranted failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions violative of the Act which the operator knew of or should have known of and had not corrected.

* * *

... Section 104(c) [of the Coal Act] provides that where an inspector finds a violation which, while not causing imminent danger, could "significantly and substantially contribute to the cause and effect of a mine safety or health hazard" (the so-called "gravity" test), and where the violation was the result of the operator's "unwarrantable failure" to comply with the Act, the inspector shall so note such findings in his notice of violations....

The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the "gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).

The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Section 104(c)(1).

The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).

The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued.

S. Rep. 95-181, 95th Cong., 1st Sess., at 30-31 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 618-619 (1978) ("Legis. Hist."). The Senate Report states that the meaning of the significant and substantial provisions as established in section 104(d)(1) is also to be applied to section 104(e). See Legis. Hist. at 620-621.

the one hand, the Senate Report seems to support the Secretary's position when, in discussing the significant and substantial provisions, it states that it is "the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard that poses a danger to miners as long as they are not of a purely technical nature." Legis. Hist. at 619. On the other hand, this passage is directly contrary to the significant and substantial language in the Act. The Act requires that a "hazard" be present, yet the Senate Report states that there need not be a "hazard." Furthermore, other portions of the Senate Report refer to the significant and substantial provisions as the "gravity test", which connotes consideration of both the seriousness of an injury and the likelihood of its occurrence. 10/ Statements on the Senate floor by Senators Harrison Williams (then-Chairman of the Senate Committee on Human Resources) and Richard Schweiker (author of section 104(e)) during debate on the section 104(e) pattern provisions are also contrary to the Secretary's position and to that portion of the Senate Report quoted above. 11/ Thus, we did not find the legislative history a reliable or helpful aid in discerning Congress' intended interpretation of the significant and substantial provisions. 12/ Neither the interpretation argued by the Secretary nor the interpretation we adopt here today is compelled or precluded by the legislative history; that history simply is not dispositive.

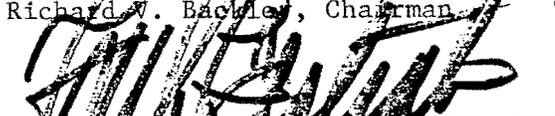
10/ Cf., 30 CFR §100.3(e).

11/ Senator Williams stated that section 104(e) is aimed at patterns of violations "which could significantly and substantially affect the health and safety of miners." 123 Cong. Rec. S. 10204 (daily ed. June 20, 1977). Senator Schweiker stated that significant and substantial violations are violations "of a serious nature." 123 Cong. Rec. S. 10279 (daily ed. June 21, 1977). He said that "no closure order [under section 104(e)] is filed until after the owner is given notice that he has established a pattern and then only if he has another violation of a serious nature." Id. (emphasis added.)

12/ The Senate Report also endorses the Board of Mine Operations Appeals decision in Alabama By-Products Corporation, 7 IBMA 85. Because we find the Senate Report to be contrary to the statutory language and other legislative history, and to be internally inconsistent, we do not believe that decision is controlling. In any event, we think it has been misread and misapplied. In Alabama By-Products, the Board rejected its earlier view that in order to support a significant and substantial finding under the 1969 Coal Act, the hazard presented had to be so serious "as to very closely approach a situation of 'imminent danger'." Rather, the Board stated that "an inspector need not find a risk of serious bodily harm let alone death" before a significant and substantial finding could be made. At the other end of the spectrum, the Board stated that violations that are purely technical in nature and which pose no threat of causing an injury or illness could not support a significant and substantial finding. We do not read the Board as having held that all such violations must be cited as significant and substantial. The Board stated that the question was one in each case for the exercise of reasonable judgment by the inspector dependent on the peculiar facts and circumstances of each case. The Board also stated that defining significant and substantial as a "reasonable possibility of danger to the health and safety of the miners" was "fairly close to the mark in our opinion." Thus, the Board seems to have tried to define a category of violations that could not be cited as significant and substantial, not defining a category of violations that must be so cited.

For the foregoing reasons, the decision of the administrative law judge is reversed and the case is remanded for further proceedings consistent with this opinion.


Richard V. Backe, Chairman


Frank J. Strap, Commissioner


Marian Pearlman Nease, Commissioner

Commissioner Lawson, dissenting;

The majority's opinion herein would discount evidently successful administration of the Federal Coal Mine Health and Safety Act of 1969 (as amended in 1977) in determining when a violation may be found to be "significant and substantial" under the 1977 Act.

The decision under review upholds clearly applicable precedent since Alabama By-Products, 7 IBMA 85 (1976). The administrative law judge's finding is that a violation is of a significant and substantial nature if it presents more than a remote or speculative possibility that any injury or illness may occur, and only purely technical violations or those with only a remote or speculative chance of any injury or illness occurring may not be cited as significant and substantial.

The majority would, however, overturn this decision to hold "...that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard 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." The mine inspector would be required to determine the seriousness of the hazard contributed to by the violation in terms of the potential injury or illness presented. In addition, he would be obligated to consider the likelihood of the injury or illness occurring.

The appellee's position is also found wanting by my colleagues since this "would result in almost all violations being categorized as significant and substantial".

The majority's concern is also expressed with the effect that the interpretation argued for by the Secretary, that is, existing law, would have on what are categorized by section 104(e) as "pattern" violations.

Conceding that the Act does not define the key terms "hazard" or "significantly and substantially" the majority would nevertheless "understand" the word "hazard" to denote a "measure" of danger to safety or health, and that a violation "significantly and substantially contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health." [Emphasis added].

They aver that their interpretation "...is also more consistent with the Act's overall enforcement scheme, which generally provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior". But most important, the majority ignores the legislative history by stating it to be "...contradictory, at times directly at odds with the Act's language, and thus not helpful in resolving the issue before us".

I must disagree, since the majority's opinion in this case would mistakenly engraft upon the Act various adjectival conditions not a part of the statute itself. The central statutory language now before us provides that:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.... [Section 104(d)(1); emphasis added].^{1/}

^{1/}See also Section 104(e)(1): "If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall 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." [Emphasis added].

Nowhere in the statute is there any qualification of the operative language "...that...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...."

Nor do the words of the statute anywhere reflect any intent to narrow or restrict such violation to one where, "...there exists a "reasonable likelihood" that the hazard contributed to would result in an injury or illness of a "reasonably serious" nature.

The majority's tampering will add to the statute words of limitation which will require every mine inspector to make judgments, not only as to the "likelihood" of the effects of the hazard, and the "reasonable[ness]" of that "likelihood", but will also demand medical predictions be made as to whether a hazard will result in an injury or illness of a "reasonably serious" nature. Must the inspector henceforth determine, not only whether the roof is safe or unsafe, but whether the unconscious miner who is the victim of a roof fall has suffered 'merely' a concussion, or a fractured skull? Would only the hazard in the latter case, under the majority's rationale, be one which is significant and substantial?

We will now have a "one toe, two toe" formula, a distinction based not upon mining but upon the extent of the injury and medically unforeseeable consequences. Are we, this Commission or its judges, or the inspectors at the mine thereby better equipped to render the judgments which will be required under this formulation? In an admittedly somewhat imprecise area, does this highly qualified and subjective articulation represent an improvement over existing practice? Neither our predecessor, BMOA, nor the Congress, has suggested such a change is feasible, desirable or in accord with their respective understandings of the language or purpose of the Act.

In summary, the standard proposed by the majority would in reality measure the significance and substantiality of the violation after the fact, and add to the Act numerous highly subjective variables, among them the magnitude of the potential injury, the (unspecified) circumstances surrounding the violation, and the post hoc accuracy of the inspector's medical judgment as to the effect[s] of the hazard.

The majority's suggested standard would be even more impossible of application in those cases in which mandatory health standards are violated, as contrasted with those which regulate only safety.

In the Federal Coal Mine Safety Act Amendments of 1965 (amending the 1952 Coal Act), where the term "significant and substantial" first appeared, such referred only to violations "of such nature as could significantly and substantially contribute to the cause or effect of a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident." [30 USCA 473(d)]. [Emphasis added]. In the 1969 Act (i.e., section 104(c) of the 1969 Act, in all relevant respects identical to section 104(d) in the 1977 Act), the Conference Committee substituted the word "hazard" for "accident", thus since at least 1969 clearly including health as well as safety within the purview of this section.

While one might well question the significance and substantiality of a single exposure to coal dust, or radon daughters, or noise, for example, the adverse, even lethal cumulative effects of these exposures is beyond dispute.

The regulations which limit miners' exposure to radon daughters, for example, express such limitation in terms of calendar year exposure.^{2/} A single exposure may consequently be either significant and substantial, or not, under the majority's criteria. This is not only meaningless but one which would require the forecasting ability of an oncologist, not a mine inspector, nor I suggest this Commission. Nor is this an isolated example. Exposures to noise and the permissible limits to which miners may be exposed are time specified,^{3/} and the adverse health effects thereof obviously based on cumulative exposure.

The breathing of coal dust, perhaps the greatest single health hazard to which coal miners are exposed ^{4/} is also cumulatively deadly, but presumably of little significance to the miners' lungs if exposure is limited to a day or a week.

^{2/}See (e.g.) 30 CFR 57.5.38: "Mandatory. No person shall be permitted to receive an exposure in excess of 4 WLM in any calendar year."

30 CFR 57.5.39: "Mandatory. Except as provided by standard 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 WL in active workings."

^{3/} 30 CFR 56.5-50: "...Permissible Noise Exposures

Duration per day, hours of exposure	Sound level dBA, slow response
8.....	90
6.....	92
4.....	95
3.....	97
2.....	100
1 1/2.....	102
1.....	105
1/2.....	110
1/4 or less.....	115....."

^{4/}See 30 CFR 75.400 to 75.403.1.

The majority's factual premises are also inaccurate. Currently, and for at least the last five years, a violation is evaluated as "significant and substantial" so long as it poses more than a remote or speculative chance that an injury or illness will result. The majority's apprehension that continuing under this criteria "would result in almost all violations being categorized as significant and substantial", is not borne out by the record. To the contrary, as counsel for the American Mining Congress here conceded at oral argument, only 62 percent of all coal mine violations were characterized as significant and substantial. This hardly rises to the level of "almost all violations."^{5/}

Beyond the logical frailty of the majority's interpretation of the statute is the violence done to the intent of Congress, unambiguously expressed in the legislative history of the 1977 Act.

The Senate report accompanying the Act discusses those cases which have interpreted "significant and substantial":

The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the "gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).

The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA-85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1). The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).

^{5/}While, at least for the first quarter of 1979 to which this operator points, a much higher percentage of metal and non-metal citations were categorized as "significant and substantial", this, if representative data (it is not a part of the record below, but was secured by this operator from MSHA apparently in response to a verbal request) reflects only one calendar quarter's data within a very limited (less than one year) experience of the Secretary with metal and non-metal mines, as contrasted with over ten years' experience with coal mine inspections. [American Mining Congress Brief, Appendix B; Oral Argument, TR-45].

The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued". [S. Rep. 95-181, 95th Cong., 1st Sess., at 31 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619 (1978).

Reinforcing that Congressional intent is the Conference Report which accompanied the Act as passed:

The conference substitute conforms to the Senate bill. While a notice may be based on the existence of a pattern of violations of one standard or of a number of different standards it is the intention of the conferees that the pattern can be based only on violations of standards that "significantly or substantially contribute to the cause and effect of a mine safety and health hazard". After the notice of the existence of a pattern although an order could be issued under this provision for a violation which is not one which makes up the pattern, the violation which results in the issuance of the order must be one which could "significantly or substantially contribute to the cause and effect of a miner safety and health hazard". Thus, just as the pattern may not be based merely on violations of technical standards, the order under this section cannot be based on violations of technical standards. [Legis. Hist., supra, at 1326-1327]. [Emphasis added].

The Congress has thus clearly and expressly rejected the BMOA Eastern Associated Coal Company case, 3 IBMA 331, 355 (1974), which held that the violation must pose "a probable risk of serious bodily harm or death", and was rejected by the BMOA itself in Alabama By-Products, (supra).

In discrediting the Eastern case, the BMOA in Alabama, (supra) interpreted "significant and substantial" to preclude substantial and significant citations under 104(d)(1) only when no risk of injury is posed, and the violation poses a source of injury which has only a remote or speculative chance of occurring.

Congress, therefore, in following the BMOA's lead and rejecting the test posed by Eastern, charted no new path, but concurred in the view that Eastern was wrong because of the BMOA's essential equation there of "significant and substantial" with "imminent danger". For this reason alone, the majority's decision and its regressive return to the Eastern test should be rejected. Their extended discourse on the Senate Committee's Report

and the Senate's claimed misreading of Alabama, (supra) is, with all due respect, irrelevant. Even if the Committee misread Alabama, the Committee's Report provides a clear indication as to Congress' own understanding of the significant and substantial clause, as indeed was found to be the case by the judge herein. [ALJ Decision at 6].

Beyond these obvious reasons for leaving well enough alone, it must be remembered that when an operator has placed itself in the 104(d) 'chain' provided for by the statute,⁶ it is as a result not only of "significant and substantial" findings, but as a consequence also of an unwarrantable failure determination. Although the requirement of "unwarrantable failure" is not necessary in pattern (section 104(e)) violations, the Secretary has thus far promulgated no regulations implementing 104(e), to explain how and when a "significant and substantial" finding will translate into a so-called "pattern" violation. The maxim "If it's not broke, don't fix it", could well have as a corollary: "If the case is not before you, don't decide it."

This makes even more startling the majority's willingness to leap in to correct the hypothetical spectre of "continual shutdown", the consequence of a pattern of violations. For, as conceded by the counsel for the Secretary in oral argument in this case:

"The Secretary hasn't issued a notice pattern yet. The Secretary hasn't issued a withdrawal order based on a notice of pattern yet. We haven't got a case that presents that yet and I don't believe the Commission should engage in this unwarranted speculation that the National Gypsum invites you to do, that we will not be able to effectively administer the Act if this definition of significant and substantial is adopted." [Oral Argument, TR-36].

In short, not one "pattern" notice has yet been issued and the rules to establish criteria for the existence of a pattern as required by section 104(e)(4) have yet to be promulgated.

§/104(d)(1) further provides: "...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". [Emphasis added].

What this demonstrates about the enforcement of section 104(e) of the Act may well raise one's eyebrows, but it can hardly be maintained, given this record, that any operator has reason to fear a 104(e) based closure of its mine. The adoption of all-encompassing rules to be applied to cases not yet--perhaps never--to be before us is both judicially premature and the unwise rendering of a judgment in a vacuum, before any experience or factual context exists within which to make such a decision. We should not promulgate rules for deciding non-existent cases which are not now and may never be before us.

Beyond the majority's encroachment on the statute and the legislative history, they would also appear to have erred semantically. "Significantly and substantially" are adverbs, which beyond argument modify "contribute", not "hazard", as was indeed necessarily conceded by counsel for the operator on oral argument. [Oral Argument, TR-23, 49, 50]. To recast the statute in terms of the significance or substantiality of the hazard, and the predicted result thereof, is simply not in accord with either the English language or the language of the Act.

The structure of the 1977 Act also reflects a considered and progressive pattern of sanctions unrelated to the seriousness of the injury, but rather focused on the operator's knowledge and frequency of violation, the mine operators' efforts toward abatement, and the efficacy of such efforts. In short, increasingly strong remedies for increasingly serious violations. Under the statute:

- (1) Section 104(a) treats with the issuing of citations which may be with or without significant and substantial findings, and the fixing of abatement times for 'simple' violations of the Act, or mandatory health or safety standards promulgated thereunder.^{7/}
- (2) Section 104(b)) specifies the action to be taken if a 104(a) violation has not been abated within the period of time originally fixed, or as subsequently extended, and the action to be taken by the inspector (issuance of a limited withdrawal order from the area affected) in that circumstance.
- (3) Section 104(d) provides for the issuance of citations if the 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 the violation is caused by an "unwarrantable failure" of the operator to comply with mandatory health and safety standards. Further, if during the same or any subsequent inspection within ninety days, the inspector discovers another unwarrantable failure violation, whether or not that violation is significant and substantial, a withdrawal order shall issue.

^{7/}In fact, all the citations issued in the case under review were issued under Section 104(a) with significant and substantial findings.

- 4) Under 104(e), if an operator is a habitual violator and has a "pattern" of (significant and substantial) violations, it is given written notice that such pattern exists, and, upon any inspection within 90 days after that notice issues, the finding of an additional significant and substantial violation will trigger a withdrawal order.
- (5) Under section 107(a)^{8/} the ultimate sanction of immediate mine closure (either in whole or in part) is imposed if the existing condition is one whose consequences are so grave that safe operation of the mine cannot be had until after the condition has been abated.
- (6) Finally, section 108(a)⁽²⁾ authorizes the Secretary to seek immediate injunctive relief if the pattern of significant and substantial violations persists, or the operator otherwise refuses to comply with any order or decision issued under the Act.

The quarrel of the majority with the "technical/non-technical" distinction also appears to be, upon examination, semantic. At least since Alabama By-Products, (supra), it would appear that this is merely the Secretary's shorthand--perhaps inartful--articulation of the judgment to be made when a citation with significant and substantial findings is to be issued.^{9/} That is, when the violation poses no risk of injury at all, or is a bookkeeping violation, or poses a risk which only has a remote or speculative chance of occurring, it is "technical", and no significant and substantial citation will issue.

The word "technical"--evidently the basis for the majority's unhappiness--has been defined as "a technicality", Webster's Unabridged. This distinction appears as easily understood--indeed better so--than a demarcation founded upon an inspector's or judge's or Commissioner's, inexpert evaluation of (e.g.) the physiological effects of a trauma or radiation upon the health of the victim. As a foundation for meaningful

^{8/}Section 107(a) provides: "If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110."

^{9/}The present formulation is framed negatively (i.e., under what circumstances a significant and substantial violation does not exist) (American Mining Congress Brief, Exhibit "F"). The suggestion that this is somehow of a lesser validity than a positively articulated standard--a distinction without a difference--is merely another attack on Alabama and the language of the Act.

analysis, I can discern no improvement which will result from this alteration of the existing procedure, and no benefit accruing to either the inspector, the miner, or the mine operator. Unless the production of litigation is our goal, I confess that I can ascertain no purpose to this redefinition.

To the extent that curtailing of the inspector's judgment may create a "management problem" (in limiting his discretion not to issue significant and substantial citations) (Oral Argument, TR-42), this would appear to be ill-suited to correction by this Commission, certainly not in the sweeping fashion advocated by the majority.

The record is replete with "agreement" that the inspector's judgment as to what violations are substantial and significant should be large: "...very wide area of discretion..." "reasonable judgment on the facts and circumstances of the case." [Oral Argument, TR-14]; the inspector's "commonsense" [Oral Argument, TR-24]; "reasonable and evenhanded" [Appellant's Brief at 5].

To add to the inspector's burden the medical "likelihood" and "reasonableness" criteria enumerated in the majority's opinion makes even more difficult meaningful inspectorial judgment, a judgment best exercised at the mine where the violation, and the hazard, exists.

Curiously, the majority claims to recognize the necessity for "the inspector to exercise his own judgment in evaluating the hazard presented by the violation in light of the surrounding circumstances. ...We believe that the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented."

However, reverting to the discredited Eastern decision's criteria, found unacceptable by both the BMOA and the Congress, necessarily has the opposite effect, and is less, not more consistent with the statutory scheme set forth above.

I have no quarrel with the inspector exercising the independence of judgment claimed to be the intent of the majority. Indeed, I see no practical alternative. Would limiting this judgment by forcing the inspector to predict the seriousness of the injury--much less the illness--which might befall the hapless miner, be of meaningful assistance to either the miner or the operator? Should the operator's responsibility rise or fall depending upon the durability of his work force? Should the protection of the miner 10/ be tied to the severity of the illness or injury or the likelihood of death?

One must quarrel with the proposition that this Commission is better able to make the majority mandated necessarily medical predictions than the inspector; in truth neither we nor the inspector are, either by training or experience, competent to so forecast.

10/Section 2(a) provides: "The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;"

The majority's claim that large mines and mine operators will be more subject to the threat of closure than small mines also sets up a curious classification. No evidence appears in this record, or elsewhere to my knowledge, in support of the proposition that large mine operators are more prone to violate the Act than are smaller ones. Indeed, the records of the MSHA Assessments Office for the calendar year 1980 reveal that violations per inspection day are greatest for both coal and metal/non-metal mines for the smallest operators, and second greatest in the average number of violations.^{11/}

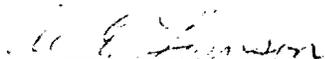
In any event, no rationale commends itself in support of the idea that large mines, if unsafe, should be given a waiver merely because of size. To the contrary, it would appear as if the large mine operator with its presumably greater resources and sophistication should be better able to assure the safety and health of the miners than the small mine owner.

While the majority is correct in noting that "significant and substantial" is not specifically defined in the Legislative History of the 1969 Act--nor earlier--it has been clearly articulated in the Legislative History of the 1977 Act, and expressly approved by the Congress in Alabama, (supra).

We are bound by this Congressional expression, and the Senate Report's^{12/} clear adherence to the rationale of Alabama, subsequently and correctly adhered to by the judge in this case. To disregard the Congressional will, the sole authoritative and proper source of the judgment we must render, is in derogation of our duty under the Act. The majority is not in this case merely caulking chinks in the statute, but rather ignoring legislative direction as to the meaning of the words of the Act. Whether or not the inspector or the judge has primary or secondary responsibility for determining whether a violation is "significant and substantial", the controlling criteria is that significant and substantial citations may not be issued only when no risk of injury is posed, or one which has only a remote or speculative chance of occurring. We have been given no authority to weigh injuries, or to determine the possibly serious or fatal consequences of a violation.

The judgment to be made must therefore inevitably be unbounded by facile formulas or quasi-medical constraints. Congress intended to protect the miner from any and all injuries and illnesses resulting from mining, not just from those of a "reasonably serious nature" as espoused by the majority.

I therefore dissent.



A. E. Lawson, Commissioner

^{11/}MSHA Office of Assessment Report, dated January 14, 1981.

^{12/}The House Report is silent on "significant and substantial." Legislative History of the 1977 Act, 376-377, 396-397.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 10, 1981

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. SE 79-16-M
v. :
 :
IDEAL BASIC INDUSTRIES, :
CEMENT DIVISION :

DECISION

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). At issue is whether the administrative law judge erred in vacating a citation that alleged a violation of 30 CFR §56.9-2. That standard provides:

Equipment defects affecting safety shall be corrected before the equipment is used.

While inspecting the Castle Hayne Quarry and Mill on July 25, 1978, a Mine Safety and Health Administration inspector cited Ideal Basic Industries for violating 30 CFR §56.9-2. The citation (No. 103843) alleged:

The hydraulic side coupling for the track mobile No. 1 was broken. Railroad cars could not be stopped due to this in case of an emergency.

After an evidentiary hearing, the administrative law judge vacated the citation. 1/ For the reasons that follow, we reverse.

The track mobile involved is a vehicle similar to a locomotive. It is used to push or pull railroad freight cars loaded with bulk cement. At the time of inspection, one end had a defective hydraulic coupling; the "knuckle" was not functional. 2/ The other end of the mobile had a manual coupling which did work. Neither party disputes that the hydraulic coupling was inoperable. The Secretary claimed that the track mobile had been in use, even if the defective coupling had not been used; the operator countered that the track mobile, if used at all, was only used with the working manual coupling.

1/ The judge's decision is reported at 2 FMSHRC 1352 (June 9, 1980).

2/ The term "knuckle" refers to a mechanism on the locomotive that holds "onto the coupling on the railroad cars." Tr. 163.

The judge vacated the citation based on his finding that the Secretary "failed to establish by a preponderance of the evidence that the defective coupling in question was in fact used prior to the time it was replaced by a new one." 2 FMSHRC at 1363. The Secretary contends that the judge has construed the standard too narrowly, arguing that a violation occurs if the equipment is used and the defective component could be used. Ideal Basic argues that the question need not be reached because, it contends, the record fails to even establish that the track mobile was used. We first address the proper interpretation of the standard, and then Ideal Basic's contention.

We hold that the judge's interpretation of the standard is too narrow. As appears from his application of the standard to the facts in this case, under the judge's interpretation a defective component does not "affect safety" if it is not used, even if the equipment containing the defective part is used.

The Secretary correctly points out, however, that the defective coupling could have been used while the track mobile was in operation--nothing precluded such use. 3/ Although the plant manager testified that the employees had been instructed not to use the faulty coupling, the plant administrator testified that the hydraulic coupling was identical in appearance to the operable manual coupling. There was no evidence presented that the defective coupling had been conspicuously marked. Thus, the defective coupling could have been used inadvertently.

Accordingly, we hold that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 CFR §56.9-2. This interpretation is more likely to prevent accidents, a primary goal of the Act. Under the judge's interpretation, one gets much closer to an accident occurring before correction is required.

Our interpretation of the standard is consistent with our decision in Eastern Associated Coal, 1 FMSHRC 1473 (October 23, 1979). The operator had been cited for an inoperable parking brake on a jitney. We held that the violation was not abated (i.e., the violation still existed) by placing a danger tag on the jitney, which remained operable in a working area:

3/ If the defective coupling were used, obvious dangerous hazards would occur. Because the mobile was used to push railroad cars, using the end with the broken coupler could likely lead to cars--not in fact coupled to the mobile--freewheeling through the yard. (The braking system of the track mobile is used to brake the railroad cars that it is pushing.)

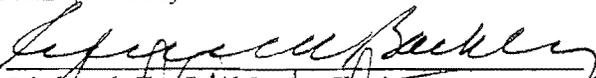
We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored.

1 FMSHRC at 1474. The reasoning of Eastern Associated is applicable here as well, where there was not even a danger tag placed on the defective coupler.

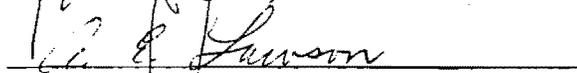
We turn now to Ideal Basic's evidentiary argument that the track mobile itself was not used. Although the judge did not specifically find that the track mobile was used, we believe he did so impliedly. In his summary of the evidence he refers to the inspector's testimony that, while he did not see the mobile in operation, he was told by unidentified employees that the mobile had been used while the coupling was defective. He also cites Ideal Basic's testimony that this track mobile was the company's only working track mobile at the time of the inspection (its other track mobile was in the repair shop at the time), that employees had been instructed not to use the faulty coupling, that at the time of the citation the track mobile was parked at the pack house (which is a shipping point where the railroad cars are loaded), and that cars were loaded the day before the inspection. There is no testimony that the track mobile was not used after the coupler became defective. In light of this testimony and the Secretary's unrefuted evidence, though hearsay and circumstantial, we conclude that the track mobile had been operated while the coupler was broken and that the judge so found (even though he found no evidence that the coupler itself had been used).

Even if, however, the evidence were insufficient to establish that the track mobile was operated while the coupler was broken, we find that the mobile was nonetheless "used" within the meaning of the standard. If equipment with defects affecting safety is located in a normal work area, fully capable of being operated, that constitutes "use". Here, at the time of the inspection, the mobile was parked in a usual location, right next to the area where railroad cars--which the mobile is used to move--are loaded. It was neither rendered inoperable nor in the repair shop. To preclude citation because of "non-use" when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.

In summary, we believe the evidence establishes "use" of the track mobile. Accordingly, the judge's decision on this citation is reversed and remanded for assessment of a civil penalty.


Richard V. Backley, Chairman


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

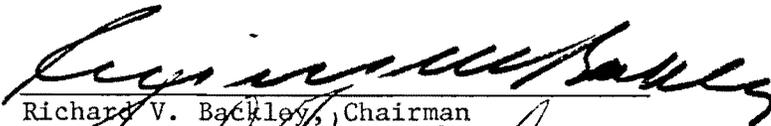
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 20, 1981

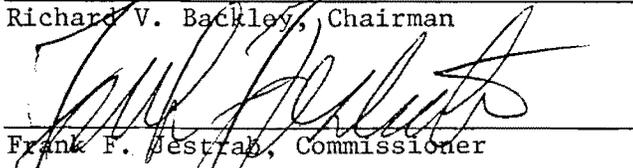
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 81-17-D
	:	
MULLIN CREEK COAL CO., INC.	:	

ORDER

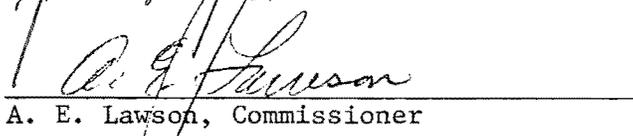
A document entitled "Petition for Full Commission Review of Bench Decision" was filed with the Commission by the operator on April 16, 1981. As of this date, however, the judge has not reduced his bench decision to writing. Accordingly, the petition is dismissed as premature, subject to refiling after the issuance of a written opinion by the judge. (29 USC 823(d)(1), Commission Rule 65(a), Council of Southern Mountains, Inc. v. Martin County Coal Corp., 2 FMSHRC 3216 (November 12, 1980)).



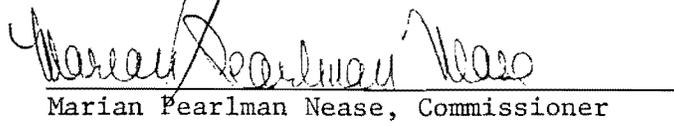
Richard V. Backley, Chairman



Frank F. Bestraf, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 29, 1981

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

v.

NACCO MINING COMPANY

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Docket No. VINC 76X99-P

IBMA No. 77-15

DECISION

This penalty proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977)(the 1969 Coal Act). 1/ The issues are whether the administrative law judge erred in determining that Nacco Mining Company violated 30 CFR §75.200 and in assessing a civil penalty of \$500 for that violation.

Section 75.200, which is drawn from section 302(a) of the 1969 Coal Act, provides in pertinent part: "No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan...." The record discloses that a company section foreman, while supervising two miners cutting a roof belt trench, proceeded alone past the last row of permanent supports under loose, unsupported roof, where a large rock fell on him causing the injuries from which he later died. 30 CFR §75.200-13(a)(2) sets forth an exception to section 75.200 permitting "persons engaged in installing temporary support ... to proceed beyond the last permanent support [before] such temporary supports are installed." Nacco's approved roof control plan included an identical exception.

The judge upheld the notice of violation of section 75.200, finding that the foreman went beyond permanent supports into an area where there were no temporary supports and that he was not installing temporary supports or inspecting the roof prior to such installation while in this area. In assessing a civil penalty of \$500, the judge determined inter alia that the gravity of the violation was very serious and that Nacco's 40 violations of section 75.200 within 2 years constituted a significant history of prior violations. The judge also concluded that Nacco was

1/ Section 109(a)(1) provided in part:

The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act ... shall be assessed a civil penalty by the Secretary.... In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

non-negligent. Cross-appeals were filed by Nacco and the Secretary as to the judge's findings of liability and non-negligence respectively.

We affirm the judge's liability findings. A section foreman's act of violation is attributable to the operator under the agency concepts embodied in the 1969 Coal Act which imposes liability without regard to fault. Ace Drilling Coal Co. Inc., 2 FMSHRC 790 (1980), aff'd mem., (3d Cir., No. 80-1750, January 23, 1981); Peabody Coal Co., 1 FMSHRC 1494, 1495 (1979); United States Steel Corp., 1 FMSHRC 1306, 1307 (1979). See also Pocahontas Coal Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), aff'g 8 IBMA 136 (1977).

In this case, substantial evidence amply supports the judge's finding that the foreman violated section 75.200. One of the miners whom the foreman was supervising testified without contradiction that the foreman had traveled under unsupported roof 10 to 12 feet past the last permanent supports and was neither installing temporary support nor inspecting the roof prior to such installation. Tr. 36-37, 40-42, 46-47. This testimony was fully corroborated by MESA's accident investigation report (Exh. P-4). Under Nacco's roof control plan and mining practices, the proper distance between the last permanent supports and the next temporary supports was five feet. Tr. 41-42, 46. There was no need or justification for the foreman's proceeding so far past the five-foot limit if, in fact, he was engaged in installing temporary support. We therefore reject Nacco's argument that the foreman's conduct was permissible under the temporary support-installation exception of section 75.200-13(a)(2) and the roof control plan. 2/ Given these facts and under the settled authority set forth above, the judge did not err in finding Nacco liable for its foreman's violation of section 75.200. 3/

2/ Nacco argues that the eyewitness' testimony on how far the foreman had proceeded past permanent support was unclear; however, the judge elicited a final clarification (Tr. 46-47) which we conclude removes any doubt engendered by uncertainty in the witness' initial testimony. Moreover, Nacco's claim that "there [is no] reliable evidence to show exactly where [the foreman] was when the rock fell" (Br. 11 (emphasis in original)) is undercut by its own contemporaneous accident report which also placed the scene of the accident 12 feet past the permanent support. R. Exh. 1, accident sketch map following p. 4.

3/ Nacco's reliance on North American Coal Corp., 3 IBMA 93 (1974), and Eastern Associated Coal Corp., 4 IBMA 184 (1975), is misplaced. In North American, the Board stated in footnoted dicta that an operator might escape derivative liability if apparently violative conduct stemmed from a miner's negligent failure to comply with the operator's safety requirements. 3 IBMA at 108-109 n. 10. To the extent that these dicta suggest an exception to the liability without fault structure of the 1969 Coal Act, they are out of line with, and do not survive, the well established precedent cited above. The Board itself substantially rejected the North American footnote in Webster County Coal Corp., 7 IBMA 264, 266-268 (1977), issued after the parties filed their briefs on appeal herein. We note that this case does not require us to express a view on North American's precise holding interpreting the duty imposed on operators by 30 CFR §75.1720. See United States Steel Corp., 1 FMSHRC at 1307 & n. 3; Kaiser Steel Corp., 1 FMSHRC 343, 345 & n.6 (1979). Eastern Associated Coal Corp. dealt only with a narrow question of whether the presence of a person under unsupported roof constituted a single or double violation of section 75.200 on the facts of the case, and did not address the larger questions of liability and what duty of care section 75.200 imposes on operators. 7 IBMA at 192-195.

As to the judge's penalty findings, his determination that Nacco was not negligent raises two issues: the appropriateness in general of considering a foreman's negligence in assessing a penalty against the operator, and whether the judge properly declined to do so in this case. Concerning the first question, the judge held that it is appropriate to "hold the operator accountable for the negligence of one of its supervisors in failing to perform the regular duties required of him by the position in which the operator has placed him, especially where the failure to perform could affect miners who are working under him by virtue of the supervisory position in which the operator has placed him." J.D. 5-6. Since operators typically act in the mines only through such supervisory agents, we agree that consideration of a foreman's actions is proper in evaluation of negligence for penalty assessment purposes. In Ace Drilling, supra, we also affirmed a judge's 1969 Coal Act penalty assessment which included consideration of a foreman's negligence. 2 FMSHRC at 791.

Regarding the specific negligence issue, the judge refused to consider the foreman's "misconduct" because he found that Nacco was not "remiss" in selecting and adequately training the foreman, who "had always exercised good judgment in discharging his responsibilities"; "the testimony [made] clear that the operator could not have been expected to have anyone else from management on the scene, and that prior to the cut being taken there was no way to tell that [the] roof was bad"; management's overall safety program was adequate; and notwithstanding all the foregoing factors, the foreman acted aberrantly, engaging in "wholly unforeseeable misconduct, resulting in his own death but not in harm or a risk of a harm to anyone else." J.D. 5. 4/ The Secretary does not dispute these factual conclusions. In such circumstances, the judge found that penalizing the company for the foreman's misconduct would not fairly or sensibly promote the 1969 Coal Act's safety purposes. On the unusual and undisputed facts present here, we agree. Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for "negligence." Such an approach might well discourage pursuit of a high standard of care because regardless of what the operator did to insure safety, a negligence finding would automatically result. We therefore approve the judge's finding of no negligence. 5/

4/ We note that before proceeding past the permanent support, the foreman warned the two miners under his supervision not to follow him and they remained behind the permanent support. Tr. 16, 37. The foreman's rescue was effected safely.

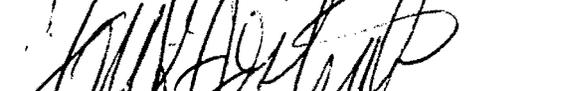
5/ In reaching this result, we do not rely on the cases arising under the Occupational Health and Safety Act of 1970, 29 U.S.C. §651 et seq. (the OSHAct), cited by the judge. The OSHAct has not been interpreted to be a liability without fault statute, and decisions dealing with liability thereunder are not useful for analysis under the 1969 Coal Act.

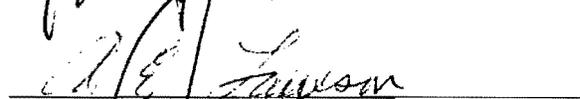
We emphasize, however, that even an agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm and may not absolve an operator who was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 6/

We also agree with the judge that Nacco's history of violations of section 75.200 is significant and note that Nacco did not object to the authenticity of MESA's violation printout. Nacco does not contest the judge's other penalty criteria findings. In sum, we approve the judge's penalty of \$500.

Accordingly, the judge's decision is affirmed.


Richard V. Backley, Chairman


Frank F. Jastrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

6/ As Prosser has pertinently observed in explaining the standard of care imposed by the common law of negligence:

[T]he standard [of care] imposed must be an external one, based upon what society demands of the individual, rather than upon his own notions of what is proper. An honest blunder, or a mistaken belief that no damage will result, may absolve him from moral blame, but the harm to others is still as great, and the actor's individual standards must give way to those of the public. In other words, society may require of him not to be a fool. [Prosser, Handbook of the Law of Torts 146 (4th ed. 1971).]

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 29, 1981

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

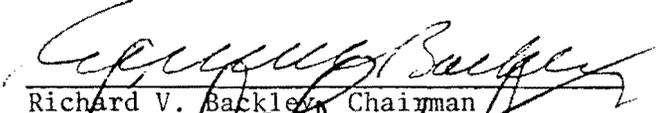
BROWN BROTHERS SAND COMPANY

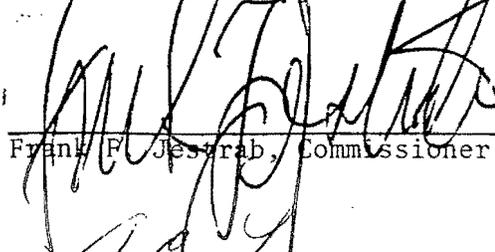
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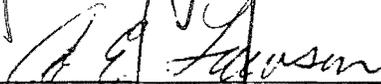
Docket No. SE 80-124-M

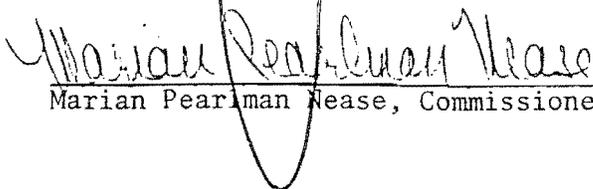
ORDER

A document seeking review of a bench decision was filed with the Commission by the operator on April 24, 1981. As of this date, however, the judge has not reduced his bench decision to writing. Accordingly, the petition is dismissed as premature, subject to refileing after the issuance of a written opinion by the judge. (29 USC 823(d)(1), Commission Rule 65(a), Council of Southern Mountains, Inc. v. Martin County Coal Corp., 2 FMSHRC 3216 (November 12, 1980)).


Richard V. Backley, Chairman


Frank F. Jes-trab, Commissioner


A. E. Lawson, Commissioner


Marian Peariman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 1981

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. LAKE 80-223-M
 :
J. P. BURROUGHS AND SON, INC. :

DECISION

This case involves the interpretation of section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The provision at issue concerns notification to the Secretary of Labor of an operator's intention to contest a citation or a proposed assessment of penalty. In an order issued June 27, 1980, the administrative law judge dismissed as untimely a notice of contest in which the operator, J. P. Burroughs and Son, Inc. challenged penalty assessments for four section 104(a) citations. The judge adopted the Secretary's proposed assessments as the final order of the Commission. Burroughs filed a petition for discretionary review, which we granted. For the reasons that follow, we reverse.

On January 14, 1980, Burroughs received from the Mine Safety and Health Administration (MSHA) a notice of proposed assessment for alleged violations cited under section 104(a). The operator mailed its notice of contest to MSHA on February 13, 1980, the 30th day after receipt of the proposed assessment. MSHA received that notice of contest two days later. On April 17, 1980, the Secretary initiated a civil penalty proceeding against the operator. At the same time, he filed a motion to dismiss the operator's notice of contest. He argued that the notice was untimely because MSHA had not received it within 30 days of Burroughs' receipt of the notification of proposed penalty as, the Secretary contended, is required by section 105(a). The judge agreed with the Secretary and granted the motion to dismiss.

The question before us is one of statutory interpretation. Section 105(a) provides:

... If, within 30 days from the receipt of the notification [of proposed assessment of penalty] issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, ... the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.... [Emphasis added.]

The issue is whether MSHA must receive the operator's notice of contest within 30 days, as held by the judge, or whether the operator satisfies the requirement of notifying the Secretary if it mails its notice of contest within 30 days.

The Act does not define the key word "notify", nor does the legislative history provide direct guidance. The language of section 105(a) as a whole is instructive, however. The Secretary argues that "notice" does not occur until it is received. But, in speaking of the document that triggers the 30-day contest period, the section refers to "receipt [by the operator] of the notification" of proposed assessment of penalty. If, as the Secretary contends, notice equals receipt, there would have been no need whatsoever for Congress to have mentioned "receipt" in speaking of "receipt of the notification" of proposed assessment. Notification to the operator would not occur until it was received. The word "receipt" would be superfluous. We read Congress as saying that notice and receipt of notice are two separate things in this context. No reason is apparent as to why the two notice requirements (first to the operator, second to the Secretary) in section 105(a) should not be interpreted in the same way. Thus, the overall language of the section supports the operator's position that notice occurs before receipt (i.e., upon mailing).

Practical and policy considerations also support the conclusion that a notice of contest is effective upon mailing. Fairness to the operator requires that it should not be penalized for vagaries in the U.S. mails. In order to try to ensure timely arrival of its notice of contest, the operator would be constrained to mail that document well before the 30th day. This would effectively deprive it of a full 30 days in which to contest a penalty. At the extreme, this arguably could even deprive the operator of any adjudication should slow or unpredictable mail service cause late receipt of a notice of contest, even though the operator mailed that notice well in advance of the 30th day.

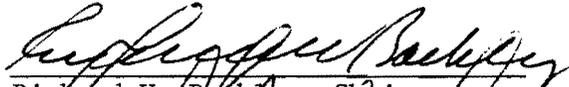
In any case, the Secretary's position may encourage frivolous contests. Congress wanted the operator to have some reasonable period to determine whether it seriously wished to contest the Secretary. Lacking sufficient time to really consider whether to contest or not, an operator may mail a notice of contest automatically, even though it may not necessarily have contested if given adequate time to reflect and decide. A procedure that encourages unnecessary penalty contests is likely to slow the overall penalty assessment and collection process, which would be counterproductive to Congress' stated goal.

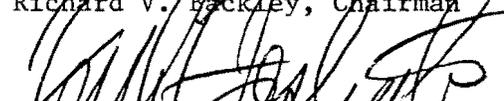
The Secretary contends nonetheless that a major concern of Congress was expediting enforcement proceedings, including penalty assessments. He argues that receipt by him of a notice of contest within the 30-day period speeds the penalty assessment and collection process. 1/ If notification is effective upon mailing, however, enforcement will be

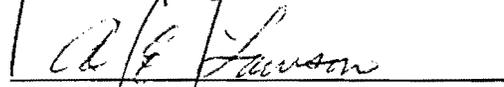
1/ The Senate Report states: "Penalty matters should be finally determined as quickly as possible." S. Rep. No. 95-181, 34, 95th Cong., 1st. Sess. (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 622 (1978).

slowed at most for the period of time that a notice of contest is en route to the Secretary; that is, the operator could mail its notice of contest on the 30th day and the delay envisioned by the Secretary in final assessment of a penalty normally would be a few days at most, the time it takes the mailed contest to be delivered. Certainly, the brief delay for the time in transit would do no appreciable damage to Congress' desire to achieve reasonable promptness in penalty assessment and collection.

Accordingly, we hold that a notice of contest is effective if mailed within 30 days after the operator receives a notice of proposed assessment of penalty. The decision of the judge is reversed and remanded for further proceedings consistent with this opinion.


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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 1 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDINGS
)	
Petitioner,	)	DOCKET NOS. WEST 79-128-M
v.	)	WEST 79-130-M
	)	WEST 79-137-M
THE ANACONDA COMPANY,)	
)	
Respondent,	)	MINE: Weed Concentrator
)	

DECISION AFTER REMAND

On February 20, 1981, the Federal Mine Safety and Health Review Commission remanded the above cases for additional findings of fact, conclusions of law, and the reasons therefor.

My prior ruling was that the evidence in these three cases is so equally balanced that it is impossible to make actual findings of fact. In response to the Commission's order of remand, I have set forth below all the relevant evidence presented at the trial. After a careful review of the record, I again conclude that these cases are in equipoise. The Secretary failed to present the required preponderance of evidence. The Secretary did not sustain his burden of proof. The law, therefore, dictates that the citations be vacated.

WEST 79-128-M

In this case, involving Citation 341994, the Secretary alleges respondent violated 30 C.F.R. 55.16-9. The cited standard provides as follows:

55.16-9 Mandatory. Men shall stay clear of suspended loads.

Secretary's evidence:

1. An MSHA inspection was made at respondent's Weed Concentrator. The inspection party consisted of MSHA inspector Ketron and MSHA trainee inspector Shanholtz for petitioner; company representatives were safety engineer Merritt, and general foreman McHugh. In addition there were two union representatives [unidentified]. Ketron observed a large metal supply cabinet being relocated on the ground level (Tr. 7-11, 18, 204).
2. The cabinet was five feet wide, four feet long, and six feet high; it was being moved by an overhead crane (Tr. 11, 12).
3. It was approximately six feet from the bottom of the supply cabinet to the ground level (Tr. 12).
4. As the cabinet descended and began moving laterally it jerked or moved abruptly. At this point an employee was underneath the cabinet steadying it and guiding it with both palms (Tr. 12-13).

5. The heavy cabinet, 300 to 400 pounds, neither ascended nor descended as it moved laterally approximately 20 feet. There was no tag line on the cabinet¹ (Tr. 13, 14).

6. Merritt said the crusher operator was with the group on the floor. An individual (not identified) said this is the way we do it all the time. Merritt moved quickly to get the man out of the position he was in (Tr. 17-19).

7. MSHA Inspector Shanholtz was also on the third floor. He stated that the cabinet had to be lifted 6 to 7 feet to clear a cone crusher. Ketron testified the cabinet was lifted 8 to 10 feet to pass the cone. After Shanholtz observed the cabinet move laterally over the top of a cone crusher he saw an employee walking along the side of the cabinet with both hands underneath it. The palms of both hands were at about shoulder level (Tr. 60, 193-194).

8. After Ketron and Shanholtz got down [to ground level] a worker explained this happened because the crane was overtravelling (Tr. 194-195).

Respondent's evidence:

9. Witness Merritt, Anaconda's safety engineer, was with MSHA witness Ketron at the time of the incident. Merritt accompanied the inspectors throughout the inspection which took place between November 28, 1978 and January 11, 1979 (Tr. 103, 105, 106).

10. Ketron and Merritt were two feet apart and they were looking at the same metal cabinet on the first floor of the crusher. Merritt testified that the cabinet was 8 to 10 inches above the floor (Tr. 107-108, 160-161) when the inspector said the employees didn't have a tag line on the metal box (Tr. 107-108, 160-161).

11. No employee or any part of his body was underneath the load. During the entire time span Merritt never saw a worker with his palms up on the bottom of the cabinet (Tr. 108, 148). Merritt's eyes were on the cabinet during the entire time except when he went downstairs (Tr. 108, 148).

12. An employee was holding the cabinet at arm's length to steady it as it was moved laterally to a position 10 feet from the stairway. In Merritt's opinion the employee was clear of the load and not in a position of danger (Tr. 108, 110).

¹/ The inspector did not know but he believed the tag line regulation, 30 C.F.R. 55.16-8 was advisory and not mandatory at the time of the inspection. The tag line standard provides as follows:

55.16-8 Taglines should be attached to suspended materials that require steadying or guidance.

13. Merritt ran down the stairs because Ketron told him the suspended load lacked a tag line and there was a man under the load. At the trial Merritt denied that there was a miner under the load (Tr. 107).

14. As the cabinet moved laterally the employee was walking along with his palms alongside the cabinet (Tr. 109).

15. At no time did Merritt observe the cabinet any higher than 6 to 8 inches from the floor. The cabinet had to be suspended so a fork-lift could pick it up. Nothing in the movement of the cabinet required that it be raised higher than 6 to 8 inches (Tr. 109, 110).

16. When Merritt was on the third level he assumed he would receive a tag line citation. However, he didn't know the nature of the citation until the end of the day (Tr. 111).

17. Merritt testified the tag line standard was advisory and not mandatory at the time of the inspection (Tr. 111).

18. Anaconda's witness McHugh, general foreman at the Weed Concentrator, was on the third level with Ketron, Shanholtz, and Merritt. He was in a position to observe the cabinet (Tr. 107).

19. According to McHugh the cabinet was lifted 10 to 12 inches (Tr. 187).

20. McHugh testified that the employee guided the cabinet with his arms outstretched and no part of his body was under it (Tr. 187-188).

DISCUSSION

The standard at issue simply states that "men shall stay clear of suspended loads." The term "stay clear of" should be construed in a way that promotes safety. Old Ben Coal Company VINC 74-11, IBMA 75-52, Volume 1 No. 9, FMSHRC Decisions, 1954 (Dec. 1979).

In view of the ordinary meaning of the words I construe the term "stay clear of" to mean that employees shall remain a sufficient distance from a suspended load to protect themselves from injury.

What constitutes a safe distance might be best approached by determining the converse, or, an unsafe distance. Initially, any employee under the load would not be clear of it and would be in an unsafe position. In addition, the unsafe area should be extended to include that area which the load would strike in falling, or after impact, in toppling over, and that area encompassed by the possible spilling of any contents.

The position of the miner in relation to the suspended load is the pivotal factor which determines whether the standard has been violated. As

to this element, the parties presented contradictory evidence. Other factors to be considered in determining a violation are the shape, height and weight of the suspended load, whether there is the possibility of a spillage of contents from the object being moved, and the balance of the load while it is suspended. There was no evidence that the cabinet while suspended was unbalanced. It was rectangular in shape and weighed 300-400 pounds. The cabinet did not have any objects in it that could spill and neither its shape nor its size presented an additional risk if it would fall from the hoist at any height. The distance it was held above the floor is determinative of the danger involved if it were to fall. Each party testified to irreconcilable distances.

Merritt's actions in running down the stairs might well indicate an inference that the worker was under the suspended load and in danger. However, Merritt's explanation is logical and reasonable. He says he ran down the stairs because Ketron said the suspended load didn't have a tagline; further, Ketron added there was a man under the load. Merritt said there wasn't a man under the load. If the man was under the load as Ketron allegedly expressed, that allegation did not work its way into the citation he issued to respondent. The citation states: "An employee was observed guiding by hand, a metal supply cabinet which was suspended from the overhead crane in the secondary crusher."

Inspector Shanholtz talked to the worker on the floor (¶ 8). The statement from the worker that this happened all the time because the crane was over travelling does not relate to the citation.

Inspectors Ketron and Shanholtz further testified that they saw the cabinet move over the top of a cone crusher (¶ 7). This is not determinative of whether a violation occurred since the action of the employee took place after the cabinet was raised over the cone crusher. This evidence raises a credibility conflict since Merritt indicated that nothing in the movement of the cabinet required that it be raised higher than 6 to 8 inches (¶ 15).

Respondent's evidence, considered by itself, places the bottom of the load from 8 to 12 inches above the floor. Merritt testified the cabinet was 8 to 10 inches above the floor (¶ 10). He also indicated he never saw it higher than 6 to 8 inches (¶ 15). I do not consider that this conflict destroys the credibility of Merritt's testimony since the evidence presented both by the Secretary and respondent was only an estimate of the distances. Those estimates were made on the third level above the ground floor where the cabinet was being moved.

Respondent's evidence further places the employee standing beside the cabinet with his palms alongside of it and his arms outstretched (¶ 12, 14, 20). This directly conflicts with the testimony of the MSHA inspectors who stated that the miner was underneath the load (¶ 4, 7).

Respondent's evidence fails to establish a violation of 30 C.F.R. § 55.16-9. The worker was an arm's length from the load and not under it. There was no danger of injury, hence, the worker was clear of the load.

As to the interest of Merritt, it is my view that he has no more of an "interest" than do the MSHA safety inspectors. All witnesses are interested in seeing their views sustained. If I should rule that respondent's witnesses have an interest that destroys their credibility, such a ruling would be tantamount to ruling in favor of MSHA in all cases. The financial interest of Anaconda in the outcome of this case does not taint its evidence. No doubt, if Anaconda loses, it will pay the total proposed penalties of \$829.00. Considerably more than that has been spent on these cases. If the mere payment of a fine causes Anaconda's witnesses to be affected by its financial exposure, then MSHA's witnesses would likewise be affected since penalties accrue to the Treasury of the United States, 30 U.S.C. 820(j).

Since the Secretary has the burden of proof,³ he should be prepared to offer additional evidence when the facts are as evenly balanced as in this case. Additional evidence that might have been offered is the testimony from the two union representatives who accompanied the inspection party. An invaluable witness would have been the worker whom inspector Shanholtz talked to on the floor, or the worker who was guiding the cabinet.

All four witnesses were in the same relative position on the third level above the ground floor. There is nothing in the record that can resolve the conflict as outlined above. Having observed the witnesses and their demeanor I could not determine any reason to believe one over the other. The MSHA witnesses are not entitled to greater credibility because they are government inspectors. Conversely, the respondent's witnesses are not entitled to greater credibility because they are Anaconda's personnel. The record fails to establish any interest or bias of any witness; hence they are equal in interest. Accordingly, I find that the evidence of each party is equally credible. The Secretary has failed to sustain his burden of proof.

For the foregoing reasons I conclude that Citation 341994 and all proposed penalties therefor should be vacated.

WEST 79-130-M

In this case Citation 342176 alleges a violation of 30 C.F.R. § 55.16-9, cited supra.

3/ 5 U.S.C. § 556(d); Brennan v. OSHRC, 511 F.2d 1139 9th Cir. 1975, Olin Construction Company v. OSHRC, 575 F.2d 464 (2d Cir. 1975).

Secretary's evidence:

1. While in the Anaconda Weed Concentrator MSHA inspector Ketron was accompanied by MSHA inspector Shanholtz and company representatives Merritt and McHugh (Tr. 21).
2. Ketron observed that a cart containing oxygen and acetylene bottles was being transported from the second floor to the first floor (Tr. 22).
3. While standing at the edge of the catwalk, inspector Ketron observed the crane operator move the crane to the load, pick it up, and move it laterally. He watched the load descend to the ground floor (Tr. 22).
4. As the cart descended from the second to the first floor two employees were directly underneath it (Tr. 23).
5. Neither employee was looking up as the load descended (Tr. 23).
6. As the load descended the two employees simultaneously reached up. Each worker grabbed one wheel and turned the load as it descended (Tr. 24).
7. Lateral movement stopped as the load descended (Tr. 24, 25).
8. The attached tag line was not touched before the cart was set on the ground (Tr. 25).
9. The correct method would be for the two employees to remain several feet back until the load was a few inches above the flat surface of the ground level (Tr. 26).
10. The balance of the cart was quite good and it was not leaning one way or the other (Tr. 26).
11. The hazard here was that two employees put themselves in a position of danger in the event of an electrical or mechanical failure of the hoist (Tr. 27).
12. Inspector Ketron notified Merritt at the time that the cart movement was a violation. The citation was written at the end of the day (Tr. 62).
13. Merritt stated the employee should not have been in that position (Tr. 27).
14. MSHA inspector Shanholtz testified that the two workers were directly underneath the cart as it was being lowered (Tr. 196).
15. Inspector Shanholtz indicated the employees initially used the tag line to steady the load off of the second floor (Tr. 196).

Respondent's evidence:

16. Anaconda's witness Merritt was with the inspection party consisting of Inspectors Ketron and Shanholtz and company representative McHugh (Tr. 114).
17. Merritt recalled that there weren't any employees on the first floor. Further Ketron stated to Merritt that there weren't any employees on the floor (Tr. 114).
18. Merritt testified that when he first observed the suspended load two employees on the second floor were near the cart. They then followed the load down to the first floor after the cart was on the floor (Tr. 116).
19. One employee on the second floor had the tagline and he walked over to the handrail and as the load descended to the floor he kept feeding off the tagline (Tr. 114, 115).
20. When the load got down to the basement floor he dropped the rope (Tr. 114).
21. The employee who was operating the tagline was clear of the load while the cart was being lowered (Tr. 115).
22. The second employee who was involved in the incident was giving hand signals to the crane operator (Tr. 115).
23. The employee gave the hand signals from the second floor (Tr. 115).
24. There wasn't any employee under the load as it was being lowered (Tr. 115, 116).

DISCUSSION

The determinative fact here is whether one or more employees were under the descending load. MSHA's evidence and Anaconda's evidence is directly conflicting and diametrically opposed.

The only hazard alleged was that two employees were standing under the suspended cart. Ketron stated that the balance of the cart was "quite good" (§ 10). There was no evidence that there was a danger that the tanks could fall from the cart. Respondent refuted the existence of this hazard by presenting evidence that miners were never under the load but were on the second level until the cart was resting on the ground level (§ 17 - 24).

Nothing in this record permits a determination to be made for or against either party. The witnesses were in the same location at the time of the incident. I made the same observations as to their demeanor and credibility as expressed in the previous case. The mere fact that two witnesses testified for the Secretary as against one for Anaconda does not give me cause to rule that the Secretary has carried his burden of proof.

There was testimony that Inspector Ketron notified Safety Engineer Merritt at the time that the cart movement was a violation. Merritt denies that Ketron notified him of a violation before that evening (Tr. 116-117).

Two items of uncontroverted evidence should be reviewed. The Secretary's evidence establishes that Merritt stated that the employee should not be under the load (§ 13). Also uncontroverted is respondent's evidence that inspector Ketron stated there weren't any employees on the floor (§ 17). Each of these statements is a damaging admission attributed to each of the parties. However, they leave the decision-maker in the same quandary, namely, the evidence remains evenly balanced.

The Secretary has the burden of proving his case. He should, therefore, in circumstances such as this be prepared to offer additional evidence to corroborate the testimony of his inspectors. In this case an invaluable witness would have been one or both of the workers whom the Secretary asserts were under the descending load. Even their names gleaned from inspector's notes, or otherwise, would help to resolve the conflict in the evidence.

For the above stated reasons I conclude that Citation 342176 and all penalties therefor should be vacated.

WEST 79-137-M

In this case Citation 342194 alleges a violation of 30 C.F.R. § 55.16-9, cited supra.

Secretary's evidence:

1. During the inspection of Anaconda's Weed Concentrator witness Ketron, in the presence of Shanholtz and Merritt, observed an employee underneath a suspended load (Tr. 44, 45). Ketron also observed another miner holding a tag line which was attached to the load (Tr. 45).
2. The object being moved was a guard⁴ for the rod mill. It weighed 400 to 600 pounds and was 4 to 6 feet long, 4 to 5 feet wide, and 3 to 6 feet high (Tr. 44, 47, 82).
3. When Inspector Ketron observed the individual under the load he stated to Jack Barnes that it was a violation (Tr. 79-80).
4. Witness Shanholtz made the following observations: the guard was raised six feet off of the floor, an employee grabbed hold of it, there was another employee on the other side of the load standing one to two feet from the guard, and he was holding the tagline (Tr. 199.)
5. After Ketron informed Barnes there was a hazard, the employees were moved away (Tr. 199).

4/ Called load, guard, box or cover by various witnesses.

Respondent's evidence:

6. Anaconda's witness Merritt observed the overhead crane begin to lift the box from the floor (Tr. 121, 122).
7. One employee with a tag line on the south side was steadying the load (Tr. 121).
8. All other employees were out of the area except one employee on the north side of the guard (Tr. 121).
9. When the cover was lifted off the floor about 3 to 4 feet this employee went over and turned the cover approximately 10 degrees so it would be straight (Tr. 121-122, 162).
10. At that point the bottom of the cover was 3 1/2 to 4 feet from the floor (Tr. 122).
11. While straightening the cover, no part of the employee's body was under the cover. His arms were extended outward horizontally as he pushed on the load approximately in the center of the cover (Tr. 122, 125).
12. At no time did Merritt observe any employee under the cover.
13. Witness Barnes, Anaconda's maintenance superintendant was supervising the foreman in charge of replacing the load (Tr. 180).
14. Barnes watched the load when they started lifting it from the floor to return it to the mill (Tr. 180).
15. Barnes did not observe any employee under the load at any time when it was being returned to the mill (Tr. 180).
16. When Barnes observed that the load was first off the ground, 3 to 4 feet off the floor, a steelworker walked over and straightened it out with his hands out-stretched (Tr. 162, 180-181).
17. The crane made no movement when the worker was near it. Other than the one worker who touched the cover twice, the nearest workers were 20 feet away (Tr. 181-183).
18. Ketron came over and said "that is not safe" and Barnes asked the worker to move away (Tr. 123, 181).
19. The worker did not again approach the cover until it was six inches, or less, away from the base (Tr. 181).

DISCUSSION

One of the mine inspectors,⁵ Ketron, places a worker under the load. The other inspector, Shanholtz, did not support this evidence. Shanholtz's testimony is so factually vague that it is of no value. Shanholtz said the steelworker "grabbed a hold" of the cover. What Shanholtz meant or how a person would accomplish the feat of grabbing a hold of a box estimated at 4 to 6 feet long, 4 to 5 feet wide, and 3 to 6 feet high is not further developed in the record. (Exhibit R-1 is a photograph of the cover).

The Commission in its decision remanding the case states that Shanholtz testified that a violation of the standard occurred after the lateral movement when the guard was hoisted over the trauma screen to be positioned on top of the mill. Shanholtz's testimony is unclear as to when Ketron informed Superintendent Barnes that there was a violation. However, Ketron testified that the violation occurred when the guard was being moved laterally from point A to point B (Tr. 79, 80). Barnes stated that when the guard was 3 to 4 feet off of the floor a steelworker walked over to it and straightened it out. It was then that Ketron told him it was unsafe. Barnes countered Ketron's testimony by stating that an employee was never "under the load" while the cover was being returned to the mill (¶ 15). Barnes asked the employee to move away from the guard. The miner did so, but came back to the guard after it was positioned six inches above the base where it was to be placed. At that time, the miner adjusted the guard so that it would set properly on the base (Tr. 180-182). Neither the citation nor the record indicates that Anaconda was charged with a violation for the adjustment of the cover immediately before its final placement on the base.

I consider in this circumstance that the evidence is equally balanced. All the witnesses in the rod mill were equally in a position to know the facts. No other person, such as the steelworker who moved the cover, was offered as a witness.

^{5/} The citation in this case alleges the worker was under the load while it was suspended 7 feet above the floor.

An additional issue is whether respondent's witnesses established a violation of 30 C.F.R. § 55.16-9. Witnesses Merritt and Barnes stated that the bottom of the cover was 3 1/2 to 4 feet from the floor when a steelworker walked over with his arms extended, pushed on the center of the guard and straightened it out about ten degrees (¶ 10, 11, 12, 16).

I construe the standard in the same manner as in WEST 79-128-M, supra, and I find that the actions of the steelworker as described by the respondent do not constitute a violation. Respondent's version of the facts places the guard 3 1/2 to 4 feet above the floor. The miner's arms were extended horizontally when he pushed on the center of the guard. He was not under the suspended load. There was no evidence that the guard was unbalanced, or of such a size or shape that it was difficult for the crane to hold it securely above the floor. The miner being at least at arm's length from the guard was "clear of" the suspended load.

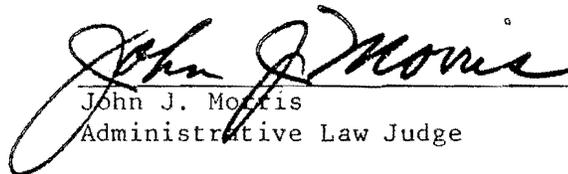
During the cross examination of Merritt he admitted that he saw "very little danger" when the cover was 3 1/2 to 4 feet off the floor (Tr. 122). He disagreed with MSHA's counsel on how much danger there was (Tr. 150-152). I do not take Merritt's statement to be an admission of a violation. The record taken as a whole aptly conveys Merritt's denial of a violation.

For the foregoing reasons I conclude that Citation 342194 and all proposed penalties should be vacated.

ORDER

Based on the stated facts and for the reasons indicated I enter the following Order:

1. In WEST 79-128-M: Citation 341994 and all proposed penalties are vacated.
2. In WEST 79-130-M: Citation 342176 and all proposed penalties are vacated.
3. In WEST 79-137-M: Citation 342194 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 7 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-216
Petitioner : A.O. No. 11-00609-03016
v. :
: Captain Strip Mine
SOUTHWESTERN ILLINOIS COAL :
CORPORATION, :
Respondent :

DECISION

Appearances: Thomas Lennon, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner;
Brent L. Motchan, Esq., St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the petitioner against the respondent through the filing of a petition for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), proposing penalties for two alleged violations of certain mandatory safety standards promulgated pursuant to the Act. A hearing was held in St. Louis, Missouri, on February 18, 1981, and the parties appeared and participated therein. Although given an opportunity to file posthearing proposed findings and conclusions, the parties opted to waive such filings and none were filed. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues are identified and disposed of in the course of this decision.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The Administrative Law Judge has jurisdiction over this matter.
2. Ronald Zara was a duly authorized representative of the Secretary of Labor when he issued the citations in question.
3. Respondent demonstrated good faith in correcting the alleged conditions.
4. Respondent has been assessed with 114 violations during the 2-year period preceding the issuance of the citations involved in this proceeding.
5. Respondent's Captain Mine has an annual tonnage of 1.4 million and Southwestern Illinois Coal Corporation has an annual tonnage of 7.7 million.
6. The effect of the proposed assessment for both citations will not harm respondent's ability to continue in business.

Citation No. 777767, issued November 5, 1979, citing a violation of 30 C.F.R. § 77.1710(g), states as follows:

George Salger, groundman on the Marion 6360 shovel, was observed working in an area where a danger of falling existed, without a safety belt. Mr. Salger was on his knees, installing a lubrication line on the end of the steering arm on the South-west corner of the 6360 Marion shovel. Mr. Salger was

approximately 12-15 feet above the ground on a platform approximately 2 feet wide, with no handrails or other protection.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Ronald G. Zara testified that he conducted an inspection of the mine on November 5, 1979, and pursuant to that inspection he issued a citation for a violation of 30 C.F.R. § 77.1710(g). He testified that the citation was based upon his observation of George Salger working without the use of a safety belt or safety line on a section of a Marion 6360 shovel where there was a danger of falling (Tr. 10-14). A picture of the shovel was marked to indicate the position where Mr. Salger was working (Tr. 16, Exh. P-2). Mr. Salger was repairing a broken grease line while standing on the steering arm of the machine which was about 18 inches wide. The inspector estimated that the arm was about 12-15 feet above the ground, and he concluded that both the possible movement of the machine and an accumulation of grease on the working surface could contribute to a fall from the steering arm. He observed no protective devices but suggested that the operator might use handrails, safety belts, and safety lines as a means of safeguarding the worker. He concluded that a worker risked the probability of a fatal injury if he fell from the steering arm. The inspector testified that he made no finding of negligence because there was no foreman in the immediate area, and he felt, therefore, that he could not prove negligence on the part of the operator (Tr. 16-22).

On cross-examination, Mr. Zara again stated that his measurements of the machine were only estimates, and from his vantage point, he could not ascertain whether there was grease on the working surface. He also acknowledged that an operator is supposed to signal before moving the shovel, and while he was aware that safety belts were available at the mine, he did not know if one was located on the shovel (Tr. 24-25).

In response to bench questions, Mr. Zara stated that he observed Mr. Salger finish his work, get up from his kneeling position, and walk down onto the crawler part of the shovel. The inspector spoke about the use of a safety belt to Mr. Salger, who offered no excuse for not wearing one, and the inspector suggested that the operator might use a mobile crane with a hanging basket to hold a worker, if the nature of the work was so infrequent that it did not warrant the construction of handrails (Tr. 30-34).

Steve Graul, master electrician and chairman of the union's safety committee at the time the citation issued, stated that "the company's safety belt rule, * * * is one of the least enforced and least stressed of all the safety rules we have" (Tr. 84-85). He also testified that when he worked on an identical steering section on the opposite side of the machine, he stood on scaffolding and wore a safety belt. In his opinion, the area marked in the picture, where the grease fittings were located, presented a danger of falling. He estimated that this area was about 2 feet wide. He further

testified that while he is aware that some supervisors do not hold safety meetings, his particular supervisors make it a practice to hold them (Tr. 84-88).

In response to bench questions, Mr. Graul agreed that it is not practical to set up scaffolding for day-to-day tasks, and he stated that scaffolds are more likely to be used for jobs extending for a period of 24 hours to 2 weeks (Tr. 88-89).

Testimony and Evidence Adduced by the Respondent

Steve Edwards, director of safety and training, indicated that a copy of respondent's safety rules and regulations is given to each employee at the mine (Exh. R-1). The rules specifically require the wearing of safety belts and lines where there is a danger of falling. Mr. Edwards also described the various types of safety-training programs which are given at the mine. Using Mr. Salger as an example, he explained that both UMWA contract training and MSHA-approved training emphasized the importance of safety belts. Mr. Salger completed his MSHA training on June 12, 1979 (Exh. R-3). In conjunction with the 1979 training, Mr. Edwards prepared some slide commentaries which further emphasized the importance of safety belts (Exh. R-2). Furthermore, the company showed a movie on the use of safety belts in 1979, and also encouraged their foremen to hold weekly "toolbox" safety meetings. He cited Exhibit R-4 as evidence that Mr. Salger attended a toolbox meeting where the topic of discussion was safety belts (Tr. 39-44). The exhibit is a record of Mr. Salger's attendance at that meeting.

On cross-examination, Mr. Edwards testified that Rule No. 8 of the company's safety rules, states that "safety belts and lanyards shall be worn as necessary." He indicated that this rule must be read with Rule No. 9 which states that "safety belts and lines shall be worn at all times where there is a danger of falling" (Exh. R-1). While he agreed that Slide No. 41, which states that "anytime there is a danger of falling, the people who are going to be working off high places must wear a safety belt," accompanies a picture of a man working on a drill mast 30-40 feet high, he felt that this picture was not misleading. Ultimately, he maintained, the need to wear a safety belt is a matter of employee discretion. With regard to enforcement of the safety rules, Mr. Edwards testified that three of the 50 miners who have been disciplined were cited with safety belt violations. He also indicated that the company's records show that the weekly toolbox meetings are held approximately 95 percent of the time (Tr. 45-51).

Tom Rushing, mine safety director, acknowledged having issued George Salger a notice of violation after the company received its MSHA citation (Tr. 60-62, Exh. R-5).

On cross-examination, Mr. Rushing testified that five of the 40-50 citations he has issued were in response to an MSHA inspection and citation. He also noted that not all supervisors would issue a notice of violation for the

same set of circumstances, and they are authorized to instruct a miner on proper procedures in accordance with Federal standards and laws, as well as company rules (Tr. 64).

In response to bench questions, Mr. Rushing stated that Mr. Salger's greasing work was not necessary more than once a year. He agreed that a cherry picker could be used for the task if the worker requested one (Tr. 70). In response to additional questions, he stated that the area where Mr. Salger was kneeling measured 47 inches wide and the ground below him consisted of broken and loose coal (Tr. 72). He agreed that the Red "X" on the photograph (Exh. P-2), indicating Mr. Salger's position, showed him to be kneeling on the steering cylinder. He conceded that he had not measured the cylinder but had instead measured the wider steering arm (Tr. 74-75). He also indicated that there were safety belts on the machine at the time the citation was issued, and in his opinion, there was no need for Mr. Salger to wear one (Tr. 77-78). He conceded that he gave Mr. Salger a notice of violation even though he felt there was no danger of falling, but claimed that it was the company's practice to issue a violation notice to the employee responsible for a citation issued by MSHA.

Citation No. 777770, issued November 6, 1979, cites a violation of 30 C.F.R. § 77.505, and, as amended, states:

The energized 4160 volt A.C. power cable, entering the metal frame of the switchbox #C-1506-3, located on the high-wall of the 2570 pit, did not enter the box through proper fittings. The switch box and cable were supplying power to the 181 Marion coal loader, which was in use at the time. The wooden fittings, which protect the cable from the sharp metal edges of the box, were not in place.

Testimony and Evidence Adduced by the Petitioner

Inspector Ronald Zara confirmed that he issued the citation in question upon observing an energized power cable measuring approximately 3 to 3-1/2 inches in diameter, entering a 6- by 6-inch opening of a metal switch-box without a proper fitting. The inspector described the sides of the metal opening as being sharp as though it had been cut with a hacksaw or a metal cutting device. The inspector discussed the dual purpose of the wooden fitting, and indicated that it provides strain relief by keeping the cable from straining on the connections within the box when it is moved or pulled. This prevents electrical shocks or the possibility of a fire if the cable shorts out. The fittings also prevent chafing of the cable against the metal edges of the box. The inspector testified that the rope arrangement, depicted in Exhibit P-5, prevents excessive strain on the connections but does not prevent chafing of the cable, and he indicated that chafing may cause the cable to wear on one side, thereby exposing energized conductors or possibly causing the cable to blow out. He explained that the ground-monitoring system should deenergize a circuit, but he referred to a prior citation as evidence that these systems can become disconnected (Exh. P-8). He further testified that

the lack of a proper fitting should have been noticed either during an onshift examination or a monthly electrical examination, and he concluded that an electrical shock could be fatal due to the voltage involved. The condition was abated by the respondent when it installed a proper fitting (Tr. 91-102).

On cross-examination, Mr. Zara stated that he stood approximately 18 inches to 2 feet away from the cable when he observed it. In his opinion, a "pothead," in the absence of proper fittings, could not provide proper strain relief. He admitted that he had not tested the "pothead" on this particular cable to determine its effectiveness, and agreed that section 77.505 includes various options to satisfy the requirement of a proper fitting (Tr. 102-111).

On redirect examination, Mr. Zara stated that he believed the standard permitted only suitable substitutes, that he would not accept a rope-restraining device in lieu of a fitting or bushing, and that in his opinion it should take only 5 minutes or less to install proper wooden fittings when the cable is inserted into the switchbox (Tr. 112-117).

Testimony and Evidence Adduced by the Respondent

Steve Edwards used a diagram to show the manner in which a loading shovel ties into a main system power source (Exh. R-1). He pointed out that any excess cable is looped, thereby eliminating stress on the cable (Exh. R-5). He also explained that the cables contain conductors which are insulated. This factor, combined with the cable's metallic shield, should prevent the system from causing a shock if the cable is cut. In Mr. Edwards' opinion, a cable which is adequately tied down would not touch the metal edges of the switchbox (Tr. 125-127, Exh. P-5).

On cross-examination, Mr. Edwards clarified his position on the cable loops, asserting that the loops are cast off to allow slack in the cable, thereby alleviating strain on the head. He was not certain whether the "pot-head" was larger than the openings in the switchbox (Tr. 127-135).

Kenneth Adams, chief electrical engineer, testified that there should be no tension on either the connections or the cable coming out of the switchbox (Exh. R-1). He reasoned that since the cable weighs over 2 pounds per foot it would take extremely heavy weight to pull it against the connections as it was coming out of the switchbox. He testified that the top wooden block, which was not present in the picture, served only to keep rodents and small animals out of the electrical enclosure (Tr. 138-139, Exh. P-5).

On cross-examination, Mr. Adams testified that the rope arrangement was an industry-wide practice for about 30 years, and that strain on the cable and connections would only occur if the cable is not clamped or tied off. He explained that the two halves of the wooden block are normally attached by hinges which fall off when they are initially used (Tr. 138-142).

In response to bench questions, Mr. Adams stated that the cable is often disconnected from the switchboxes, and this procedure requires removing the wooden blocks (Tr. 148-150).

Mitchell Wolfe, respondent's safety technician, stated that he accompanied Mr. Zara on his safety inspection and that he was in charge of the abatement which he accomplished by calling an electrician to install the top portion of the wooden fitting. He also confirmed Mr. Adams' contention that the two wooden blocks, when put together, merely prevented rodents and other animals from passing through the enclosure (Tr. 153-160). He determined that it takes approximately 15 minutes to replace the fittings when a cable is removed (Tr. 164).

Safety director Tom Rushing described a similar cable connection and switchbox in use at the mine which had no wooden fittings, but was tied off. This box passed the inspection scrutiny of both Inspector Zara and Mr. Hinkel, the electrical inspector (Tr. 167, Exh. R-9).

Inspector Zara was recalled by the bench and testified that he would issue a citation for incomplete fittings if he found the top portion of the wooden block missing. He pointed out that providing there is sufficient strain relief, a smooth device around the cable protecting it from sharp edges, would fulfill the safety requirement of the cited standard (Tr. 171-174).

Findings and Conclusions

Fact of Violation

Citation No. 777767, November 5, 1979, 30 C.F.R. § 77.1710(g)

Respondent was cited here for the failure by the shovel groundman to have a safety belt or line attached to his person while he was performing work at the end of the machine-steering mechanism located some 12 to 15 feet above the ground. Section 77.1710(g) provides that mine employees shall be required to wear safety belts and lines where there is a danger of falling, and the standard states as follows:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

* * * * *

(g) Safety belts and lines where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered. [Emphasis added.]

Inspector Zara testified that he issued the citation after observing groundman George Salger in a kneeling position at the end of the steering arm of the Marion shovel performing some maintenance work and that he was not wearing a safety belt or line. Since he was some 12 to 15 feet off the ground

and was not otherwise protected, Mr. Zara was concerned that he might fall off the machine to the ground below and sustain injuries. Mr. Zara estimated the width of the area where Mr. Salger was working to be some 18 inches, and he concluded that a sudden movement of the shovel and an accumulation of grease in the working area would result in a fall. Mr. Zara had no actual knowledge of the presence of any grease in the area because he did not climb out to the location in question, and his 18-inch estimate of the width of the area where Mr. Salger was standing was an estimate based on Mr. Zara's visual observation from ground level looking up at the steering arm.

Inspector Zara did not believe that the respondent was negligent in this case because he observed no supervisor present when Mr. Salger was positioned on the steering arm. As a matter of fact, Mr. Zara stated that when he first observed Mr. Salger, he was some distance away, and as he approached the shovel, Mr. Salger was on his way back and had climbed down from his position by the time he reached the scene. This would seem to indicate that Mr. Salger took it upon himself to walk to the end of the steering arm without a safety belt or line. Whether he believed he was in any danger of falling remains unanswered since he was not called to testify and he offered no explanation to the inspector as to why he was not wearing a belt or line.

Respondent's witness Tom Rushing testified that a day before the hearing he measured the area where Mr. Salger was purportedly kneeling on the day the citation was issued and he found it to be 47 inches wide. This area was the steering arm, but he did not measure the steering cylinder, which he estimated to be anywhere from 36 to 47 inches. Mr. Rushing indicated that he made his measurements from under the machine after climbing a ladder to reach it from the underside. And, while he expressed the opinion that he personally would have no fear of falling from the area in question, he could not state that this would be the case in the event another individual had to walk out to the area to perform some work. He candidly conceded that belts are located on the shovel "for men to use in an area where they think there is a danger of falling" (Tr. 77).

In North American Coal Corporation, 3 IBMA 93, 106-109 (1974), the operator was charged with a violation of 30 C.F.R. § 75.1720(a) after an inspector observed two miners performing tasks hazardous to the eyes without wearing the required protective goggles. The pertinent portion of this safety standard reads as follows:

Each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:

(a) * * * face shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles. [Emphasis added.]

In holding that a violation of 30 C.F.R. § 75.1720(a) did not occur, the former Board of Mine Operations Appeals stated as follows at 3 IBMA 107, 108:

A violation of this regulation occurs where an operator does not "require" a miner to wear safety goggles. North American contends in substance, and we agree, that an operator, in order to comply with the regulation, must establish a safety system designed to assure that employees wear safety goggles on appropriate occasions and must enforce such system with due diligence. Where the failure to wear glasses is entirely the result of the employee's disobedience or negligence rather than a lack of a requirement by the operator to wear them, then a violation has not occurred.

* * * * *

On the basis of the existing record we find that North American did in fact have a safety system: (1) designed to assure that all reasonable efforts are employed to insure that miners wear safety goggles at appropriate times and places; and (2) enforced with due diligence. We further find that the preponderance of the evidence indicates that the failure to comply with the operator's clear safety requirement in this case was due solely to the negligence of the employees involved rather than to any enforcement omission on the part of the operator. It is, therefore, the judgment of the Board that North American overcome [sic] the Government's prima facie case and that the subject notice of violation must be vacated. 10/ [Emphasis added.]

The footnote reference in North American states:

Where a miner intentionally, knowingly, recklessly, or negligently fails to comply with a requirement designed solely for his own protection, and where such failure does not endanger or create a hazard to anyone but himself, and where the operator has not condoned such conduct, we do not believe a violation may properly be charged to the operator. Cf. Cam Industries, Inc., CCH Employment Safety and Health Guide par. 15,113 (1972).

In Webster County Coal Corporation, 7 IBMA 264 (1977), the Board reversed a judge's dismissal of a petition for assessment of civil penalty after the judge found that an operator could not be held liable for a violation caused by the negligence of a miner who was fatally injured. In dismissing the violation, the judge relied on the aforementioned North American footnote.

In Webster County Coal Corporation, the Board observed as follows at 7 IBMA 267-268:

The question of whether an operator can be liable for civil penalties even though there is no showing of negligence on his part, was never discussed in North American, supra, nor raised or argued by the parties.

The operator's contention in North American was that he had fully complied with the cited regulation and therefore was not in violation of 30 CFR 75.1720. The regulation directed the operator to require a miner to wear goggles. On the facts of that case, the Board found that the operator had complied with the standard by providing glasses and replacements, by having a system designed to assure the wearing of glasses, and by enforcing his requirement with due diligence. Based on the express provision of this regulation, the Board found that the operator was in compliance.

The footnote to North American, relied upon by the Judge, was not intended to, nor did it in fact, set out any rule of law contrary to the holding in the case. * * *

Rather than setting out a rule of law, its intent was merely to reflect that a similar result was reached by OSHRC and to suggest that the result may be different where any operator condones the intentional, or negligent non-use of safety glasses by a miner. In such event he may be held to be in violation of not fulfilling his obligations under the standard. [Emphasis added.]

Rushton Mining Company, 8 IBMA 255, decided February 16, 1978, concerned mandatory safety standard 30 C.F.R. § 75.1714-2(a), which requires that self-rescue devices shall be worn or carried on the person of each miner. In affirming a judge's finding of a violation based on the company's admission that the cited miner was not wearing the protective device at the time he was observed by the inspector, the Board rejected the operator's argument that it did all that was expected of a reasonably prudent mine operator in insuring that each miner possessed a device before entering the mine.

In view of the foregoing case law, I believe that it is clear that in an appropriate factual set of circumstances, the issue decided in the North American decision, supra, would be a defense to the violation in issue in the instant case. As a matter of fact, I so held in MSHA v. Peabody Coal Company, Docket No. DENV 77-77-P, decided August 30, 1978, where I vacated a citation charging the operator with a violation of section 77.1710(g), on the ground that the operator established that it had a viable safety program requiring its employees to wear safety belts which it provided for their safety and that the company enforced its requirements in this regard with due diligence. After discussing and distinguishing the aforementioned precedent cases and the rather broadly worded mandatory safety standards which use the regulatory language "shall be required to wear," I specifically invited MSHA to seriously consider amending section 77.1710(g) to clearly and precisely mandate that an employee wear a safety belt (see pp. 14-15 of my decision). As far as I know, nothing has been done in this regard and MSHA has obviously opted to continue litigating this safety standard on a case-by-case basis, and I have subsequently issued additional decisions concerning this very same standard. See MSHA v. Kaiser Steel Corporation, Docket No. DENV 77-13-P, decided October 10,

1978, affirmed by the Commission on May 17, 1979, and MSHA v. Peabody Coal Company, Docket No. VINC 79-67-P, decided March 29, 1979.

In Kaiser Steel, supra, while the company established that it had a comprehensive safety program for its employees, including a requirement that they wear safety belts, and enforced this rule with due diligence against its own employees, the facts also established that the company did not extend or enforce this rule in the case of employees of contractors who were on its property performing work for the company. In these circumstances, I concluded that the company could not avail itself of the North American defense, and that it should be held accountable for its failure to insure that the contractor's employees who are on mine property are furnished a safety belt by the contractor before commencing work. In affirming my decision and rejecting Kaiser's defense to the fact of violation based on the North American holding, the Commission stated as follows:

In the present case, under the rationale of the Board's decision in North American Coal Corp., supra, Kaiser was required to establish that the deceased employee's failure to wear a safety belt tied-off to a lifeline was contrary to an effectively enforced requirement. Kaiser does not dispute that its safety equipment requirement did not extend to its contractor's employees. Furthermore, Kaiser did not establish that the employee's failure to wear appropriate safety equipment was contrary to an effectively enforced requirement imposed by its contractor. To the contrary, the evidence in this case leads to the inference that the contractor had no such effective requirement. Accordingly, a violation of the standard was established for which Kaiser, as owner of the mine, can be held responsible. 6/

In the cited Kaiser Steel footnote, the Commission observed that: "[B]ecause Kaiser has not established the proof required under North American, we need not reach the question of whether we agree with the rationale of that decision."

In my second Peabody Coal Company decision, supra, I affirmed a citation for a safety belt violation and in fact increased the proposed assessment recommended by MSHA. In that case, I concluded that the company failed to establish that it had a clear and readily understandable safety policy in effect with respect to employee use of safety belts. I also concluded that the company's safety rules failed to adequately inform the employees of the requirements for wearing safety belts while working in elevated areas where there was a danger of falling, and that company supervisors were inconsistent in the manner in which they enforced the safety belt rules. Coupled with the practice of permitting each individual miner to decide for himself when he should wear a belt, I simply could not conclude that the company met the tests laid down in the North American case.

As noted in the preceding discussion, the Commission in Kaiser Steel avoided a review of the prior North American opinion by the former Board of

Mine Operations Appeals because it believed that Kaiser Steel did not establish the factual defense required by the North American decision. An inference can be made that the Commission agreed with the defense, but it specifically declined to address the issue. In a subsequent case concerning the requirements of section 75.1714-2(a) that miners wear or carry self-rescue devices while underground, the Commission rejected the operator's defense that it complied with the standard by establishing a program designed to assure that the devices were available to all employees, that all employees were trained in their use, and that the company enforced its safety program in this regard with due diligence. U.S. Steel Corporation v. MSHA, Docket Nos. PITT 76-160-P and PITT 76-162-P, IBMA No. 77-33, Commission decision of September 17, 1979. The Commission discussed the prior North American, Webster County, and Rushton Mining decisions, but declined to address the issue presented in those cases, and its rationale in this regard is stated in footnote 3 of its decision as follows:

U.S. Steel's argument relying on North American Coal Corp., 3 IBMA 93 (1974), is not persuasive. The rationale of the Board's decision in North American has been limited to the language of the particular standard involved in that case, 30 CFR §75.1720. Webster County Coal Corp., supra. See also Rushton Mining Co., supra. The present case presents no occasion to determine whether we agree with the Board's interpretation of 30 CFR §75.1720.

Thus, on two occasions when faced with the opportunity to consider the former Board's opinion in the North American case, the Commission has declined to do so. In Kaiser Steel, the Commission obviously declined review because it believed that the record established that Kaiser had not met the test laid down by the North American decision. This being the case, I believe the Commission expressed a veiled agreement with that decision. Likewise, in U.S. Steel, the Commission avoided review by simply relying on the fact that the case dealt with a standard different from those which contain the loose "shall be required to wear" language.

In the instant proceeding, respondent's safety rules with regard to the use of safety belts are found at page 8 of Exhibit R-1, and they state the following:

* * * * *

8. Safety belts and lanyards shall be worn as necessary.
9. Safety belts and lines shall be worn at all times where there is a danger of falling. If belts or lines present a greater hazard or are impractical, notify your supervisor so that alternative precautions are taken.

As I pointed out in the aforementioned previous decisions concerning the safety belt requirements of section 77.1710(g), the regulatory language "shall

be required to wear" has prompted mine operators to adopt that rather broad language as part of its own company safety requirements, and following the reasoning of the North American decision, they have defended on the ground that they have complied fully with the standard by not only requiring its employees to use safety belts, but by disciplining those who do not. In the three cited prior decisions, I accepted the defense in one of the Peabody Coal cases, but rejected it in the second Peabody Coal case, as well as in the Kaiser Steel case, and I did so on the specific facts of those cases.

Turning to the facts in the instant case, I conclude that the record supports a finding that the respondent here has established and met the tests laid down in the North American Coal Corporation case, supra. While the two company safety rules quoted above are somewhat contradictory in that No. 8 states that belts are to be worn "as necessary," while No. 9 states they shall be worn "at all times" where there is a danger of falling, and while the decision as to when a belt should be worn is left pretty much to the discretion of the individual employee, I believe these results stem from the fact that the ambiguous regulatory language "shall be required to wear" lends itself to different interpretations. It seems to me that it should be a relatively simple matter for MSHA to amend the standard so that it directly states that safety belts and lines shall be worn where there is a danger of falling. Failure to address this regulatory ambiguity will only result in continued and protracted litigation on a case-by-case basis, along with the inevitable inconsistent and somewhat strained case-by-case adjudicatory decisions.

Respondent's un rebutted testimony and evidence reflects that a safety belt was provided for the shovel and was apparently available for use by the groundman. Further, respondent has established that it does have a safety program in effect and that its safety rules and regulations require employees to wear safety belts and lanyards "as necessary" and at all times "where there is a danger of falling." Although a safety committeeman testifying on behalf of the petitioner stated that the safety belt rule is the least enforced safety rule, his conclusion in this regard was not supported by any credible evidence other than his own opinion. He conceded that he always wore a safety belt while working in a comparable elevated position on the shovel steering arm. Further, while the safety committeeman disagreed that 95 percent of the mine supervisors held "toolbox" safety meetings with their crews, and that he knows of some who do not, he conceded that three of his supervisors, identified by name, do make it a practice to hold regular safety meetings (Tr. 88).

Respondent produced evidence and testimony that it has cited individual miners in the past for failing to wear a safety belt. Respondent's director of safety and training testified that approximately 50 disciplinary notices have been issued to miners for company safety violations, and that three of those were for safety belt violations, including one (Exh. R-5) which was issued to the same miner cited by the MSHA inspector in this case. Although this citation was issued after the MSHA citation was issued, it is at least indicative of the fact that the respondent does enforce its rule in this respect. While an inference can be drawn that the respondent may have issued its company notice of violation to Mr. Salger to mitigate its own liability

for the citation, since there is no indication that any supervisory personnel were present when Mr. Salger walked out to the end of the shovel steering arm when the MSHA inspector observed him, an inference can also be made that Mr. Salger took it upon himself not to use a belt and the inspector obviously believed that this was the case because he did not believe the respondent was negligent. Further, since Mr. Salger was not called as a witness by either party, I have no way of knowing why he was not wearing a belt when the inspector observed him, and although the inspector indicated that he spoke with Mr. Salger, no explanation was offered as to why he was not wearing a belt.

After careful consideration of all of the evidence adduced in this case, I conclude and find that the respondent has met the guidelines established by the North American decision, that respondent has established that it was in compliance with the cited standard, section 77.1710(g), by requiring employees to wear belts and that petitioner has failed to establish by the preponderance of any credible evidence that a violation of the cited standard occurred. Accordingly, Citation No. 777767, issued November 5, 1979, is VACATED.

Fact of Violation

Citation No. 777770, November 5, 1979, 30 C.F.R. § 77.505

In this instance, respondent is charged with a violation of section 77.505, which provides as follows: "Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

It seems clear to me that the reason the inspector issued the citation in this case is the fact that he found the top half of the wooden device (Exh. R-4) used as a fitting to be missing at the point where the cable passes through the metal frame of the electrical compartment in question (see Exh. P-5). He stated that the top half of the device is usually hinged to the bottom half so as to provide some rigid stability for the cable so as to prevent its being pulled out and chafed against the side of the unprotected metal hole, which the inspector described as being sharp. His concern was that the chafing would, in time, cause the cable to wear and expose the inner conductors, thereby subjecting them to possible short circuiting or blow-outs, and presenting a shock hazard.

Respondent takes the position that the practice of using a rope as a restraining device is in fact the same as using a proper fitting or bushing for that purpose. In short, respondent argues that the use of a rope is a suitable substitute under the cited standard, and that the rope is in fact a strain insulator (Tr. 112-114). Further, in questioning Inspector Zara on the citation, respondent's counsel brought out the fact that MSHA's Inspector's Manual concerning the interpretation to be placed on section 77.505, describes a "proper fitting" as including devices such as box connectors, packing glands, strain insulators, strain clamps, and counsel stated that he believed a rope can be considered to be a strain insulator (Tr. 110-111).

Petitioner's counsel took the position that the cited standard is not a performance standard, but rather, a specification standard that does not provide for so-called "suitable substitutes" (Tr. 112). Although Inspector Zara conceded that the use of a rope as a restraining device was in use at the mine and that section 77.505 included various options available to a mine operator so as to meet the requirements of a "proper fitting," he nonetheless stated that he would not accept such a rope-restraining device in the case at hand because a rope would not prevent the chafing or wearing of the cable against the metal unprotected edges of the hole where the cable entered the box. He also indicated that he would accept a rope restraint if the hole through which the cable passed was protected by a smooth-edging device or a complete wooden-block fitting to prevent the cable from chafing against the exposed metal edge of the hole.

The March 9, 1978, edition of MSHA's Inspector's Manual contains the following "policy" statement with respect to section 77.505:

For the purpose of this part, a cable either single or multiple conductor is one that has an outer jacket in addition to the insulation provided for each power conductor. An electrical fitting is an accessory such as a clamp or other part of a wiring system that is intended primarily to perform a mechanical rather than an electrical function. The function of a proper electrical fitting for a cable entering a junction box, electrical panel, termination box, or other electrical enclosure is to prevent a strain on the electrical connections and to prevent chafing or other movement of the cable that might allow an energized electrical conductor to fault to the enclosure frame. Proper fittings would permit box connectors, packing glands, strain insulators, strain clamps, or metal or wood clamps, etc.

Electric circuits that are made up of individual insulated wires that enter junction boxes, termination boxes or other electrical enclosures need not have fittings but must be provided with insulated bushings. Insulated wires that pass through metal walls within an electrical enclosure must also be provided with insulated bushings.

Respondent's argument is that the use of a rope-straining device falls within the "etc." portion of the "policy" statement found in the Inspector's Manual. This argument is rejected. The standard requires the use of proper fittings at the place where cables enter the frames of electrical compartments, and it seems clear that the intent of the standard is to prevent the chafing and deterioration of a cable when it passes through an opening which lacks the required protection called for by the standard. The "policy" statement simply emphasizes the intent of the standard and seems to itemize the types of devices acceptable for compliance. In the instant case, it seems obvious to me that the respondent has opted to use wooden fittings of the types depicted by Exhibit R-4 and some of the photographic exhibits as a means

of compliance with the standard. The use of the rope device is, in my view, an additional device which the respondent opted to use to stabilize the cable, and the fact that its use is commonplace at the mine does not, ipso facto, establish compliance in this case. The inspector cited the violation because he found part of the wooden-fitting device missing and he was concerned with the fact that the cable could dislodge itself from the fitting and rub and chafe against the sharp edge of the opening to the electric compartment in question. The fact that a rope would assist in preventing this from happening is a matter that goes to mitigating the seriousness of the violation and may not, in my view, serve as an absolute defense to the citation. In short, I reject respondent's argument that the rope is a suitable substitute for a proper fitting of the type called for by the standard. Under the circumstances, I conclude and find that petitioner has established a violation and the citation is AFFIRMED.

Good Faith Compliance

The parties stipulated that the respondent exercised good faith in the abatement of the conditions cited, and I adopt this as my finding in this matter. The record reflects that the conditions cited were abated on the same day the citation issued and approximately 15 minutes prior to the time fixed by the inspector (Exh. P-4). This reflects rapid compliance by the respondent, and I have taken this into consideration in assessing a penalty for this violation.

Gravity

Although the inspector's narrative (Exh. P-9) reflects a notation by the inspector that he believed a "danger of electrical shock" was present, I cannot conclude that the facts adduced in this matter support such a conclusion. While it may be true that over a prolonged period of time it is possible for a cable to be rendered hazardous due to constant rubbing against a rough or sharp edge of an opening through which it passes, the facts adduced in this case reflect that the cable in question was in good condition, that it was protected to some degree by the rope-restraining device, as well as by a "pothead" device, and that the cable itself contained protective devices such as insulated conductors and metallic shields. In these circumstances, I cannot conclude that the missing portion of the wooden fitting presented a serious or grave situation. Accordingly, I conclude that on the facts presented here, the violation in question was nonserious.

Negligence

Although respondent's arguments concerning the use of a rope as a suitable substitute for a proper fitting suggests that respondent may not have been negligent because the use of such ropes may be commonplace at the mine, the fact is that petitioner established that on two prior occasions on September 11, 1979, respondent was cited for identical violations of section 77.505, by Inspector Zara for failing to maintain proper cable fittings, and in both instances the citations concerned wooden block fittings such as the

one in issue here (Exhs. P-7, P-8). Since these two citations were issued prior to the one in issue here, respondent can hardly be heard to complain that it was totally oblivious of the requirements of section 77.505, and the interpretation placed on that standard by the inspector. If the respondent is not too enchanted with the manner in which MSHA has interpreted section 77.505, and believes that a rope-restraining device is a suitable substitute for a wooden fitting, then I suggest respondent seriously consider filing a petition for a modification or waiver of the standard pursuant to the Act so that the Secretary may have an opportunity to consider the merits of respondent's contention in this regard. As far as the instant proceeding is concerned, I conclude and find that respondent failed to exercise reasonable care to prevent the conditions cited by the inspector, conditions which I believe the respondent should have been aware of by closer inspection of or attention to its electric equipment, and its failure to exercise reasonable care in this regard constitutes ordinary negligence.

Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business

The information stipulated to by the parties with respect to the size of respondent's mining operation suggests that respondent is a large operator, and I conclude and find that this is the case. The parties agreed that the assessed penalties will not adversely affect respondent's ability to continue in business and I adopt this stipulation as my finding on this issue.

History of Prior Violations

The parties stipulated that for purposes of this case, respondent's prior history of violations consists of 114 prior violations issued by MSHA during the 24-month period prior to the issuance of the citation in question here. Considering the size of the respondent and the lack of any specific information concerning the prior citations, I cannot conclude that respondent's overall prior history is so bad as to require any drastic increase in the initial civil penalty assessment made in this case. However, I have considered the fact that respondent was cited for two similar violations and conditions 2 months prior to the issuance of the citation and this reflects in the assessment made by me with respect to the citation which I have affirmed.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of \$200 is reasonable and appropriate for Citation No. 777770, November 5, 1979, 30 C.F.R. § 77.505, and respondent is ORDERED to pay the penalty within thirty (30) days of the date of this decision.

On the basis of the foregoing findings and conclusions with respect to Citation No. 777767, November 5, 1979, 30 C.F.R. § 77.1710(g), it is ORDERED

that the citation be VACATED, and petitioner's civil penalty proposal as to this citation is DISMISSED.


(George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 7 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
	:	Docket No. SE 81-12
Petitioner	:	A.O. No. 40-02419-03011
v.	:	
	:	Docket No. SE 80-140
G & M COAL COMPANY,	:	A.O. No. 40-02419-03008
Respondent	:	
	:	Docket No. SE 81-7
	:	A.O. No. 40-02419-03010
	:	
	:	No. 1 Mine

DECISIONS

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
the petitioner;
Bill Marshall, pro se, Kingston, Tennessee, for the
respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with a total of 13 alleged violations found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations. Respondent filed timely answers and notices of contest requesting a hearing, and a hearing was convened in Knoxville, Tennessee, on March 12, 1981, and the parties waived the filing of posthearing proposed findings and conclusions.

Issues

The principal issues presented in these proceedings are (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be

assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties agreed to the following:

1. Respondent is subject to the jurisdiction of the Act, and I have jurisdiction to hear and decide these cases.
2. At the time the citations were issued, the respondent operated the No. 1 Mine, and the mining operation was small in size.
3. The inspectors who issued the citations were duly authorized MSHA mine inspectors, and the citations were duly served on the respondent.
4. Respondent's history of prior violations is reflected in Exhibit P-1, a computer printout listing all citations issued to the respondent for the period June 9, 1978, through August 5, 1980. The printout reflects five prior citations concerning mandatory safety standard 30 C.F.R. § 75.200, one prior citation concerning section 75.1100-2(a)(2), and one citation for a violation of section 70.507.
5. Respondent exhibited normal good faith compliance with respect to all of the citations issued in these proceedings, except for Citation Nos. 985402 and 985403 (Docket No. SE 80-140), which the respondent abated rapidly.
6. Respondent does not contest the fact of violation with respect to all of the citations except Citation No. 984540 (Docket No. SE 80-140).
7. Respondent is no longer in the mining business and has abandoned the mine in question. He is, however, engaged in reclamation work at the site in

order to reclaim the land so as to meet the requirements imposed on him by Federal and State surface mining and reclamation agencies.

8. Since the respondent is no longer in business and has abandoned the mine, the issue concerning the effect of any civil penalties imposed for the citations in question is moot.

Procedural Matter

Petitioner's motion to amend Citation No. 984540 to add subsection paragraph (d) to the cited standard section 75.1720 was granted.

Findings and Conclusions

Docket No. SE 80-140

Fact of Violations

MSHA inspector Arthur C. Grant confirmed that he issued Citation Nos. 984540, 985402, and 985403 on June 6 and 9, 1980, during mine inspections which he conducted. The first citation was issued after he observed mine operator Bill Marshall exiting the mine at the portal without wearing a hardhat. Mr. Marshall was not carrying one at the time, but went to his truck where the hat was located and then put it on.

Respondent's defense to this citation is based on Mr. Marshall's belief that the hardhat requirement of section 75.1720(d) only applied to mine employees, and since he was the mine owner rather than an employee, and since he is not recognized as an "employee" for other purposes, he did not believe the cited standard was violated.

Section 75.1720(d) requires that each miner regularly employed in the active workings of an underground coal mine wear a suitable hardhat or hard cap. Mr. Marshall does not dispute the fact that he did not have such a hat on when the inspector observed him. He also conceded that he works in the mine and had been underground when the inspector observed him coming out of the mine. His interpretation of the requirements for wearing a hardhat is erroneous and it is rejected. The citation is AFFIRMED.

Mr. Grant testified that he issued the remaining citations after finding that short-circuit protection was not provided for the roof-bolting machine and cutting-machine trailing cables operating in the section. Section 75.601 requires that trailing cables be provided with automatic circuit breakers or other no less effective MSHA-approved devices. Respondent does not dispute the fact that the cited trailing cables lacked the required short-circuit devices. Accordingly, the citations are AFFIRMED.

Negligence

I conclude and find that the respondent should have been aware of the requirements of all the cited safety standards, that the violations resulted

from respondent's failure to exercise reasonable care to prevent the conditions cited, and that this constitutes ordinary negligence as to all of the aforementioned citations which have been affirmed.

Gravity

With respect to the hardhat citation, the facts reflect that Mr. Marshall was exiting the mine when he was observed, and at that point in time there is no evidence that he was exposed to any hazard. However, Mr. Marshall did not deny that he had been underground in the mine without his hat, and in these circumstances, I conclude that the violation is serious.

With regard to the two trailing cable citations, Mr. Marshall testified that the main power source junction box supplying power to the cables was equipped with a magnetic-type short-circuit protective device which provides for an instantaneous power disconnect in the event of problems with the cables. However, there is no evidence that this provided a fail-safe protection and respondent conceded that the cables were not equipped with the required short-circuit protective devices. Accordingly, I find that these citations were serious in that the lack of cable short-circuit protection posed a potential electrical hazard to the equipment operators.

Docket No. SE 81-12

Fact of Violation

MSHA inspector Jerry F. McDaniel confirmed that he issued Citation Nos. 984814, 984815, 984816, 984818, and 984822 during mine inspections he conducted on August 6 and 7, 1980 (Exhs. P-2 through P-6). The first two were issued because of violations of the respondent's approved roof-control plan (Exh. P-7). Page 4 of the plan requires the use of crossbars or steel strips as additional roof support in areas where overhead hill seams or horsebacks are encountered. In addition, the transmittal letter which accompanied the plan also required the respondent to use a combination of posts and roof bolts so as to provide full overhead support in all roof spans during the initial development of the mine. Since the respondent was not in full compliance with the plan, Mr. McDaniel issued the citations. I find that the petitioner has established the violations, and Citation Nos. 984814 and 984815 are AFFIRMED.

Citation No. 984816 concerns the lack of an automatic audible backup alarm of an end loader used on the surface to load coal into trucks. Respondent conceded that the loader was not equipped with the required alarm and the citation is AFFIRMED.

Citation No. 984822 concerns the failure by the respondent to provide at least 500 gallons of water and at least three pails of 10-quart capacity for the mine section as required by section 75.1100-2(a)(2), as part of the mine's firefighting equipment. Respondent conceded that the water and pails were not provided and the citation is AFFIRMED.

Citation No. 984818 concerns an alleged violation of section 70.507 because of an asserted failure by the respondent to conduct a noise survey. The citation was vacated from the bench after I concluded that the petitioner could not establish by any credible evidence that a violation occurred. Petitioner interposed no objection to my ruling and in fact concurred that it could not prove a violation.

Negligence

I conclude and find that each of the citations which have been affirmed resulted from respondent's failure to exercise reasonable care to prevent the cited conditions, and that this constitutes ordinary negligence as to each of the citations in question.

Gravity

Citation Nos. 984814 and 984815

Inspector McDaniel testified that the mine roof was well supported and fully roof bolted according to the plan. Some straps were used, but his inspection did not detect any loose, cracked, or faulty roof. In addition, Mr. McDaniel agreed with Mr. Marshall's testimony that by driving the entry less than the 20-foot wide distance permitted by the plan, additional support was provided to the roof. Although the inspector stated that he observed some horsebacks and hill seams, he also indicated that the horseback condition is a roof condition where rock flares out of the coal seam, but that he observed none in the immediate area where men may have been working and he observed no hazardous roof conditions. Under the circumstances, I cannot conclude that the conditions cited were serious, and I find that they were not.

The inspector considered Citation No. 984816, concerning the lack of an alarm on the end loader, to be of "minimum" gravity because of the fact that it was a tractor-type loader, with good visibility to the rear, and he observed no one in back of it or exposed to any real hazard. I find that this citation was nonserious.

With regard to Citation No. 984822, concerning the lack of water on the section, the inspector believed that the gravity was "minimum." He testified that fire extinguishers were provided on the mobile equipment which was operating in the section, and there is no evidence that the other fire equipment required by the cited standard was not provided. Further, the inspector stated that since the entry had not been driven more than 100 feet or so, the men could readily escape the mine in the event of a fire quicker than it would take to fight any fire with water and pails. He also indicated that the use of water is not effective in the event of an electrical equipment fire. Under the circumstances, I conclude that the conditions cited were nonserious.

Fact of Violation

Inspector McDaniel confirmed that he issued Citation Nos. 984813, 984817, 984819, 984820, and 984821. Respondent conceded that the conditions cited by the inspector constituted violations of the cited standard. I find that the petitioner has established the violations and the citations are AFFIRMED.

Gravity

Citation No. 984813 concerns the failure by the respondent to install a main mine fan after driving approximately 100 feet into the mine for approximately two crosscuts. The inspector considered this violation to be serious because the respondent had already mined into an area of the old mine workings and could have mined into another similar area. In the event methane were found, the lack of a fan would result in a methane buildup, and coupled with the fact that coal dust was present, the lack of a fan prevented the removal of dust and possible methane from the mine. I conclude that this citation was serious.

Citation No. 984817 concerns the failure by the respondent to weigh the self-rescuing devices worn by the miners underground during the required 90-day interval. Weighing is necessary to determine whether the chemical agent inside the device was leaking or contaminated. The inspector believed the citation was of "minimum" gravity because the men could readily escape from the mine without the need to use the devices, and once the rescuers were weighed, they were found to be in proper working order and in compliance. Under the circumstances, I find that the violation is nonserious.

Citation Nos. 984819 and 984820 concern failure by the respondent to record the results of certain mine examinations required to be made under several mandatory safety standards. The inspector testified that the examinations had been made but respondent simply neglected to record them in the mine books. He considered the two citations to be "record keeping" violations and believed they were of "minimum gravity." I conclude that the citations were nonserious.

Citation No. 984821 concerns the failure by the respondent to store several detonators in a magazine as required by section 77.1301-(a). The inspector found the detonators in a large cardboard box on the wooden floor of a metal-covered storage building which also contained some mine record books and which may have been used as an office. The inspector believed the gravity to be "probable" and indicated that it was possible that lightning could strike the building or someone could have taken the detonators since they were in plain view and unsecured. Under the circumstances, I find that the violation was serious.

Negligence

I conclude and find that each of the aforementioned citations which have been affirmed resulted from respondent's failure to exercise reasonable care to prevent the cited conditions, and that this constitutes ordinary negligence as to each of the citations.

With respect to the detonator citation, Mr. Marshall stated that he had no idea who placed the detonators in the storage shed and indicated that they were of a different brand from those which he normally used. However, the fact is that the inspector found no storage magazine on the mine property and the detonators were subsequently removed from the property. In these circumstances, I conclude that the respondent was negligent in not discovering the detonators which were in plain view of the inspector.

Good Faith Compliance

The parties stipulated as to respondent's good faith compliance in all of these cases, and I adopt these stipulations as my findings on this issue. I have also considered respondent's compliance in this regard in assessing the civil penalties for the citations which have been affirmed, and find that he is a responsible operator who made an effort to comply with the law.

History of Prior Violations

Respondent's history of prior violations as reflected in Exhibit P-1 shows that respondent paid civil penalty assessments for 31 citations during a 2-year period. Although there are several repeat violations, I cannot conclude that respondent's history of prior violations is such as to warrant any substantial increases in the penalties assessed in these cases.

Size of Business and Effect of Assessed Penalties on Respondent's Ability to Continue in Business

Petitioner does not dispute the fact that the respondent is no longer in the mining business and has abandoned the mine. Further, petitioner does not dispute the mine operator's assertion that he is financially unable to pay civil penalties in the amounts initially assessed for the citations in question, nor does it dispute the fact that the respondent has been forced to liquidate some of his property to pay debts that he has incurred as a result of his small and somewhat marginal mining operation.

The record establishes that at the time the citations were issued respondent had recently developed and activated the 002 section, that coal production was minimal, and that the entry had been driven for a distance of approximately 100 to 120 feet.

Penalty Assessments

In a previous decision concerning these very same parties, I took into consideration the fact that the respondent's financial situation was such as

to preclude payment of substantial civil penalties for two violations which had been established by the petitioner. MSHA v. G & M Coal Company, Docket No. SE 79-128 (November 19, 1980). Nothing has changed since that decision, and it seems clear to me that respondent has abandoned the mine and is no longer in the mining business. In these circumstances, and considering the fact that I consider the respondent to be a responsible party who has made a good faith effort to comply with the law and to meet his obligations, I conclude that the following civil penalty assessments are reasonable considering the particular circumstances of these cases:

Docket No. SE 80-140

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
984540	6/6/80	75.1720(d)	\$ 5
985402	6/9/80	75.601	10
985403	6/9/80	75.601	10

Docket No. SE 81-12

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
984814	8/6/80	75.200	\$10
984815	8/6/80	75.200	10
984816	8/6/80	77.410	5
985822	8/7/80	77.1100-2(a)(2)	5

Docket No. SE 81-7

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
984813	8/6/80	75.300	\$20
984817	8/6/80	75.1714-3(c)	5
984819	8/7/80	75.1803	5
984820	8/7/80	75.1801	5
984821	8/7/80	77.1301(a)	10

ORDER

Respondent IS ORDERED to pay civil penalties totaling \$100 within thirty (30) days of the date of these decisions for the citations in question, and upon receipt of payment by MSHA, these matters are DISMISSED.



George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 8 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
)	
	)	DOCKET NO. CENT 79-83-M
Petitioner,	)	ASSESSMENT CONTROL NO.
	)	39-00225-05002
v.)	
	)	DOCKET NO. CENT 79-84-M
CONCRETE MATERIALS COMPANY,	)	ASSESSMENT CONTROL NO.
	)	39-00225-05003
Respondent.)	
	)	BRANDON ROAD PIT & MILL NO. 1

DECISION

APPEARANCES:

Eliehue C. Brunson, Esq., Office of the Solicitor, United States Department of Labor, 911 Walnut Street, Kansas City, Missouri 64106, for the Petitioner,

William G. Taylor, Esq., of WOODS, FULLER, SHULTZ & SMITH, 310 South First Avenue, Sioux Falls, South Dakota 57102, for the Respondent.

Before: Judge Virgil E. Vail

INTRODUCTION:

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 30 U.S.C. § 801 et seq. [hereinafter the Act], arose out of an inspection conducted by representatives of petitioner on October 2, 1978 at respondent's mine near Sioux Falls, South Dakota. As a result of the inspection, two citations and a withdrawal order were issued.

Citation 329050 charges that respondent violated 30 CFR 56.9-87 1/ because a 1971 Chevrolet dump truck, owned by Midwest Excavating Company and leased to respondent, was not equipped with an automatic reverse signal alarm. A penalty of \$106.00 was proposed in connection with this citation.

1/ 30 CFR 56.9-87 provides: Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Citation 329067 charges that respondent violated 30 C.F.R. § 56.9-2 ^{2/} because a 1967 International dump truck, owned by Midwest Excavating Company and leased to respondent, was not equipped with operating stop lights. A penalty of \$72.00 was proposed in connection with this citation.

Citation and withdrawal order number 329068, issued pursuant to § 104(a) and 107(a) of the Act, charge that respondent violated 30 C.F.R. § 56.9-87 because the 1967 International dump truck was not equipped with an automatic reverse alarm. A specially assessed penalty of \$1,000 was proposed in connection with this order. ^{3/}

The parties stipulated that the violations were in fact committed on respondent's property, and that the violations involved vehicles and equipment belonging to an independent contractor as well as its employees (Tr. 4, 5). ^{4/} Respondent contends, however, that as a matter of law it should not be found in violation of the cited standards. First, respondent argues, the premises upon which the violations were committed are not a "mine" within the meaning of the Act, and that the Act, therefore, does not apply. In the alternative, respondent argues that the proper party to have been cited in this case was Midwest, an independent contractor, not respondent, the mine owner. Finally, respondent contends that the policy of citing the mine owner for violations committed by its independent contractor is properly applied only where the employees of the independent contractor are exposed to hazards contemplated by the Act.

Although respondent apparently advances three independent arguments, there are actually only two issues to be decided in this case: Were the violations committed at a "mine" as defined by the Act? Was respondent-owner the proper party to have been cited?

^{2/} 30 C.F.R. § 56.9-2 provides: Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

^{3/} Section 107(a) expressly provides that the issuance of an order under that Sub-section does not preclude the issuance of a citation under Section 104 or a penalty proposal under Section 110. In this case, the withdrawal order is also a citation issued pursuant to § 104(a). The penalty assessment is based on the § 104(a) citation.

30 C.F.R. § 100.4 allows the Secretary to waive the conventional penalty procedures and make a special assessment, documented by a set of narrative findings.

^{4/} Respondent had orally contracted with Midwest Excavating Company to have Midwest move sand from respondent's Brandon Pit to its Ready Mix Plant (Tr. 91, 92, 101). Midwest was to provide the trucks and the drivers, and operate and maintain the trucks (Tr. 92). Midwest paid the drivers, supplied the fuel and determined the hours during which the work would be performed (Tr. 92). Although the drivers were sometimes directed toward the stockpiles by Sweetman employees (Tr. 98, 99), the evidence as a whole indicates that Midwest functioned as an independent contractor rather than as respondent's agent.

FACTS:

Respondent owns and operates a sand and gravel pit near Sioux Falls, South Dakota. The entrance to the premises is located approximately one mile southeast of the pit (Tr. 88). Immediately inside the entrance there is an unobstructed, flat area, referred to as the sales area. At the south end of the sales area there is a scale house; toward the north end of the sales area several stockpiles of sand and gravel form an arc which protrudes into the sales area from northwest to southeast. Approximately twenty feet northwest of the stockpiles, in the "pocket" of the arc, is a machine which cleans and classifies the material (Tr. 50, 99; respondent's exhibit 1). The pit is approximately three quarters of a mile northwest of the classifier. Material is transported from the pit to the classifier on a conveyor belt.

Workers check in and out, and receive instructions at the scale house (Tr. 30). Customers (both retail and commercial) drive trucks to the scale house, are weighed-in empty, and then proceed approximately two hundred feet to the north end of sales area where they back up to the stockpiles of sand and gravel. The trucks are loaded by respondent's front end loader (Tr. 65), and then weighed again at the scale house before they exit (Tr. 14, 32, 89, 100). Customers are not permitted outside the sales area (Tr. 90, 114).

On September 28, 1978, a truck owned by the independent contractor Midwest Excavating Company and driven by its employee William Crowder entered respondent's premises and backed up to the stockpiles. Mr. Crowder got out of the truck and was checking under the hood when a second truck owned by Midwest Excavating Company backed into him (Tr. 80, 108).

On October 2, 1978, Richard White and Wilbur Synhorst, inspectors representing the Mine Safety and Health Administration, entered respondent's premises to investigate the accident (Tr. 26). Mr. White inspected a 1971 Chevrolet dump truck located in the stockpile area (Tr. 33), and issued a citation charging that the truck was not equipped with an automatic reverse signal alarm (Tr. 28). Mr. Synhorst issued a citation charging that a 1967 International dump truck, also located in the stockpile area, was not equipped with operating brake lights. He also issued a withdrawal order charging that the same truck lacked an automatic reverse signal alarm (Tr. 13, 45, 77). These two trucks were owned by the independent contractor Midwest Excavating Company.

LAW:

1. Jurisdiction:

The jurisdictional issue in this case is whether the sales area on respondent's premises is part of a "mine" as defined by the Act. Respondent argues that it is not because the sand and gravel is not extracted or prepared there.

The Act defines "coal or other mine" in Section 3(h)(1) as

- (A) An area of land from which minerals are extracted ...
- (B) private ways or roads appurtenant to such area, and
- (C) lands, excavations, underground passageways; shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in or resulting from ... the work of preparing coal or other minerals, ... [Emphasis added].

The Act defines "work of preparing the coal" in section 3(i) as

[t]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of the coal mine.

Respondent argues that since "work of preparing the coal" is defined broadly, the "preparation of other minerals", which is left undefined by the Act, should be interpreted narrowly; thus, respondent argues, the sales area does not fall within the Act's definition of "mine" because no extraction, milling, crushing or washing of minerals takes place there.

To narrowly construe the term "preparation of other minerals," as contended by respondent, would violate the intent of the Act. Congress passed the Federal Mine Safety and Health Act of 1977 to consolidate and strengthen the enforcement of existing legislation governing coal, metallic, and non-metallic mines. Federal Mine Safety and Health Amendments Act of 1977 S. Rep. No. 181, 95th Cong. 1st Sess. 1-6, reprinted in [1977] U.S. Code Cong. & Ad. News 3401-06. Commenting on the broad definition of "mine", the Senate Committee stated that "what is considered to be a mine and to be regulated under this Act is to be given the broadest possible interpretation and that doubts are to be resolved in favor of inclusion of a facility within the coverage of the Act." This statement indicates that the definition of a mine, and particularly the term "preparing . . . other minerals," should be construed broadly.

A broad definition of "mine" was recently applied by the Third Circuit Court of Appeals in Marshall v. Stoudt's Ferry Preparation Company 602 F. 2d 589 (1979), Cert denied ___ U.S. ___, January 7, 1980. In that case, the company purchased material dredged from a riverbed by the Commonwealth of Pennsylvania and transported the material to its plant, where it was processed into two piles. The company contended its premises were not a "mine" under the Act because the activities did not include the extraction or preparation of minerals.

The court rejected the argument and stated in part as follows:

We agree with the district court that the work of preparing coal as other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it - the word means what the statute says it means - moreover, the record also establishes that the Company processes and sells the sand and gravel it separates from the material dredged from the river. We are persuaded, as was the district judge, that in these circumstances the sand and gravel operation of the company also subjects it to the jurisdiction of the Act as a mineral preparation facility (emphasis added).

I find that the stockpiling and loading of material by the respondent in this case is covered under the Act and falls with MSHA jurisdiction.

2. Proper Party -- Independent Contractor Issue:

The respondent argues that the employees of the independent contractor, Midwest Excavating, were not exposed to mining hazards, and that respondent was therefore not subject to the jurisdiction of the Act. Further, respondent argues that acts of an independent contractor cannot create vicarious liability on the part of the mine owner (respondent's letter dated October 21, 1980).

The issue of whether a mine owner may be cited for violations committed by an independent contractor was considered by the Federal Mine Safety and Health Review Commission in the case of Secretary of Labor (MSHA) v. Old Ben Coal Company, 1 FMSHRC 1480, (1979), wherein the Commission stated as follows:

When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation. Old Ben, supra. at 1483.

See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

The Commission further stated in Secretary v. Old Ben Coal Company, *supra* at 1483 that contractors can be proceeded against and held responsible for their own violations.

At the time the citations were issued, the Secretary of Labor was following his interim enforcement policy of citing only owner-operators for violations committed by their independent contractors. Subsequently, the Secretary published new enforcement guidelines as to when he will cite independent contractors, when he will cite owner-operators, or when he will cite both, either jointly or severally, for violations committed by independent contractors. 45 F.R. 44, 494-98 (1980). In Secretary of Labor (MSHA) v. Pittsburg and Midway Coal Mining Company, (Docket No. BARB 79-307-P, (August 4, 1980), the Commission ruled that in light of the new regulations, the Secretary should be afforded an opportunity to continue to prosecute citations against the operator, independent contractor or both. In my order dated August 28, 1980, I afforded the Secretary such an opportunity in this case. Pursuant to that order, the Secretary determined to proceed solely against Concrete Materials Company.

Since the Secretary has determined to proceed solely against the mine operator, the Old Ben decision is controlling; thus, the operator in this case, Concrete Materials Company, must bear the responsibility for the citations issued against it for the violations of the mandatory safety standards committed by its independent contractor.

3. Penalty:

The parties further stipulated that respondent is a small operator, abated the violations in good faith, and committed one violation within the twenty-four month period preceding the investigation of October 2, 1978 (Tr. 5, 40).

Respondent contends that since Midwest committed the violations, negligence should not figure into a penalty determination. The authority, however, is to the contrary, and supports the proposition that the negligence of an independent contractor may be imputed to the mine owner. Secretary of Labor v. Buffalo Mining Company, 1 MSHC 2266, 2268 (December 10, 1979).

With respect to citation 329068, however, no evidence of negligence was presented at the hearing. If the 1967 International truck were shown to have been involved in the accident, then the absence of a reverse signal alarm four days later would be evidence of negligence. But petitioner failed to establish any connection between the violations and the accident.^{5/} Although Mr. White testified that the International truck was involved in the accident (Tr. 13), he admitted that he had not witnessed the accident and that his information was based solely on what he had learned from other people (Tr. 76, 77). Mr. White also testified that he had not asked respondent to produce the truck involved in the accident; that he just assumed that the trucks involved in the accident on September 28 would be on respondent's premises four days later (Tr. 38, 29; also see 46, 52, 53, 62). No other evidence of negligence was presented.

Since petitioner failed to establish that one of the trucks cited on October 2 had been involved in the accident of September 28, the evidence concerning the cause of the accident (which, incidentally, was contradictory) proves little, if anything, about the gravity of the violations.

The \$1,000.00 penalty proposed in connection with citation 329068 assumes that the truck which was cited was also involved in the accident. The record does not establish this connection; a \$1,000.00 penalty is, therefore, not warranted. Upon considering the evidence concerning the six statutory penalty criteria set out in § 110(i) of the Act, I find that \$100.00 is an appropriate penalty. The evidence, however, does support the Secretary's proposals made in connection with citations 329050 and 329067; \$102.00 and \$72.00 respectively.

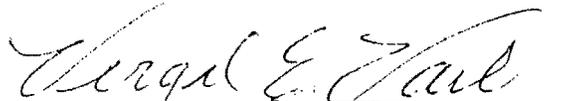
CONCLUSIONS OF LAW

1. The violations alleged in citations 329050, 329067 and 329068 occurred at a "mine" within the meaning of the Act, and, therefore, properly fell within the jurisdiction of this Commission.
2. Respondent violated 30 C.F.R. § 56.9-87 as alleged in citation 329050, and a penalty of \$102.00 is appropriate.
3. Respondent violated 30 C.F.R. § 56.9-2 as alleged in citation 329067, and a penalty of \$72.00 is appropriate.
4. Respondent violated 30 C.F.R. § 56.9-87 as alleged in citation 329068, and a penalty of \$100.00 is appropriate.

^{5/} It is important to emphasize at this point that the violation did not consist of the accident but of the failure to install and maintain reverse alarms and brake lights on the truck.

ORDER

Pursuant to the foregoing, it is ORDERED that the penalty proposals made in connection with citations 329050, 329067 and 329068 are affirmed. It is further ORDERED that respondent pay the sum of \$274.00 within 30 days of this order.


Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 8 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-245-M
Petitioner : A.O. No. 33-00047-05014 I
v. :
: Jonathan Mine and Mill
COLUMBIA CEMENT CORPORATION, :
Respondent :

DECISION

Appearances: F. Benjamin Riek III, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner;
Robert A. Minor, Esq., and Michael G. Long, Esq.,
Vorys, Sater, Seymour & Pease, Columbus, Ohio, for
Respondent.

Before: Judge Edwin S. Bernstein

On July 8, 1979, Mr. James Levering was seriously injured while operating a Waldon 5000 front-end loader at Columbia Cement Corporation's Jonathan Mine and Mill. Respondent was cited for a violation of 30 C.F.R. § 57.9-2. The Secretary of Labor alleged that the Waldon 5000 loader had defective service brakes, that Respondent was grossly negligent, and the Secretary of Labor requested assessment of a penalty of \$10,000. Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), I conducted a hearing on December 9 and 10, 1980, in Columbus, Ohio. Following the hearing, the parties submitted briefs. Upon the entire record and the parties' briefs, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The parties stipulated and I find:

1. Jonathan Mine and Mill is a mine. Its products enter and affect interstate commerce.
2. Respondent operates, and at all times pertinent to the citation at issue, operated Jonathan Mine and Mill.

3. Respondent and every miner employed at the mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 and jurisdiction over the subject matter of this proceeding vests with the Federal Mine Safety and Health Review Commission.

4. During the year of 1978, this mine accumulated 561,645 production man-hours. Respondent's firm accumulated 795,115 production man-hours for 1978. For 1979, this mine's production was 503,120 man-hours. This constitutes medium-sized production for both years.

5. The assessment of penalties as requested will not affect Respondent's ability to continue in business.

6. Inspectors Dennis Haeuber and Daryl Beauchamp are authorized representatives of the Secretary of Labor.

7. As indicated by a computer printout submitted as an exhibit by Petitioner, Respondent paid fines in connection with 140 violations covering the period from July 10, 1977, through July 9, 1979.

8. Citation and Order No. 361463 involved in this proceeding was served upon Respondent on July 9, 1979. Notice of this proposed penalty was served on Respondent on February 18, 1980. Notice of contest of the proposed penalty was filed on March 21, 1980 and a special assessment was filed on May 5, 1980.

9. The alleged violation was abated in good faith.

Ten witnesses testified for Petitioner while three witnesses testified for Respondent.

James Levering testified that he worked in the mine during the second shift on Sunday, July 8, 1979. He operated a Waldon 5000 front-end loader in order to clean up dirt and mud that was built up in the crusher area in the underground mine portion of Respondent's facility. Craig Brannon had operated the same machine during the prior shift and Ernie Curtis was shoveling dirt in the area to help Levering.

Mr. Levering stated that the Waldon loader was without brakes and the gear shift kept popping out of gear. It had been this way for about two months. Levering had operated that Waldon loader about six or 12 times previously and never recalled that the loader had brakes. When the gear shift popped out of gear, the machine would float freely and the machine would be in neutral. In order to make the machine go forward, one would push the front of the foot pedal on the righthand side of the machine. To make it go backwards, one would push that same pedal down with his heel. Because the machine had no brakes, you would stop the machine by reversing your foot on flat surfaces or dropping your bucket to drag the machine.

Before the accident, Levering told Ernie Curtis about the brakes from the beginning of the shift onward. Levering also told his foreman, Harold

Roberts, that the machine had no brakes and that the gear knob was popping out. He told them this at about 5 p.m. that day. Roberts said that he realized this but so many things needed to be fixed in the mine that he doubted that anyone could work on the Waldon loader. He stated, "As you know, bigger pieces get fixed first; small ones are the last to be worked on."

As he made one roundtrip and was beginning his second trip going up a ramp, the machine slipped out of gear, he was unable to stop the machine, and the machine rolled backwards. The machine rolled against a catwalk behind him. This caused Levering to be pinned between the catwalk which was pressing against his back and the steering wheel of the Waldon loader. As a result of the accident, his ribs were broken and his left femur was broken in five places. He was out of work for 14 months as a result of the accident.

On cross-examination, Levering stated that before July 8, 1979, he never complained about the brakes to anyone representing management although he talked to other employees about it. He stated that the top speed of the machine in low gear was about five miles per hour. He did not tell Roberts that he was using the ramp and Roberts may not have known this. Roberts had told him not to take the dirt in that area. However, there was no other place to put dirt and Roberts never told him to avoid the ramp.

Dennis Haeber stated that he is an MSHA mine safety specialist who visited the mine on October 30 and 31 and November 1, 1979, in order to make a special investigation of the accident. He saw the Waldon 5000 loader parked at the bottom of the ramp near the accident site. He took photographs which were submitted as exhibits in this hearing.

Haeber stated that on October 31, 1979, he pushed the brake pedal with his hand and he felt no resistance. The pedal went down to the floor. Based on his experience, the brake should have stopped before going down to the floor.

He interviewed Ray Walker, a mobile maintenance superintendent, whose job was to order parts and supervise repairs. Walker said that the brakes on the Waldon loader never were good. Walker stated that two master cylinders were ordered before the accident and that he thought that the master cylinder had been put in this Waldon. However, Walker stated that when he looked after the accident he was surprised to find that a master cylinder had not been installed in this loader.

Haeber also found a work order issued by George Hill, one of Respondent's foremen, on July 4, 1979, to Walker which stated about the 5000 Waldon loader, "Needs brakes and light." Haeber also found a purchase order for two master cylinders dated February 23, 1979. Haeber concluded that the brakes were inadequate. He also found the gear shift stick wired in a forward or low gear position.

Craig Brannon testified that he operated the Waldon 5000 on the earlier shift on July 8, 1979. He stated that the machine did not have brakes. He did not recall pushing the pedal that day because the brake pedal had not worked on previous days. In order to stop the machine, he needed to reverse gears by reversing his foot on the foot pedal. He stated that sometimes if he reversed the gear shift would pop out and into neutral. He testified that he complained about these mechanical problems to his supervisor, Don Hammer. He stated that he was never instructed not to use the Waldon 5000 loader on either July 5, 6, or 7, 1979. He testified that it was general knowledge that the brakes on the machine did not work. Most of the workers complained to each other about the brakes.

Lawrence Reed testified that he has been a mobile equipment repairman for Respondent for the past 25 years. He stated that the maintenance supervisor, Ray Walker, instructed Reed to remove the master cylinder from the Waldon 5000 loader in question in February of 1979. Reed removed the master cylinder from that machine. He was told that a new master cylinder would be ordered the next day. Reed never installed another master cylinder in that Waldon and does not know whether or not a master cylinder was ordered or received. He stated that he did not work on that machine after February 1979, and he did not know whether or not the machine had a master cylinder at the time of the accident. He testified that if a master cylinder is removed or empty there is little pressure on the brake.

Robert Jones stated that he worked at Respondent's mine and is a member of the union safety committee. He testified that a few days before the accident he looked at the Waldon 5000 loader in question with George Hill and Clarence Simmons. Simmons had refused to run the machine because of safety. Jones pushed the brake pedal and the pedal went to the floor with little resistance. He stated that if the brakes were good the pedal would have gone no more than halfway to the floor. Therefore, he concluded that the machine had no brakes. A work order was written requesting repair of the brakes. That work order was admitted into evidence as Petitioner's Exhibit G-27. The date on the work order is July 4, 1979, a Wednesday.

Jones testified that Hill told the oncoming shift foreman, Donald Hammer that the machine had no brakes. Hammer said that he told "Baldy" (Roberts) about this. Jones acknowledged that driving through mud and water such as that found in the area causes brake problems.

Ernie Curtis was working as a mine utility man and clearing the belt at the time that Levering was injured. Curtis used the machine on the day before the accident, Saturday, July 7, 1979. He stated that on that date the machine had no brakes and popped out of gear. The brake pedal went to the floor. The gear stick lever was wired into a forward position. It had been that way for at least six months. When the wires would come out of place it would be rewired.

Curtis stated that he spoke to Harold Roberts, a shift foreman, about the brake on Saturday, July 7, 1979. Roberts told Curtis to park the

machine and that Roberts would try to get a maintenance man to repair the brakes. The machine was not marked as being defective or "tagged out." Roberts did not request that it be tagged out.

The following day as Curtis was shoveling he found Levering pinned between the Waldon and the catwalk. He called Roberts for help and together they removed Levering.

Before the accident that day, Levering told Curtis that he had told "Baldy" about the defective brakes on the Waldon. Roberts did not tell Levering to go up the ramp, however, Levering went up the ramp in order to do the required job. He stated that the ramp was approximately 30 feet long and that the Waldon moved in low gear at a maximum speed of two to two and a half miles an hour.

Dwight Kelley testified that on the day after the accident he walked by the Waldon 5000 loader in question and he pushed the brake pedal to the floor. He found no resistance in the pedal. He found the linkage to the pedal was loose and not connected with anything. He saw no master cylinder where it should have been and saw no piston. He was told that the master cylinder had been removed previously. He reported this to Robert Stouton, the mine superintendent.

He stated that removal of a master cylinder renders the braking system useless. He stated that Respondent's firm had consistent brake problems on most equipment due to mud and water. Usually if brakes were defective, the machine would be deadlined or taken to the shop. He testified that sometimes, but generally not all the time, machines that were defective would be tagged out. On cross-examination, Kelley stated that he could not see the master cylinder from where he looked. To view the master cylinder, he would have to remove the plate on the floor. However, looking from the pedal side he saw no piston going through the floor. Thus, even if the master cylinder was in place it would be inoperative unless it was connected to the piston which it was not.

Harold Roberts testified for Petitioner as an adverse witness. He stated that at the time of the accident he was Levering's foreman. Roberts denied being told by Hill on July 4, 1979, or before the accident that the Waldon loader had inadequate brakes. Roberts also denied being told by Curtis that the machine had inadequate brakes and an inadequate gear shift. Roberts admitted that after Levering had started work, Levering had asked Roberts if he knew that the shift lever was wired. However, he denied that Levering told him about the defective brakes.

Roberts stated that he "assumed the brakes were adequate a few days and before the accident." He stated that he ran the Waldon himself in June and that the brakes were adequate. The pedal did not go all the way to the floor.

In his report, Roberts had said "Loader may not have had any brakes." He stated at the hearing that he never checked on this. At first, he denied

this as a possible cause. He stated that if the brakes were bad enough the machine would have been tagged out. He did not personally push the brake pedal after the accident.

George Hill, a mine foreman for Respondent, testified that Jones refused to run that Waldon loader on July 3, 1979. He stated that he then checked the brakes for pedal pressure with his hand and found the brakes to be weak. The brakes went to the floor showing little or no brakes. Hill told the maintenance superintendent, Ray Walker, that this was a problem and the brakes needed correction. Walker said that he would have the brakes fixed either that shift or the next shift. On July 4, 1979, Hill wrote a work order for repair of the brakes. He also told another supervisor, Don Hammer, about the defective brakes. He did not recall whether or not he told Roberts about the defective brakes.

Hill stated that he did not tag out the loader as being unsafe. He acknowledged that he should have tagged out the machine. The reason was that at the time he did not have any tags. He did not check to see if the machine was repaired, however, he did not assign anyone else to run the Waldon after he requested repair of the brakes. Hill stated that the slope of the ramp is 10 percent and any grade is sufficient to enable the Waldon to coast down the ramp.

Daryl Beauchamp investigated the Waldon the day after the accident, July 9, 1979. He pushed the pedal with his hand and the pedal with just a little resistance pushed all the way to the floor. He concluded that the accident was caused when the machine popped out of gear and the operator lost control of it as a result of having no brakes.

Beauchamp testified that adequate emergency brakes are no substitute for inadequate service brakes. He stated that the company cooperated fully during his investigation and during his regular inspections. He stated that Brannon said that he knew the brakes were bad before the accident but had not told anyone about this. Beauchamp testified the withdrawal order is still in effect in that the machine is still on the site unrepaired.

James Hammer testified for Respondent. He stated that a week after the accident he looked at the Waldon 5000 on his own. He had heard there was no master cylinder but when he looked at the machine he saw a master cylinder in place. He does not know if there was a master cylinder before or during the accident. He does not recall working on the machine before the accident. He noted that hydraulic lines were not connected to the master cylinder. Without hydraulic lines being connected to the master cylinder, the brakes would not work. He noted that the master cylinder was held in place by three mounting bolts and could have been installed in 10 to 15 minutes. He stated that he could not tell how the hydraulic lines became disconnected. He indicated that the master cylinder that he saw was not a new one, it was rusting. He could not tell if there was a rod going between the master cylinder through the firewall to the pedal.

Howard Miller testified that he was Respondent's mine maintenance superintendent between 1974 and 1978 and since March 1, 1980, but not at the time of the accident. He has operated the Waldon 5000 and is familiar with the machine, including its repair. He stated that the machine's top speed and range is 2.5 miles per hour. He testified that the machine had brake problems from 1974 to 1978. He reported concerning tests that were made with a similar but larger Waldon Model 6000 loader at the mine. These tests indicated that on level ground by shifting gears between forward and reverse the machine could be stopped at between two and a half and approximately nine feet.

Miller stated that Respondent no longer has any Waldon 5000 in use. These have been replaced by Bobcat machines which do not use hydraulic brakes and therefore have more effective braking systems.

Miller testified that he examined the work slips for 1979 and found no slip complaining about the gear shift popping out of range, however, these slips were not complete and many were not available.

On cross-examination, Miller stated that if the Waldon popped out of gear on that ramp and had no brakes it would coast at about 10 miles per hour until it stopped or hit something.

David McVicker has been Respondent's safety director or industrial relations manager since May 1979. He stated that he accompanied Beauchamp and Haeber during their investigations. He had submitted a report which said "No brakes" but this was based on hearsay of others. He was told by a mechanic that the master cylinder was in the Waldon but the lines were disengaged. He stated that if the hydraulic lines were not connected, the brakes could not work. He did not check to see if the brake pedal was connected to the piston.

With regard to repair orders, he stated that if work is done a yellow copy is received. With regard to the July 4, 1979, work order for brakes, he found no yellow copy. Thus, he had no information to indicate that the brakes had been repaired after July 4, 1979. He also had no information that would indicate that a master cylinder had been installed on that Waldon 5000 after it had been removed by Reed in February 1979.

CONCLUSIONS OF LAW AND CONCLUDING FINDINGS

I find that Respondent violated the mandatory safety standard at 30 C.F.R. § 57.9-2 as alleged. That standard reads: "§ 57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

The evidence is overwhelming that on July 8, 1979, when Mr. Levering used the Waldon 5000 loader at Respondent's facility the machine had defective brakes and had a defective gear shift. In its posthearing brief, Respondent argued that the problem with the loader's brakes was not one which affected safety because "the machine's use was to be restricted to

traveling only on level ground at a speed of two and one-half miles per hour." Although the machine moved slowly, it was extremely dangerous because of its heavy weight. Even on a slight incline the machine was capable of rolling and injuring either a pedestrian or its operator. In fact because of the defective brakes, Mr. Levering suffered injuries which incapacitated him for 14 months.

Upon consideration of the criteria in section 110(i) of the Act, I assess a penalty of \$10,000, the maximum amount authorized by section 110(a), against Respondent. I find that Respondent (1) is a medium sized operator; (2) has a history of 140 violations of the Act in the 2-year period prior to this violation; (3) abated the violation in good faith; and (4) assessment of this penalty will not affect Respondent's ability to continue in business. Further, I find that this violation (5) constituted gross negligence and (6) was of severe gravity.

30 C.F.R. § 100.3(d)(3) defines gross negligence as follows:

"Gross negligence" means an operator either caused the condition or practice which occasioned the violation by exercising reckless disregard of mandatory health and safety standards or recklessly or deliberately failed to correct an unsafe condition or practice which was known to exist.

I find that in failing to correct the loader's defective brakes before the July 8, 1979 accident, Respondent recklessly and deliberately failed to correct an unsafe practice which was known to exist.

First, Mr. Ray Walker, Respondent's former mobile maintenance foreman ordered its mechanic, Laurence Reed to remove the master cylinder for the loader in February, 1979. There is no evidence that this master cylinder was replaced before the accident. The loader was continued in use after the cylinder was removed.

Second, on July 4, 1979, Mr. George Hill, one of Respondent's foremen in the company of Mr. Randy Jones inspected the loader and found that it had little or no brakes. Hill then gave a work order to Walker who promised to repair the brakes on that shift or the next shift. The work order stated: "Needs brakes and lights." Hill also told another supervisor, Don Hammer about the defective brakes. Hill did not tag the machine out although he admitted that he should have and the machine continued in use.

Finally, another of Respondent's foremen, Harold Roberts, was told of the defective brakes both by Ernie Curtis on July 7, 1979 and by Levering on July 8, 1979. Although Roberts was told that the brakes was defective by Curtis, he told Levering to use the loader the next day. I credit Levering's testimony that when Levering complained about the brakes shortly before the accident, Roberts told him to continue to use the loader because other equipment had to be repaired first.

These actions and inactions by Respondent's foremen and supervisors constituted a deliberate decision to continue to use a machine that they knew was unsafe over an extended period of time despite numerous warnings and opportunities to repair or discontinue use of the machine. The defective brakes were further aggravated by the defective gearshift which would pop out of place throwing the machine out of a running gear and into neutral. Instead of repairing the gearshift, Respondent's wired it into place in a defective, makeshift manner. This entire course of conduct constituted a deliberate and reckless regard for safety and a reckless and deliberate failure to correct an unsafe condition.

My finding of severe gravity is first based upon the fact that this was an extremely heavy machine capable of killing or seriously injuring either its operator or a pedestrian as a result of its deficient brakes. In fact, Mr. Levering was disabled for over a year because of this violation. Additionally, the fact that the deficient brakes continued over a substantial period of time increased the probability that someone would be injured.

ORDER

Respondent is ORDERED to pay \$10,000 in penalties within 30 days of the date of this Order.



Edwin S. Bernstein
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

APR 8 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-303-M
Petitioner : A.C. No. 12-00084-05002
v. :
: Eckerty Quarry
MULZER CRUSHED STONE COMPANY, :
A Partnership, :
Respondent :

DECISION

Appearances: Steven E. Walanka, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
Petitioner, MSHA;
Philip E. Balcomb, Manager, Tell City, Indiana,
for Respondent, Mulzer Crushed Stone Company.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Mulzer Crushed Stone Company (hereinafter Mulzer) for a violation of mandatory safety standards. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. § 56.12-30. A hearing was held in Evansville, Indiana, on February 24, 1981. George LaLumondiere testified on behalf of MSHA. Nelson R. Paris testified on behalf of Mulzer. The parties waived their right to submit findings of fact and conclusions of law in briefs and the record was closed at the end of the hearing.

ISSUES

Whether Mulzer violated the Act or regulations as charged by MSHA and, if so, the amount of civil penalty which should be assessed.

APPLICABLE LAW

Section 110(a) of the Act, 30 U.S.C. § 820(a), provides:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. § 56.12-30 provides as follows: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

STIPULATIONS

The parties stipulated the following:

1. That the Administrative Law Judge has jurisdiction in matters related to the Mine Safety and Health Act of 1977.

2. That the inspector who issued the citation was a duly authorized representative of the Secretary of Labor.

3. That the size of the mine as to production of tons or man-hours per year is 101,812.

4. That the size of the company as to production of tons or man hours per year is 469,971.

5. That the proposed assessment will not harm Mulzer's ability to continue its operations.

6. That Citation No. 366831 has been terminated.

7. That Mulzer owned and operated a secondary crusher motor, the subject of this citation, on February 12, 1980.

8. That Respondent operates a limestone (crushed and broken) type facility.

SUMMARY OF EVIDENCE

On February 12, 1980, MSHA inspector George LaLumondiere made an inspection of Eckerty Quarry. In checking out the ground floor level of the crusher control booth building, he observed that the oil switch of the secondary crusher drive motor was set permanently in a "run" position by means of a wooden wedge holding the switch in place. By keeping the switch in this position, the magnetic overload protection was unable to be utilized. This protection is designed to automatically turn off the switch if the machine is not functioning properly. The inspector testified that if the motor should single phase or lose a phase conductor, it might overheat since the wedge prevented the switch from automatically turning off. He believed that this could cause an electrical fire or an oil fire which could ignite the wooden crusher control booth and cause injury to the control operator on the second floor of the building. In the inspector's opinion, this amounted to a potentially dangerous condition, and he issued a citation for a violation of 30 C.F.R. § 56.12-30.

The inspector stated that the operator was aware that the wooden wedge was being used. The violation was abated on the same day by an electrician who cleaned the contacts or magnetic switches and removed the wedge.

Mulzer's chief electrician, Nelson Paris, testified that the only purpose of the starter switch is to reduce the amount of voltage and current that is used when starting the motor. After starting, the switch is then moved into the "run" position. Mr. Paris explained that they had been having problems keeping the switch in the "run" position since the level of oil pressure was being read inaccurately, causing the motor to shut down even though the oil supply was adequate. When the motor and crusher stopped, rocks would wedge into the machine resulting in a work stoppage of 4-6 hours while they dug out the crusher. In order to keep up production and prevent false tripping, a wooden wedge was inserted to hold the switch in the "run" position.

Mr. Paris stated that the magnetic overload protection functioned by shutting off the switch when the motor overloads and generates heat. He maintained, that in the absence of the protection provided by the automatic switch, the machine would eventually shut off when the electrical fuses shorted out. He also indicated that the crusher operator can manually stop the motor by using the handle located on the side of the starter's enclosure.

DISCUSSION

MSHA asserts that Mulzer violated 30 C.F.R. § 56.12-30 by having an oil start-stop switch for a secondary crusher motor wedged into a run position. Its use of a wooden wedge which prevented the machine from automatically shutting off when the oil pressure was too low, was a "potentially dangerous

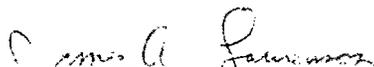
condition." I find that by using the wedge, Mulzer had to either rely on the control operator to detect an emergency situation, or had to wait for the fuses to burn out in order for the power to be cut off. The possibility that the motor might single phase, allowing the machine to run for a period of time and build up heat presents a potentially dangerous condition. Since the building was small and made of wood, a fire might cause immediate and serious harm.

MSHA has established the fact of violation by demonstrating a potentially dangerous condition. I find that the probability of a dangerous situation occurring is low since protection was provided by both the fuses and manpower. Since the operator was aware of the wedge and the purpose of the automatic overload protection switch, this violation amounts to ordinary negligence. It is also noted that the violation was abated immediately after the citation was issued, therefore showing good faith on the part of the operator.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of \$40, the amount proposed by MSHA, is appropriate.

ORDER

WHEREFORE, IT IS ORDERED that Mulzer pay the sum of \$40 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 56.12-30.



James A. Laurenson, Judge

Distribution by Certified Mail:

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Philip E. Balcomb, Manager, Mulzer Crushed Stone Company, P.O. Box 248, Tell City, IN 47586

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 8 1981

MARK SEGEDI, : Application for Review
: of Discrimination
On behalf of: :
: Docket No. PENN 80-273-D
S. J. EZARIK, ET AL., :
Complainants : Somerset No. 60 Mine
v. :
: :
BETHLEHEM MINES CORPORATION, :
Respondent :

ORDER OF AMENDMENT

On March 31, 1981, a document styled "Decision" was issued in the above-captioned case. The Decision contained an order divided into eight parts, denominated Parts A through H. In Part G of the order, the undersigned Administrative Law Judge retained jurisdiction of the above-captioned proceeding for the purpose of assessing against the Respondent a sum equal to the aggregate amount of all costs and expenses, including attorneys' fees, reasonably incurred by those Complainants identified in Part B of the order in connection with the proceeding. In view of the retention of jurisdiction, Parts A, D, and E of the order are herewith AMENDED to read as follows:

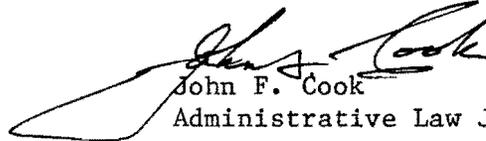
A. IT IS ORDERED that the above-captioned proceeding be DISMISSED as to those Complainants who were scheduled to begin work at 8:15 a.m. on January 30, 1980. Such Complainants are identified as B. G. Miller; R. Filby; D. W. Clark; C. J. Zukauckas; S. A. Jestat; T. L. Pysh; R. T. Harris; D. Phillips; G. R. Wheeler; C. J. Rocco; S. Durko, Jr.; L. T. Pruski; J. R. Kennedy; R. T. Rados; J. E. Karpoff; M. Toth; J. E. Timlin; H. W. Ambrosy; G. A. Dean; and G. S. McKeta. Such dismissal shall take effect immediately upon the issuance of the order disposing of the issues pertaining to the assessment of costs and expenses, including attorney's fees.

* * * * *

D. IT IS FURTHER ORDERED that the Respondent pay the back pay and interest awarded herein within 30 days of the issuance of the order disposing of the issues pertaining to the assessment of costs and expenses, including attorney's fees.

* * * * *

E. IT IS FURTHER ORDERED that the Respondent, immediately upon the issuance of the order disposing of the issues pertaining to the assessment of costs and expenses, including attorney's fees, clear the employment records of the Complainants identified in Part B of this order of all unfavorable references, if any, concerning the activities that occurred prior to 8:15 a.m. on January 30, 1980.


John F. Cook
Administrative Law Judge

Issued:

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S.
Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 10 1981

FREDERICK G. BRADLEY, : Complaint of Discharge, Discrimi-
Complainant : nation or Interference
v. :
Docket No. WFVA 80-708-D
: MSHA Case No. HOPE CD 80-68
BELVA COAL COMPANY :
Respondent : Belva Coal Mine

SUPPLEMENTAL DECISION AND ORDER

On February 11, 1981, I issued a decision finding that Respondent had unlawfully discriminated against Complainant in violation of § 105(c) of the 1977 Mine Act, 30 U.S.C. § 815(c). The parties were unable to agree on the relief due, so further submissions were ordered. The monetary award herein covers the period June 12, 1980 through April 10, 1981.

Since the initial decision, the Commission has issued Secretary of Labor ex rel. Robinette v. United Castle Coal Co., Docket No. VA 79-141-D (April 3, 1981), which further sharpens the contours of § 105(c). It is now plain that the Pasula 1/ analysis should be applied to every discrimination case. For the sake of clarity, then, I will summarize the manner in which the Pasula tests have been applied to the evidence in this case.

The Weight to be Accorded the Decision of the West Virginia Coal Mine Safety Board of Appeals

During the course of these proceedings, Respondent moved for summary decision based on a decision adverse to Complainant issued by the West Virginia Coal Mine Safety Board of Appeals. Complainant's cause of action before that tribunal was essentially the same cause of action he has presented here. The motion was denied, for the reasons set forth in my order of January 12, 1981. However, the transcript of the hearing before the Board and the Board's decision were admitted as evidence at the hearing.

The weight to be given this evidence is controlled by the factors outlined in Pasula, supra, at 2795. Based on these factors, I find that the Board's decision is entitled to no weight, because there are essentially no reasons to explain it. Without knowing how the Board evaluated the testimony or applied the law, I think any deference to its decision would be unjustifiable.

1/ Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 14, 1980).

The Pasula Analysis

1. Did Bradley Engage in Protected Activity?

Four witnesses testified that Bradley often complained to his superiors about unsafe practices in the mine. On June 11 and 12, 1980, a Federal inspector visited the mine and issued a number of citations and orders. In particular, he directed Respondent to remove the damaged portion of a trailing cable and install a permanent splice. The cable was tagged but was not locked out. Complainant began to hang the cable so a scoop could pass. Larry Davis then told Complainant not to hang the cable and simply to allow the scoop to run over it. Complainant refused to comply with this order.

The controlling standard is whether Complainant had a good faith, reasonable belief that there was a hazardous condition and whether he reacted in a reasonable manner to that belief. Robinette, supra, at 10. Complainant honestly believed that running over the cable was hazardous. This belief was reasonable since the cable was damaged and could have been further damaged by the scoop. Although the cable was tagged and de-energized, it was still connected to a power source and a mining machine. If it became energized accidentally, it could have seriously harmed anyone touching it. The risk of harm would be significantly increased by further damage to the cable. Complainant reacted reasonably by refusing to so increase the risk. His refusal led to only a modest delay in the performance of his duties while he hung the cable.

2. Was the Discharge Motivated in Part by the Protected Activity?

Respondent was clearly aware of Complainant's protected activity. Since the discharge followed so closely on his refusal to allow the scoop to run over the cable, such refusal unquestionably figured in the decision to discharge.

3. Was the Discharge Motivated in Part by Unprotected Activity?

Respondent introduced evidence that Complainant did not comply with an order to bring a tape measure and argues that this precipitated the discharge. It is clear, however, that this, in itself, is not a case of egregious misconduct, and that discharge was a totally disproportionate sanction.

4. Would Bradley have been Discharged for the Unprotected Activity Alone?

The testimony suggests that personality differences played a significant role in the decision to discharge. The only specific acts of misconduct alleged by Respondent, however, were the refusal to have the scoop run over the cable and the refusal to bring a tape measure. I conclude from all the testimony that the refusal to let the scoop run over the cable was the key event. This act of defiance and the substantial burdens placed on company personnel by the Federal inspector became intertwined in Larry Davis's mind. Complainant's discharge finally expressed the dissatisfaction and resentment which had been building against him for months. I find that the isolated refusal to get a tape measure, under the circumstances, would not have provoked the discharge by itself.

Monetary Award

The parties were unable to agree on the amount due under paragraphs 2 and 4 of my order of February 11, 1981. They have supplied argument and documentation to support their positions and, having considered them, I make the following rulings on each item.

The back pay provisions of § 105(c), like the corresponding provisions of Title VII of the Civil Rights Act, appear to be modeled on § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975). Questions arising under it should therefore be resolved by reference to NLRB precedent. Id. The general rule is that back pay is the difference between what the employee would have earned but for the wrongful discharge and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598 (D.C. Cir. 1976). In practice, this means gross pay minus net interim earnings equals the award. Respondent, of course, is responsible for complying with applicable state and Federal laws on withholding. Cf. Social Security Board v. Nierotko, 327 U.S. 358 (1946).

Complainant claims gross back pay of \$ 25358.82. Respondent's computations show that \$ 25450 is due. Respondent's figure is better documented and will be accepted. Complainant asserts that he earned \$ 1850 while employed elsewhere during the period. Respondent places the figure at \$ 5800.

Respondent has proved net earnings of \$ 1300.12 from Uniajax Mining. Uniajax also paid a \$ 2000 "cash advancement" to Complainant. Complainant asserts that the latter was monthly salary and subject to withholding, so the net received was \$ 1300.12. Respondent also contends that Complainant earned \$ 1800 at Misty Coal. However, Respondent does not specify whether this is net or gross pay. Therefore, only the \$ 600 actually received by Complainant will be deducted. Total interim earnings were \$ 3200.24.

Unemployment and other public benefits received by Complainant, states Respondent, amount to \$ 8099. But these benefits, unlike interim earnings, may be recoverable under state law. If Complainant has perpetrated a fraud on the State of West Virginia, as Respondent alleges, it is a problem for that state, not this Commission, to correct. In any event, the weight of authority persuades me that public benefits should not be deducted from a back pay award. Wilson and Rummel v. Laurel Shaft Const. Co., 2 FMSHRC 2623 (September 12, 1980); Neal v. Boich, 3 FMSHRC 443, 453 (February 12, 1981); NLRB v. Pan Scape Corp., 607 F.2d 198 (7th Cir. 1979); Marshall v. Goodyear Tire and Rubber Co., 554 F.2d 730 (5th Cir. 1977). The benefits received by Complainant will not be deducted.

Complainant claims reimbursement of \$ 90 for the transcript of the hearing before the West Virginia Board. I deny his claim for this expense but award \$ 60.60, the cost of the transcript in the Commission hearing, and court costs of \$ 18.90.

Respondent argues that Complainant did not "incur" any attorneys fees within the meaning of § 105(c)(3) and therefore attorneys fees should not be awarded. I cannot adopt this construction of the statute. In awarding attorneys fees to successful complainants, Congress intended that the costs of litigation not prevent them from vindicating their rights. The Seventh Circuit, applying the Civil Rights Attorneys Fees Awards Act of 1976, squarely faced the question whether publicly funded legal clinics could recover attorneys fees:

It is true that the prospect of attorneys fees does not discourage the litigant from bringing suit when the legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus an award of attorneys fees to the organization providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant.

Mary and Crystal v. Ramsden, 635 F.2d 590, 602 (7th Cir. 1980), quoting, Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

Counsel for Complainant claims fees in the amount of \$ 1485, 24 3/4 hours at \$ 60 per hour. Although the time spent is challenged by Respondent, counsel has not provided any documentation of the hours spent. The hearing took approximately 7 hours, and I conclude that an additional 14 hours were necessarily spent on the case and will award \$ 1260 as attorneys fees.

The total amount of the award is \$ 23589.26. The figure was derived as follows:

Gross back pay due.	\$ 25450.00
Interim earnings.	3200.24
Subtotal.	22249.76
Transcript	\$ 60.60
Court costs	18.90
Attorneys fees	1260.00
Subtotal.	1339.50
Total	23589.26

ORDER

Respondent shall pay to counsel for Complainant the sum of \$ 22249.76 within 30 days of the date of this order, less amounts withheld pursuant to state and Federal law. Respondent shall also pay to counsel for Complainant

the sum derived by applying a rate of 12 per cent 2/ interest to the net back pay award after withholding, and \$ 1339.50 for costs and fees. Counsel for Complainant shall retain \$ 1339.50 and shall disburse the balance to Complainant.


James A. Broderick
Chief Administrative Law Judge

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Special Investigation, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

2/ This is the current adjusted prime rate used by the Internal Revenue Service for underpayments and overpayments of tax. Rev. Ruling 79-366. The NLRB also uses this figure to compute interest on back pay awards. Florida Steel Corp., 231 N.L.R.B. No. 117, 1977-78 CCH NLRB Para. 18,484.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 13 1980

SECRETARY OF LABOR, : Complaint of Discharge,
MINE SAFETY AND HEALTH : Discrimination, or Interference
ADMINISTRATION (MSHA), :
On behalf of: : Docket No. SE 80-46-DM
: MD 79-138
WILLIAM JOHNSON, :
Complainant : Tenoroc Mine
v. :
BORDEN, INC. (Chemical Division, :
Smith-Douglass), :
Respondent :

DECISION

Appearances: Shaka M. Shedeke, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
Complainant;
William R. Neale, Esq., Borden, Inc., Columbus,
Ohio, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) on behalf of William Johnson alleging that William Johnson was discharged from his employment at Borden, Inc., Chemical Division, Smith-Douglass (hereinafter Borden) on April 26, 1978, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (hereinafter the Act). On May 10, 1978, William Johnson filed a complaint with the Occupational Safety and Health Administration (hereinafter OSHA) concerning his discharge. OSHA investigated the complaint and subsequently referred the matter to MSHA.

On December 31, 1979, MSHA filed this action on behalf of William Johnson. Upon completion of discovery and prehearing requirements, a hearing was held in Tampa, Florida, on December 2-4, 1980. The following witnesses testified on behalf of Complainant: Gerald E. Harper, Charles DeCroes, William Johnson,

and Donald Fancher. The following witnesses testified on behalf of Borden: Kenneth Snow, Richard Daniels, and Joseph Lang. Because of the onset of a sudden illness, Joseph Lang was unable to complete his testimony at the hearing. Pursuant to an agreement of the parties, Mr. Lang completed his testimony by means of a deposition in Atlanta, Georgia, on December 18, 1980.

At the hearing, Borden objected to MSHA's right to propose a civil penalty herein without following the procedures set forth in 30 C.F.R. §§ 100.5 and 100.6 and 29 C.F.R. § 2700.25. Borden's objection was sustained and the civil penalty proposal was severed from the complaint and remanded to MSHA to begin the civil penalty assessment process.

ISSUES

Whether Borden violated section 105(c) of the Act in discharging Complainant William Johnson and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. § 815(c), provides in pertinent part as follows:

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

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days

after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation, shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner, to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

STIPULATIONS

The parties stipulated the following:

1. Borden is an "operator" of a "mine" as those terms are defined in the Act.
2. William Johnson was employed as a "miner" by Borden from October 29, 1973, to and including April 26, 1978, as that term is defined in the Act.
3. During the period of Johnson's employment with Borden as a miner, immediately prior to his termination on April 26, 1978, Johnson was employed at the Tenoroc Mine facility.
4. William Johnson was employed by Borden pursuant to the terms and provisions of a collective bargaining agreement between Borden and Local 37,

International Chemical Workers' Union. Until the final disciplinary action on April 18, 1978, Johnson had never received any oral or written reprimand, suspension, or discharge from or with respect to his job performance and employment with Borden.

5. Pursuant to the Collective Bargaining Agreement, particularly Article XI, Paragraph 9, "[n]o employee can be discharged without first being suspended, the suspension to become automatically a discharge within seven calendar days of its issuance unless otherwise directed by the management or modified by the grievance procedure."

6. Pursuant to such collective bargaining agreement, Borden retained the right to discipline and discharge, but had no published rules of conduct for employees.

7. On or about April 4, 1978, William Johnson made a nuisance report to the Polk County Health Department about filthy restrooms.

8. An inspection was made on April 7, 1978, and a follow-up inspection on April 14, 1978, showed correction of the situation.

9. On April 13, 1978, William Johnson returned to the machine shop at Tenoroc and removed tools from his locker.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. At all times relevant herein, Borden was the operator of the Tenoroc Mine (hereinafter the mine) in Polk County, Florida.

2. William Johnson (hereinafter Johnson) was employed as a "miner" by Borden from October 29, 1973, to April 26, 1978. At the relevant times herein, Johnson worked as a machine shop helper and recovery plant oiler. Prior to the incident leading to Johnson's discharge, no disciplinary action had been taken against him by Borden. Johnson earned \$4.58 per hour at the time of his discharge and his pay would have increased to \$4.83 per hour on July 1, 1978, pursuant to a collective bargaining agreement between Borden and Local No. 37, International Chemical Workers' Union (hereinafter the Union).

3. Labor-management relations at the mine were governed by the collective bargaining agreement. Although Johnson did not belong to the Union, the Union was recognized as the exclusive bargaining agent for all production and maintenance employees at the mine.

4. During the time prior to April 4, 1978, William Johnson complained about the filthy condition of the restroom facilities at the mine. On April 4, 1978, he telephoned the Polk County, Florida, Department of Health

(hereinafter Department of Health) and complained about filthy restrooms at the mine.

5. On April 7, 1978, Johnson was notified by his supervisor, Larry Bradford, that the restrooms would be inspected and that Johnson should clean them prior to the inspection.

6. On April 7, 1978, Gerald E. Harper, a sanitarian employed by the Department of Health inspected the restrooms at the mine. During this inspection, he was accompanied by mine manager, Jim Calandra. Of the three restrooms inspected, two were found to be in satisfactory condition, the third restroom was ordered closed, and minor violations were noted by the sanitarian. During the course of the inspection, mine manager Jim Calandra made several references to the person who filed the health complaint and stated, in response to a question from the sanitarian, that he knew that Johnson filed the complaint.

7. On April 10, 1978, Borden posted a notice that the position of machine shop helper at the mine would be eliminated effective April 17, 1978. Johnson and one other employee were the only employees classified as machine shop helpers at the mine. Thereafter, Johnson claimed a temporary job for 1 week as a recovery plant oiler but did not attempt to "roll" or "bump" into a permanent job prior to the time of his discharge.

8. In late 1977, Johnson enrolled in a welding course. Borden was aware of this fact and gave Johnson permission to practice welding at the mine after working hours on his own time. Borden's superintendent, Richard Daniels, testified that Johnson was instructed that he could practice welding only when a supervisor was present. Johnson testified that Superintendent Daniels only instructed him that he should practice welding after his regular shift but not on weekends when no one was present.

9. At one of the two entrances to the mine property, there were gates and a guard shack. Borden contracted with an independent security firm to provide guard services at this entrance. Often, the guard shack was unoccupied. The other entrance to the mine property was unguarded. It was the practice of miners employed at the mine to return to the mine property after working hours and on weekends to go fishing on the mine property. It was not the custom or practice of the miners to stop or sign in at the guard shack. Frequently, miners would be accompanied by nonemployees during their fishing expeditions.

10. On April 13, 1978, at approximately 7 p.m., Johnson returned to the mine to practice welding. Upon entering the property, he bypassed the guard shack and entered the unguarded entrance. Prior to this time, there had been a heavy rain. When Johnson attempted to begin welding, he got an electrical shock due to the wet floor conditions. He discontinued welding but decided to clean out his lockers since he only had 1 more working day before he began work at a different building at the mine.

11. The mine had no written rules or policies concerning the procedure for checking out lockers, but Superintendent Daniels claimed that he and Larry Bradford, Johnson's immediate supervisor, told Johnson and the other machine shop helper not to remove tools until their lockers had been checked. Johnson denied that he received such an instruction from Bradford or Daniels. Neither Bradford nor the other machine shop helper testified at the hearing.

12. On Friday, April 14, 1978, Superintendent Daniels notified Johnson that he intended to check his locker before Johnson reported to his new assignment as a recovery plant oiler. Johnson advised Daniels that he had no tools in his locker since he took them home on the previous night.

13. On Monday, April 17, 1978, Superintendent Daniels called Joseph A. Lang, industrial relations manager of Borden's Smith-Douglass Division, and informed Lang that Johnson had violated his instructions and that something should be done about it. A meeting to discuss the situation was scheduled for the next day.

14. On Tuesday, April 18, 1978, a meeting was held at the mine with the following in attendance: Joseph Lang, Richard Daniels, Larry Bradford, Kenneth Snow--the Union shop steward at the mine, and Johnson. During this meeting, Johnson conceded that he had removed certain tools--some belonging to Borden and some of his own tools--from his locker on April 13, 1978. Johnson denied receiving an instruction from Superintendent Daniels or Supervisor Bradford that he have his locker checked out before removing tools. Contrary to the assertions of Lang and Daniels, Johnson was not asked to return the tools. At the conclusion of the meeting, Johnson was given a Termination Notice signed by Daniels stating that he was "suspended for 7 days to automatically end in termination on 4-26-78" for the following reasons: "Unauthorized plant entry, unauthorized removal of tools and failure to follow specific instructions of Supervisor."

15. Borden's employment and personnel records show that prior to April 18, 1978: (1) several employees were suspended, without being discharged, for up to 7 days for failure to follow instructions or insubordination, but only one employee was discharged for "gross insubordination"; (2) several employees were discharged for theft of company property; and (3) no employees were subject to discipline for unauthorized plant entry or unauthorized removal of tools.

16. Johnson was unemployed from April 26, 1978 to August 7, 1978 when he commenced employment at Church's Fried Chicken, Inc., at a salary of \$175 per week.

17. Johnson paid Sun Personnel Services the sum of \$951.33 for its services in obtaining employment for Johnson at Church's Fried Chicken, Inc.

18. Johnson was employed at Church's Fried Chicken, Inc., until May 1979. Between May 1979, and February 1980, Johnson worked for three different employers as a grinder operator, a life insurance salesman, and a

clerk. Since February 18, 1980, he has been employed by Piper Aircraft Corporation. Johnson's current rate of pay at Piper Aircraft Corporation is \$5.68 per hour.

DISCUSSION

A. Applicable Law and Contentions of the Parties

Section 105(c)(1) of the Act provides in pertinent part: "No person shall discharge * * * any miner * * * because such miner * * * has filed or made a complaint under or related to this Act * * * of an alleged danger or safety or health violation * * *." Recently, in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar antiretaliation issues arising under other Federal statutes. The Commission held as follows:

We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800. [Emphasis in original.]

MSHA, on behalf of Johnson, contends that Johnson was discharged by Borden because of his complaints to Borden and the Department of Health concerning filthy restrooms at the mine. Complainant further asserts that Borden's stated reasons for discharging Johnson are a pretext to conceal an unlawful motive. Johnson claims that he is entitled to reinstatement, back pay, and other consequential damages.

Borden asserts that Johnson did not establish a prima facie case because of the following: (1) his complaint to the Department of Health about filthy restrooms is not protected activity under section 105(c)(1) of the Act;

(2) he did not establish that his discharge "was motivated in any part by the alleged protected activity"; (3) Borden had a "legal and rational basis to discharge Mr. Johnson", i.e., unauthorized plant entry, unauthorized removal of tools, and failure to follow specific instructions of supervisor; and (4) Johnson is not entitled to the remedies he seeks.

B. Did Johnson Engage in Protected Activity

Johnson asserts that he complained to Borden about the filthy and unhealthful conditions of the restrooms at the mine and, when no action was taken by Borden, he called the Department of Health about this complaint. Borden contends that Johnson did not intend to exercise his statutory right under section 105(c)(1) of the Act and, hence, this was not activity protected under the law.

It should first be noted that sanitary toilet facilities are the subject of a mandatory MSHA regulation applicable to metal and nonmetallic open-pit mines. 30 C.F.R. § 55.20-8(b) provides in pertinent part: "(Toilet) facilities shall be kept clean and sanitary." Thus, I find that a complaint about the unclean and unsanitary toilet facilities is activity protected under section 105(c)(1) of the Act. Furthermore, it matters not that the complaint was made to the Department of Health as opposed to MSHA. The fact is that the complaint is a health complaint which constitutes protected activity.

Borden is unable to cite any authority to support its contention that a miner must establish that he intended to invoke his statutory rights at the time he made his complaint. Where the miner establishes that he did, in fact, engage in protected activity under section 105(c)(1) of the Act, I find that there is no additional requirement that the miner establish an intent to invoke the statutory rights.

I conclude that Johnson has established that he engaged in protected activity pursuant to section 105(c)(1) of the Act in connection with his complaint about unsanitary toilet facilities at the mine.

C. Was Johnson's Discharge Motivated in Any Part by His Protected Activity

On the issue of Borden's alleged unlawful motivation for Johnson's discharge, MSHA and Johnson presented no direct evidence. However, they assert that Borden was aware of Johnson's complaint to the Department of Health; Johnson was identified as the complainer; and shortly thereafter Johnson was discharged. All of the relevant events occurred in April 1978, as follows: April 4--Johnson complained to Department of Health; April 7--Department of Health inspected the mine and ordered corrections and repairs; April 14--Final inspection by the Department of Health finding violations to be abated; and April 18--Johnson was suspended with intent to discharge. Although not articulated as such, Complainant apparently contends that the above circumstances give rise to an inference of unlawful motivation sufficient to establish a prima facie case.

Borden contends that Complainant has failed to establish a prima facie case because he presented no evidence "that the adverse action was motivated in any part by the alleged protected activity." Moreover, Borden asserts that the testimony of its management employees who made the determination to discharge Johnson--Superintendent Daniels and Industrial Relations Manager Lang--establish that neither of them was aware of the fact that Johnson made the complaint to the Department of Health until long after Johnson was discharged.

The first issue to be resolved is whether Borden was aware of the fact that Johnson made the complaint to the Department of Health. Department of Health sanitarian Gerald Harper testified that he performed the inspections in question. During the initial inspection on April 7, 1979, he was accompanied by mine manager Jim Calandra. Harper stated: "On the way back, Calandra made references to the person who filed the health complaint saying he was in the bargaining unit but not in the Union * * *. I then asked him if he knew who filed the complaint and he said Johnson did." (Exh. G-6-E) Jim Calandra did not testify at the hearing.

Johnson testified that his supervisor, Larry Bradford, told him prior to the initial inspection by the Department of Health, that since he was concerned about clean toilet facilities, he should clean them himself. Larry Bradford was also present at the meeting when Johnson was suspended but he did not testify at the hearing.

While Joseph Lang may have been unaware of the fact that Johnson initiated the health complaint, it is inconceivable that Superintendent Daniels was unaware of it since both of the other supervisors of the mine had such knowledge. Curiously, these two supervisors did not testify at the hearing. Superintendent Daniels' testimony, that he had no knowledge of Johnson's complaint concerning the unsanitary toilet facilities, is rejected. On this issue, I find that Johnson's testimony, concerning Superintendent Daniels' statements admitting knowledge of Johnson's complaint prior to his discharge, is more credible. Moreover, Johnson's other evidence corroborating Borden's knowledge of his complaint was not rebutted by Borden. Thus, I conclude that Borden was aware of the fact that Johnson made the complaint to the Department of Health.

Turning next to the question of the alleged unlawful motivation of Borden in discharging Johnson, I find that the sequence of events is relevant. Johnson worked for Borden for 4-1/2 years prior to April 1978, without any disciplinary action being taken against him. On April 4, Johnson filed his health complaint. On April 7, because of Johnson's concern about the toilet facilities, he was ordered to clean them prior to their inspection. Upon completion of the inspection on April 7, Borden's mine manager Jim Calandra expressed a personal animus towards Johnson as set forth above. On April 10, Johnson's job was abolished or terminated. On April 14, the final inspection by the Health Department took place and Johnson was questioned about unauthorized plant entry and unauthorized removal of tools. On April 18, Johnson was called to a meeting and suspended with an intent to

discharge. I conclude that these circumstances give rise to an inference that Johnson's discharge was motivated by his protected activity. Therefore, the preponderance of the evidence establishes a prima facie case of violation of section 105(c)(1) of the Act.

D. Did Borden Establish a Legitimate Reason for Johnson's Discharge

Under the standard announced by the Commission in Pasula, supra, once the Complainant establishes a prima facie case of violation of section 105(c)(1) of the Act, Borden may affirmatively defend by proving by a preponderance of the evidence that its decision to discharge Johnson was also motivated by his unprotected activities and that it would have discharged him for the unprotected activities alone. In this regard, Borden asserts that Johnson engaged in serious misconduct--unauthorized plant entry, unauthorized removal of tools, and failure to follow specific instructions of supervisors--which constitutes a legal and rational basis for his discharge. Thus, it is necessary to examine and analyze, individually and cumulatively, these contentions by Borden.

The issue of Johnson's alleged unauthorized plant entry on April 13, involves the limits of Johnson's privilege to use the Borden facilities to practice welding after regular working hours. The evidence establishes that Johnson enrolled in a welding course in 1977 and Borden was aware of this fact. Johnson asserts that he was initially given permission to use Borden's equipment and facilities to practice welding in connection with this course. In late 1977, Superintendent Daniels and Johnson discussed the terms under which Johnson would be permitted to practice welding. Apparently, there were no witnesses to this conversation and nothing was reduced to writing. Superintendent Daniels testified that he instructed Johnson that he was only permitted on the premises if a supervisor was present or the plant was in operation. Johnson testified that the only limitation on his access to the plant was that Johnson could not practice welding on weekends when no one was there.

At the hearing, there was much ado about security at this mine. Suffice it to say that I find that during the period in question, Borden failed to establish that Johnson was required to check in with the guard or that he attempted to conceal his entry. The evidence also establishes that security was lax and it was common practice for miners to enter the site after regular hours, sometimes accompanied by nonemployees, for the purpose of fishing on waters within Borden's property.

In any event, Superintendent Daniels and Industrial Relations Manager Lang concede that no employee had ever been disciplined for unauthorized plant entry before and that even by their version of this incident, Johnson's unauthorized plant entry, standing alone, would not merit more than a short suspension. Therefore, I find that Johnson's alleged unauthorized plant entry, even if true, would not justify his discharge.

Borden's contentions concerning Johnson's alleged unauthorized removal of tools and failure to follow specific instructions of his supervisor are interrelated. Superintendent Daniels contends that both he and Johnson's supervisor, Larry Bradford, told Johnson that he was not to remove his tools until his lockers had been checked out. Daniels cannot recall the date of his instruction to Johnson but thinks he gave this instruction on Tuesday or Wednesday, April 11 or 12. Again, supervisor Larry Bradford did not testify. Johnson claims that neither Daniels nor Bradford gave him any instruction concerning the removal of his tools prior to April 14. In any event, Johnson conceded that when he went to the mine during the evening of April 13 to practice welding, he also removed some of his own tools along with welding tools belonging to Borden. Johnson's stated reason for the removal of the welding tools was that his job in this location was to terminate the following day and that he was to begin a temporary assignment for a period of 1 week beginning on Monday, April 17. Although Borden has established a record of disciplining other employees previously for theft of its property, it never accused Johnson of theft. Moreover, while Borden asserts that it ordered Johnson to return its tools on several occasions, the evidence fails to support this claim. Johnson denies that he was ever asked to return the tools. Kenneth Snow, the Union shop steward and a witness called by Borden, testified that he attended the meeting of April 18 at which Johnson was suspended, but could not recall Johnson being asked to return the tools. To this date, almost 3 years after the incident in question, Borden has taken no action to retrieve the tools in question.

Although Borden contended that it was standard practice that employees' lockers had to be checked before they were reassigned to another site, the evidence again fails to support this claim. Borden had no written rule or policy concerning the removal of property from miners' lockers. The evidence fails to support Borden's contention that such a verbal rule or practice was enforced. Borden has never alleged that Johnson committed theft in taking the tools. The evidence fails to establish that Borden at any time requested the return of the tools. The evidence does not establish that Johnson violated a supervisor's instruction and the testimony of Superintendent Daniels to the contrary is rejected because it is not credible. In short, the evidence shows that Borden's claims concerning the unauthorized removal of tools and failure to follow specific instructions of the supervisor are a pretext to conceal its unlawful motive of discharging Johnson in retaliation for his complaint to the Department of Health. Borden has failed to establish its affirmative defense. Since Borden failed to establish its affirmative defense, Complainant has sustained his complaint of discharge in violation of section 105(c)(1) of the Act.

E. Award of Complainant

Section 105(c)(2) of the Act provides in pertinent part that if the charges are sustained, Complainant shall be granted such relief as is appropriate "including but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." The evidence of record establishes that the mine in controversy was closed by Borden in

late 1978. On August 1, 1980, Borden sold all of its remaining mines to Amax Phosphate, Inc. The terms of the agreement between Borden and Amax Phosphate, Inc., are not in the record. However, I note that the record establishes that all employees of Borden on the date of the sale were automatically transferred to Amax Phosphate, Inc. In an analogous case, the Commission ordered a successor operator to reinstate an employee who was unlawfully discharged in violation of section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969. See Glenn Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463 (December 4, 1980). In any event, Borden is ordered to rehire and reinstate Johnson to his former position. If Borden is unable to comply with this order, the parties may apply to the Commission for additional relief. Although Johnson claims that he wishes to be rehired and reinstated by Borden, there is no explanation in the record for MSHA's failure to seek an order of temporary reinstatement for him pursuant to section 105(c)(2) of the Act. Moreover, since Johnson is presently employed at Piper Aircraft Corporation at wages higher than he earned at Borden, there is some question whether he truly is seeking to be rehired and reinstated. For the foregoing reasons, Johnson shall notify Borden within 15 days after the date on which this decision becomes final, whether he will accept reinstatement to his former position at Borden. A failure of Johnson to notify Borden within the above period will constitute a waiver or forfeiture of Johnson's right to be rehired and reinstated.

Turning to the question of back pay, the evidence establishes that Johnson was unemployed from April 26, 1978, until August 7, 1978. I find that Johnson's rate of pay would have been \$4.58 per hour between April 26, 1978, and June 30, 1978. His rate of pay, pursuant to the agreement between Borden and the Union would have been \$4.83 per hour beginning on July 1, 1978. I find that Johnson lost 47 days' wages at 8 hours per day at \$4.58 per hour and 25 days' wages at 8 hours per day at \$4.83 per hour. Therefore, Johnson is entitled to an award of \$2,688.08 for the period during which he was unemployed following his discharge. Exhibit G-15, which shows the wages paid to the recovery plant oiler during Johnson's period of unemployment, is received in evidence over Borden's objection. I find, however, that this document is entitled to little weight because of Complainant's failure to establish that he would have held this position during his period of unemployment.

On August 7, 1978, Johnson accepted a job paying \$175 per week. While his base pay at Borden would have been approximately \$18 per week more, Johnson was vague concerning increases in his wages. He conceded that he was earning approximately \$195 per week at times and at other times was earning a commission of approximately \$100 per week. Thereafter, Johnson changed jobs frequently. The evidence presented by Complainant concerning his claim for back pay after August 7, 1978, is speculative and insufficient to establish any valid claim. Therefore, the claim for back pay after August 7, 1978, is denied.

After being discharged by Borden, Johnson attempted to find other employment. Since he was unsuccessful, he contracted with Sun Personnel

Services, Inc., for assistance in finding employment. When the employment agency located a job for Johnson, he paid a fee of \$951.33 for its services. Borden argues that this fee should be disallowed because Johnson failed to exhaust "job opportunities available to (him) without outside paid help" and "the fee is not for comparable employment but for a complete change of career." Borden submits no authority in support of these contentions and they are rejected. I find that this employment agency fee is the type of consequential damages which is authorized by section 105(c)(2) of the Act. Complainant is awarded the additional sum of \$951.33 with interest at 6 per cent per annum from July 3, 1978.

Johnson also seeks reimbursement of \$20 paid by him for tape recordings of his unemployment compensation hearing. Johnson failed to establish a valid reason for the need for these tape recordings as a reimbursable item of consequential damages. The claim for \$20 for tape recordings of the unemployment compensation hearing is denied.

Finally, Borden is required to expunge all references to Johnson's discharge from his employment records.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Johnson and Borden were subject to the provisions of the Act.
2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
3. On April 4, 1978, Complainant Johnson engaged in the following activity which is protected under section 105(c)(1): Telephone call to the Department of Health complaining about filthy restrooms at Borden's mine.
4. Complainant Johnson established a prima facie case of a violation of section 105(c)(1) of the Act because he established by a preponderance of the evidence that he engaged in a protected activity and that he was discharged under circumstances which give rise to an inference that the discharge was motivated by the protected activity.
5. Borden's justification for discharging Complainant--unauthorized plant entry, unauthorized removal of tools, and failure to follow specific instructions of the supervisor--is a pretext to conceal the true reason for Complainant's discharge.
6. Borden failed to establish that it would have discharged Complainant for the unprotected activities cited in the Notice of Termination.
7. Complainant William Johnson was discharged by Borden in violation of section 105(c)(1) of the Act.
8. Complainant Johnson shall be rehired and reinstated with full seniority rights.

9. During the period beginning on April 26, 1978, and ending on August 7, 1978, Complainant would have earned \$4.58 per hour until July 1, 1978, and \$4.83 per hour thereafter for 40 hours a week for a total of \$2,688.08. Complainant has failed to establish his claim for back pay subsequent to August 7, 1978. Complainant is entitled to an award of \$2,688.08 as back pay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

10. Complainant is entitled to an additional sum of \$951.33, the amount paid to Sun Personnel Services, Inc., on July 3, 1978, for services in obtaining employment at Church's Fried Chicken, Inc., commencing on August 7, 1978. Complainant is also entitled to interest on this sum at the rate of 6 percent per annum from July 3, 1978 to the date such payment is made.

11. Complainant has failed to establish entitlement to an award of \$20 for obtaining recordings of his unemployment compensation hearing.

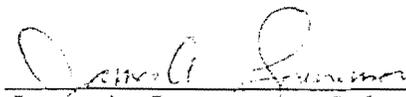
12. MSHA failed to follow the procedures concerning proposed assessment of a civil penalty as set forth in Commission Rule of Procedure 25, 29 C.F.R. § 2700.25 and, therefore, the proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED and Complainant shall be rehired and reinstated with full seniority rights provided that he notifies Borden of his desire to be rehired and reinstated within 15 days after this decision becomes final.

IT IS FURTHER ORDERED that Borden shall pay to Complainant the following sums: (1) \$2,688.08 for back pay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date payment is made; and (2) \$951.33 for an employment service fee paid by Complainant in connection with subsequent employment, plus interest at the rate of 6 percent per annum from July 3, 1978, to the date payment is made.

IT IS FURTHER ORDERED that Borden shall expunge all references to Complainant's discharge from his employment records.



James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 14 1981

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

Petitioner,

v.

JET ASPHALT AND ROCK COMPANY, INC.,

Respondent.

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 79-6-M
ASSESSMENT NO. 03-00401-05002

DOCKET NO. DENV 79-505-PM
ASSESSMENT NO. 03-00401-05001

MINE: Hampton Pit and Plant

DECISION

Appearances:

Bobbie J. Gannaway, Esq., Office of the Solicitor
United States Department of Labor, Dallas, Texas,
for the Petitioner.

Don Dodson, Esq., El Dorado, Arkansas,
for the Respondent.

Before: Judge John J. Morris

Pursuant to notice, the above cases were called for a hearing on the merits on January 13, 1981 in Little Rock, Arkansas. After the completion of the evidentiary hearing and after the parties waived closing arguments and the filing of post trial briefs, I rendered a bench decision. After receipt of the transcript an order was entered correcting minor errors in the bench decision. The decision, as amended, is as follows:

JURISDICTION

The parties have stipulated that the Federal Mine Safety and Health Review Commission has jurisdiction to hear and determine this cause.

PRELIMINARY ISSUES

Two preliminary issues are raised by the Respondent, and they are:

1. Lack of a search warrant and
2. Harassment of Respondent by Federal Mine Safety and Health Inspectors.

I rule both of these issues against the Respondent.

Concerning the search warrant, the facts are clear in the case that the inspector did not have a search warrant, and I find that a search warrant is not necessary under existing law. The type of operation as described here by the witnesses is a gravel operation in combination with an asphalt plant. The weight of authority in the United States holds that a warrantless inspection procedure is authorized by 30 U.S.C. 813 and that such a procedure has been upheld in several of the Circuit Court of Appeals.

These cases are Marshall vs. Sink, 614 F. 2d 37 (4th Cir. 1980); Marshall vs. Texoline Co., 612 F. 2d 935 (5th Cir. 1980); Marshall vs. Nolicheckey Sand Company, Inc., 606 F. 2d 693 (6th Cir. 1979), cert. denied, U.S. _____, 100 S. Ct. 1835, 64 L. Ed. 2d 261 (1980); Marshall vs. Stoudt's Ferry Preparation Company, 602 F. 2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1815, 100 S. Ct. 664, 62 L. Ed. 2d 644 (1980); also, Marshall vs. Cedar Lake Sand and Gravel Company, 480 F. Supp. 171 (E.D. Wis. 1979); Marshall vs. Donofrio, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd without opinion, 605 F. 2d 1196 (3rd Cir. 1979), cert. denied, U.S. _____, 100 S. Ct. 1067, 62 L. Ed. 2d 787 (1980); cf., Youghiogeny and Ohio Coal Company vs. Morton, 364 F. Supp. 45 (S.D. Ohio 1973). These decisions have generally examined the 1977 Federal Mine Safety and Health Act under the standards established for judging the constitutionality of warrantless administrative inspections which are set forth in the Supreme Court decision of Marshall vs. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

A contrary view that would support the Respondent's claim that a warrant is required is set forth in the case of Marshall vs. Wait, 628 F. 2d 1255, which was a case decided by the 9th Circuit Court of Appeals in 1980; in fact, September 29, 1980. I have carefully read the Wait Case and, to me, it holds that an operation involving the husband and wife, or a very small operation, is not within the terms of a pervasively regulated industry and, therefore, a search warrant is required. I distinguish Marshall vs. Wait from this case and, as the parties know, we're not in the 9th Circuit, but we're in the 8th United States Circuit, or the United States Court of Appeals, and to my knowledge they have not ruled on this issue. It may well be that this will be the case that will possibly decide the case for the 8th Circuit if it goes up on appeal. In any event, they have my opinion and the facts before them that the inspector did not have a search warrant and they'll have a full record upon which to decide the issue.

The second preliminary issue raised by the Respondent is that there was an undue harassment, or an illegal harassment of the Respondent by the federal inspectors. I also rule this point against the Respondent. At best, this would be an affirmative defense because it would be particularly within the knowledge of the Respondent because he might well be doing business with different inspectors at different plants. The best that the uncontroverted evidence shows is that inspectors do come to inspect these plants and they contact the superintendent, and they proceed and inspect the plants and sometimes as much as a full day is involved in these inspections. Each time,

some inspectors do find something different and, naturally, business can be disrupted by these inspections. While I find that this is certainly an inconvenience to a business and to the Respondent particularly, I do not find that this constitutes, under law, an harassment of an operator that is subject to the Act. Further, the evidence fails to establish that the inspections by the Federal Mine Safety and Health Administration have been excessive in view of the fact that they are charged, by the Congress, with making certain annual inspections as the inspector testified to in this case.

For these reasons I rule both of these preliminary issues against the Respondent.

Case No. CENT 79-6-M alleges a violation of several regulations.

ISSUES

The issues are did these violations occur and if they did occur, what penalties, if any, are appropriate.

Citation 162903. This citation alleges a violation of 30 CFR 56.11-1. The initials, the "CFR", of course, stand for the Code of Federal Regulations which is a publication published, in part, on behalf of the United States Government. The citation of 30 CFR 56.11-1 provides as follows:

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

I find from the uncontroverted evidence that there existed on this work site a rusted and deteriorated piece of pipe. The pipe was currently one of six braces that holds a crusher and a shaker, or did at one time. Of preliminary importance is the fact that I do not find that this pipe held anything or, by itself, provided any means of access to anything. It was merely on the work site and not in use. The way I read the regulation, anything unsafe must necessarily involve a means of access because this was the very term used in the standard. In view of the fact that there was no means of access involved, I consider that there's no violation of the standard. Accordingly, Citation 162903 should be vacated, together with all proposed civil penalties.

Citation 164032. This citation alleges a violation of 30 CFR 56.14-1 which involves a drive shaft on the pump as described by the witnesses in the evidence. The standard itself provides as follows:

Mandatory. Gears; sprockets; chains; drive, head, tail,
and take-up pulleys; fly wheels; couplings,
shafts; saw blades; fan inlets; and similar
exposed moving machine parts which may be
contacted by persons, and which may cause
injury to persons, shall be guarded.

I find from the facts here that there were in fact unguarded tail pulleys and, as the compliance officer testified, there were workers in the area. Based on this, I find that the government has made a prima facie case, but I'm more persuaded by the Respondent's evidence testified to by its superintendent and foreman with their more detailed explanation of the position of the workers in relation to the exposed equipment; particularly, the workers are some, in one instance, 3 to 3-1/2 feet away from the exposed belt. Also, the witness testified that if a man is working on the equipment itself, the pump is shut down while that work is carried on. In short, I find a lack of employee exposure to the hazard involved here. In a case of this type where the regulation itself provides that equipment must be guarded where it may be contacted by persons or where a person may be injured, the government has an obligation to show a general factual situation which shows that the condition that exists is generally within the regulation itself and must further show that employees, particularly workers of the Respondent, were exposed to a hazard.

Inasmuch as I find no exposure here, I intend to vacate Citation 164032, together with all proposed penalties therefor.

Citation 164033. This citation alleges the violation of 30 CFR 56.9-11. This relates to the cab windows in the equipment. The citation provides as follows:

Mandatory. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

I find that the facts are essentially uncontroverted in this case. The cab window was, in fact, broken, and the inspector testified that the operator's vision would be impaired from the sun striking the window. He was in the equipment and made this observation. Of course, if the vision of the operator is impaired an injury could result. The Respondent does not deny this condition of the broken window nor the sun possibly impairing the operator's vision, and the standard itself provides that, and it is directed at the windows, that they shall be kept in good condition. I take it that the standard means that the broken window, in combination with the possible distortion of the operator's vision, is sufficient to constitute a violation of the regulation.

Accordingly, based on this conclusion, I intend to affirm Citation 164033 and, in view of the stipulation as to the penalties in the case as set forth at the beginning of the trial, and in view of the statutory criteria for assessing penalties as set forth in 30 U.S. Code 820(i), I deem that the penalty proposed by the Petitioner in the amount of \$52.00 is appropriate.

Citation 164034 and 164044. These citations allege separate violations of 30 CFR 56.5-50. The cited regulation provides as follows:

Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications of type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels of the table

I find here from the facts that an 8-hour dosimeter test was conducted at two different places in this plant. I find that the drag line operator was exposed to an amount of 448 percent in excess of the limits permitted by the regulation, and I further find that the front-end loader operator was exposed to approximately 334 percent in excess of the permissible limits. The government, accordingly, has made a case on these issues.

The defense here, as I see it, centers on the abatement methods used, whether the equipment came properly equipped from the manufacturer, and it also touches somewhat on the use of ear plugs. None of the defenses offered in this case prevail as a legal defense. Whatever abatement methods were undertaken, whether the door reduced the noise level or not, is not relevant. Apparently, -- and I do find from the evidence -- the closure of the door on the equipment did reduce the exposure to the operator within permissible limits. However, abatement is a matter that goes to remedying a violation, and it doesn't go to the violation itself.

There's evidence here that ear plugs were used by the operator. Whether they were or were not used or whether they did or did not reduce the exposure to the operator is not a defense in the case because the way the standard reads, it provides that when there is exposure, then feasible administrative or engineering controls shall be used. Only if such controls are used and fail or if the controls are not feasible does personal protective equipment then come into the picture. That's not saying that personal protective equipment should not be used. What I'm trying to say is that the first thing to be considered is administrative or engineering controls.

In view of the fact that I find a violation of the noise standards, Citations 164034 and 164044 should be affirmed. In view of the statutory penalty provisions which the Congress set forth in 30 U.S. Code 820(i), I consider that the proposed penalty of \$60 for each of the citations involving the noise violation should be affirmed.

Citation 164041 and 164042.

These citations involve violations of 30 CFR 56.14-1, which has been cited under Citation 164032.

I find from the facts that the tail pulley on the finish belt, as described by the witnesses, and the cone crusher were in fact unguarded. However, I find from the evidence that the workers have no access to these hazards. To reach the cone crusher, the worker would apparently have to lie on the ground or get on his hands and knees to reach it and, as the witness described, a worker would have to reach over to reach another pinch point. I further find that workers could not reach the pinch point during the time that they were removing any material that might be sloughed off of the tail pulley and if there is no employee exposure, then the citations should be vacated.

As previously indicated, the Petitioner must prove the facts supportive of a violation as well as employee exposure.

I've made several credibility determinations, as are apparent in this case, involving the testimony of the MSHA inspector and the testimony of the company superintendent and foreman particularly as to the unguarded equipment. I have credited the company's representatives with more knowledge of what happens on the work site than I have credited the inspector because the company representatives are there every day and they know the general status of the equipment, but, particularly, they are cognizant of what their employees do in relation to that equipment, and what they don't do. So any credibility determinations on that issue are resolved in favor of the company employees. Not that I have generally discredited the government's representation, but the company employees are there on the job, and I credited them with more knowledge of what the workers do rather than the inspector who made only a short visit to the work site.

Citations 164041 and 164042 and all proposed penalties should be vacated.

Citation 164043.

This citation alleges violation of 30 CFR 56.9-87.

The cited standard provides:

Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

I find from the facts in this case that the equipment here moves backwards and forwards some 350 to 400 times a day and that there are workers in the

vicinity. The uncontroverted evidence further shows that this equipment had no back-up alarm.

The way I read the standard, the devices must be at least two. The standard itself says, "with audible warning devices," devices being in the plural. Inasmuch as there was no back-up alarm, it's clear, at least to me, that there is a violation of the regulation.

It's my view that Citation 164043 should be affirmed and in reviewing again the statutory criteria regarding assessment of a penalty, I deem that the proposed penalty of \$44.00 is appropriate.

The defense raised in this case seems to me to pivot on the issue of whether the driver had an unobstructed view or did not have an unobstructed view to the rear. The standard does not read that way. The first part of the standard reads:

Heavy duty, mobile equipment shall be provided with audible warning devices.

From there you get into the obstructed view issues and things of that nature.

In short, I rule that the first paragraph requires an absolute duty for equipment to have at least two audible warning devices and inasmuch as there was none, I affirm that citation.

In the case of DENV 79-505-PM.

Citation 164031 alleges a violation of 30 CFR 56.9-22. The citing standard provides as follows:

Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

I find here that the evidence is uncontroverted. The evidence all indicates that there was a 4-foot-high -- let's call it an elevation for the moment -- some 30 feet long and used by the front-end loader. The defense pivots on certain issues, namely, whether or not this is an elevated roadway. That's one of the defenses. I find that it is since it was in use by the front-end loader.

Further defense is that a 4-foot-high roadway is insufficient to constitute a violation and I disagree. The standard itself says "elevated roadway." A 4-foot-high roadway, if the front-end loader should leave it, would certainly flip it over as well as an 8-foot high. It's just a matter of degree.

The defense is that the proposed method of abatement, namely, the hub-high berm later installed after the citation was issued, was insufficient. Of course, any method of abatement, again, does not relate to whether or not a violation

occurred. If in fact the Respondent believes the 4-foot-high berm is insufficient, then it should be raised. I consider the testimony of the inspector in this regard to again relate to the method of abatement and it would not be relevant as far as whether or not a violation did in fact occur.

In view of this conclusion, I consider the Citation 164031 should be affirmed and, in view of statutory criteria, the proposed penalty of \$38.00 should be affirmed.

Based on the foregoing findings of fact, the conclusions of law enter the following:

ORDER

Case No. CENT 79-6-M

1. Citation 162903 and all penalties therefor are vacated.
2. Citation 164032 and all penalties therefor are vacated.
3. Citation 164033 is affirmed and the proposed penalty of \$52.00 is affirmed.
4. Citation 164034 is affirmed and the proposed penalty of \$60.00 is affirmed.
5. Citation 164041 and Citation 164042 are vacated together with all proposed penalties therefor.
6. Citation 164043 is affirmed and the proposed penalty of \$44.00 is assessed.
7. Citation 164044 is affirmed and the proposed penalty of \$60.00 is assessed.

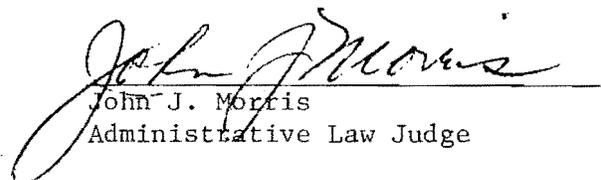
Case No. DENV 79-505-PM

1. Citation 164031 is affirmed, together with the proposed civil penalty of \$38.00.

(BENCH DECISION CONCLUDED)

ORDER

The foregoing bench decision, as amended, is affirmed.


John J. Morris
Administrative Law Judge

Distribution:

Bobbie J. Gannaway, Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square
Dallas, Texas 75202

Don B. Dodson, Esq.
Nolan, Alderson & Vicery
510 First National Bank Building
El Dorado, Arkansas 71730

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	
	)	CIVIL PENALTY PROCEEDINGS
Petitioner,)	
	)	DOCKET NO. CENT 79-297 M
	)	A/O No. 03-01425-05001
)	
	)	DOCKET NO. CENT 79-362-PM
JET ASPHALT AND ROCK COMPANY, INC.,	)	A/O No. 03-01425-05002
)	
Respondent.	)	MINE: Eagle Mills Pit & Plant
)	

DECISION

APPEARANCES:

Bobbie J. Gannaway, Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square - Suite 501
Dallas, Texas 75202

For the Petitioner

Don B. Dodson, Esq.
Nolan, Alderson & Vicery
510 First National Bank Building
El Dorado, Arkansas 71730

For the Respondent

Before: Judge John J. Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent Jet Asphalt and Rock Company (JET), violated a safety regulation promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Little Rock, Arkansas on January 13, 1981.

The parties waived post trial arguments and briefs.

ISSUES

The threshold issue is whether the Secretary's warrantless search violates respondent's right to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution.

Secondary issues are whether the violation occurred, and, if so, what penalty, if any, is appropriate.

CONSTITUTIONAL ISSUE

The respondent raised its objections to the search and seizure conducted by the Secretary. The same arguments were entered in a case involving the same parties, Docket NO. WEST 79-6-M. Respondent reoffered those constitutional arguments in this case.

Before considering the constitutional issue it is necessary to review the following pertinent facts: (1) the alleged violation of the Act involved a mine that has products which enter commerce or has operations or products which affect Commerce; (2) Jet Asphalt's Eagle Pit and Plant is a non-coal operation that has over 10,000 but less than 20,000 annual hours worked; (3) Jet Asphalt, the controlling company, had under 60,000 annual hours at all times relevant to these proceedings (Tr. 4, 5).

Concerning the search warrant, the facts are clear that the inspector did not have a search warrant; however, I find that a search warrant is not necessary under existing law. The type of operation involved here is a gravel operation in combination with an asphalt plant. The weight of authority in the United States holds that a warrantless inspection procedure is authorized by 30 U.S.C. § 813. Such a procedure has been upheld in several of the United States Circuit Courts of Appeals.

These cases are Marshall v. Sink, 614 F. 2d 37 (4th Cir. 1980); Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichucky Sand Company, Inc., 606 F. 2d 693 (6th Cir. 1979), cert. denied, _____ U.S. _____, 100 S. Ct. 1835, 64 L.Ed.2d 261 (1980); Marshall v. Stoudt's Ferry Preparation Company, 602 F. 2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1815, 100 S. Ct. 665, 62 L.Ed. 2d 644 (1980); also, Marshall v. Cedar Lake Sand and Gravel Company 480 F. Supp. 171 (E.D. Wis. 1979); Marshall v. Donofrio, 465 F. Supp 838 (E.D. Pa. 1978), aff'd without opinion, 605 F 2d 1196 (3rd Cir. 1979), cert. denied, _____ U.S. _____, 100 S. Ct. 1067, 62 L.Ed. 2d 787 (1980); cf., Youghioghny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973). These decisions have generally

examined the 1977 Federal Mine Safety and Health Act under the standards established for judging the constitutionality of warrantless administrative inspections which are set forth in the Supreme Court decision, Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L.Ed. 2d 305 (1978).

A contrary view that would tend to support the Jet claim that a warrant is required is set forth in the case of Marshall v. Wait, 628 F. 2d 1255, which was decided by the 9th Circuit Court of Appeals on September 29, 1980. I have carefully read Wait, and it holds that an operation involving the husband and wife, or a very small operation, is not within the terms of a pervasively regulated industry and, therefore, a search warrant was required. Wait is against the weight of authority, and I distinguish it from the case at bar in view of the size of respondent, Jet Asphalt. For the foregoing reasons I overrule respondent's Fourth Amendment arguments.

CENT 79-297-M
CITATION 164055

The above citation alleges a violation of 30 C.F.R. 56.4-1(a) and proposes a civil penalty of \$36.00. At the hearing, without objection, the Secretary amended his complaint to allege a violation of 30 C.F.R. 56.4-2¹ (Tr. 7-8).

FINDINGS OF FACT

1. MSHA inspector Calvin F. Hardway issued a citation because "no smoking" signs had not been posted on a tank used to store fuel in the bed of a Ford pickup (Tr. 9, 10).
2. The 85 gallon diesel fuel tank was located next to oxygen and acetlyene bottles (Tr. 9-10, 16, 19).
3. Oxygen contributes to a fire or explosion hazard (Tr. 11).
4. Some diesel fuel had spilled onto the bed of the truck (Tr. 12).

¹/ The standard in contest provides as follows:
56.4-2 Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

5. Because fuel had spilled from the tank, a person could set off a fire with a lit cigarette (Tr. 14).

DISCUSSION

The standard, 30 C.F.R. 56.4-2, requires warning signs to be posted ... where fire or explosion hazards exist. In this case diesel fuel had spilled from the tank onto the bed of the truck. That spillage is sufficient to constitute a fire or explosion hazard.

Jet's twofold contentions are that no fire hazard existed because diesel fuel is not combustible. Jet further argued that a hazard did not exist because the fuel was contained in a steel tank, much like an automobile gas tank.

I find the combustibility of diesel fuel is a matter of expert opinion. The MSHA inspector was of the view that a hazard existed in that a fire or explosion could result if a person threw a lit cigarette into the bed of the truck. I accept his opinion.

Jet's second argument is that the situation here is akin to a person smoking a cigarette while sitting in close proximity to an automobile gasoline tank. Jet's argument is not persuasive. The facts here indicate that some diesel fuel had spilled onto the bed of the truck (Tr. 12). Jet's evidence does not counter the inspector's testimony in this regard. I find that a fire hazard was created by conditions outside of the diesel fuel tank. This hazard could also cause the fuel tank or oxygen and acetylene bottles to explode. The required signs were not posted in the area. Accordingly, the citation should be affirmed.

The citation, according to inspector Hardway reflects findings for negligence, good faith and gravity (Tr. 12). After reviewing these facts and the stipulation concerning size and prior history of Jet (Tr. 4), I deem the proposed penalty of \$36.00 to be appropriate.

CONCLUSION

Based on the foregoing findings of fact I conclude that Citation 164055 and the proposed penalty therefor should be affirmed.

CENT 79-362-M
CITATION 164054

The above citation alleges a violation of 30 C.F.R. 56.11-1, and the Secretary proposes a civil penalty of \$56.00.

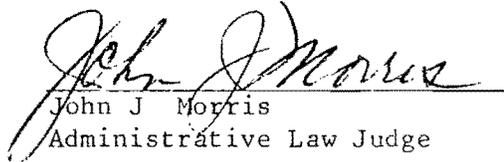
At the commencement of the hearing respondent stipulated that a violation of the standard occurred (Tr. 67).

In view of the stipulation, I affirm Citation No. 164054. Having considered the necessary criteria, 30 U.S.C. § 820(i), I deem the proposed penalty of \$56.00 to be appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. In CENT 79-297-M,
Citation 164055 and the proposed penalty
are affirmed.
2. In CENT 79-362-M,
Citation 164054 and the proposed penalty
therefor are affirmed.


John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 14 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 80-255
Petitioner : Assessment Control
: No. 15-11233-03007 V
v. :
: No. 5 Mine
BIG HILL COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Charles E. Lowe, Esq., Lowe, Lowe & Stamper, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened on December 10, 1980, in Pikeville, Kentucky, counsel for the parties moved that a settlement agreement reached by the parties be approved. Counsel for the parties thereafter discussed the six assessment criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977 in support of their settlement agreement under which respondent has agreed to pay a penalty of \$275 instead of the penalty of \$500 proposed by the Assessment Office.

It was stipulated by the parties that respondent is subject to the provisions of the Act and that I have jurisdiction to approve the settlement(Tr. 3).

As to the criterion of the size of respondent's business, counsel for the parties stated that respondent has three coal mines which produce about 175,000 tons annually. The No. 5 Mine involved in this proceeding produced 7,000 tons over a 6-month period and employed 11 miners. (Tr. 4;7). On the basis of those facts, I find that respondent operates a small coal business.

With respect to the criterion of whether payment of penalties would cause respondent to discontinue in business, it was stipulated that payment of the settlement penalty of \$275 will not adversely affect respondent's ability to continue in business (Tr. 5).

Counsel for MSHA stated that during the 24 months preceding the citing of the single violation involved in this proceeding, respondent had been cited for 72 prior alleged violations (Tr. 5). Those previous violations did not include a prior violation of 30 C.F.R. § 75.306 which is involved in this proceeding. It has been my practice to increase a penalty under the criterion of history of previous violations only when a respondent's history

of previous violations shows that respondent has been previously cited for the same violation which is before me in a given case. Therefore, I find that the parties' failure to indicate any specific amount as being assessable under the criterion of history of previous violations is acceptable.

As to the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance, the order shows that it was issued at 9:30 a.m. on July 18, 1978, and was terminated by 2:30 p.m. on the same day. The order, of course, did not provide any time within which the alleged violation was required to be abated, but the abatement was sufficiently rapid to warrant a finding that respondent demonstrated a normal good faith effort to achieve compliance. Penalties are usually increased or decreased under the criterion of good faith compliance only when there is a lack of good faith compliance or an extraordinary effort to achieve rapid compliance, respectively. Since there was normal compliance with respect to the violation alleged in this proceeding, the settlement penalty need not contain any amount expressly assessable under the criterion of good faith abatement.

The remaining two criteria of negligence and gravity will hereinafter be specifically evaluated in connection with consideration of the condition or practice described in the inspector's order. Order No. 70479, here involved, was issued on July 18, 1978, under section 105(d)(1) of the Act citing respondent for a violation of 30 C.F.R. § 75.306 because a proper record of the weekly ventilation examinations was not being kept. The withdrawal order was issued under the unwarrantable failure provisions (section 104(d)(1)) of the Act when the inspector was told that no anemometer or other type of measuring device for measuring air velocity was kept at the mine. The Assessment Office waived the penalty formula provided for under 29 C.F.R. § 100.3, and proposed a penalty of \$500 based on narrative findings of fact. A copy of the Assessment Office's findings is in the official file and those findings indicate that the criterion of negligence was extensively relied upon by the Assessment Office. Those findings indicate that the Assessment Office considered the violation to have been the result of a high degree of negligence because management is alleged to have known that the ventilation examinations were not being made and the Assessment Office believed the report made to the inspector to the effect that management had failed to provide the mine foreman with an anemometer or other instrument for measuring air velocity in the mine.

At the hearing, counsel for respondent explained that the alleged violation was not being contested because respondent's owner was ill and could not attend the hearing (Tr. 7). If respondent's owner had appeared at the hearing, he would have testified that an anemometer had been made available and that respondent's management assumed that the mine foreman was making ventilation examinations. Additionally, respondent's counsel stated that the mine foreman who was responsible for making the ventilation examinations had been discharged for failure to perform all of his obligations as a mine foreman (Tr. 6).

If a hearing had been held, it is likely that respondent's owner would have been able to show that his degree of negligence was much less than the

degree of negligence assumed by the Assessment Office when it wrote its narrative findings.

The Assessment Office found that the violation was serious because failure to make the required examinations would have kept the miners from knowing that the air velocity was sufficient to prevent possible accumulations of methane and to carry away respirable dust. The inspector's order and the findings of the Assessment Office are silent about whether respondent had installed brattice curtains to within 10 feet of the face at the time the order was written. Existence of curtains would have been likely to provide adequate ventilation. Therefore, the violation may or may not have been serious, but the Assessment Office is correct in finding that respondent's mine foreman would not have known for certain that the proper volume of air was being supplied at the last open crosscut and working face apart from his making the proper examinations with an anemometer.

I find that the settlement penalty of \$275 should be approved because the parties have shown that the degree of negligence was probably less than it was thought to be by the Assessment Office, the degree of seriousness is not known for certain, and a small operator is involved. Those criteria support a finding that a penalty of \$275 is reasonable in the circumstances.

WHEREFORE, for the reasons given above, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay a penalty of \$275.00 for the violation of section 75.306 alleged in Order No. 70479 issued July 18, 1978, under section 104(d)(1) of the Act.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Charles E. Lowe, Esq., Attorney for Big Hill Coal Company, Lowe, Lowe & Stamper, P.O. Box 69, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 15, 1981

UNITED MINE WORKERS OF AMERICA, : Complaint of Discharge,
LOCAL UNION 9800, : Discrimination, or Interference
Complainant :
v. : Docket No. KENT 80-216-D
SECRETARY OF LABOR, : Peabody Coal, Riverview Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
or :
THOMAS DUPREE, :
Respondents :

DECISION

Appearances: J. Davitt McAteer, Esq., Center for Law and Social Policy,
Washington, D.C., for Complainant Local Union No. 9800;
Thomas P. Piliero, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for Respondent
Secretary of Labor;
Stuart A. Kirsch, Esq., American Federation of Government
Employees, Washington, D.C., for Respondent Thomas Dupree.

Before: Chief Administrative Law Judge James A. Broderick

STATEMENT OF THE CASE

The complaint filed in this case alleges that the Mine Safety and Health Administration (MSHA) or Thomas Dupree violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), by threatening a lawsuit against Local Union 9800, United Mine Workers of America, in retaliation for the local notifying MSHA of alleged irregularities in inspections at Peabody Coal Company's Riverview Mine. Respondent MSHA filed a motion to dismiss and a motion for summary decision on the ground that it is not a person subject to section 105 of the Act. These contentions were rejected by an order denying the motions issued on September 25, 1980. 2 FMSHRC 2680.

Pursuant to notice, a hearing was held on January 13 and 14, 1981, in Evansville, Indiana.

Members of Local Union 9800 who testified for Complainant were Houston Elmore, George Christian, Richard Embry, Charles Wilkins, Richard Maddox, Neil Butterworth, and Randall Duncan. James Rowe and Thomas Gaston, officials of District 23, United Mine Workers of America, also testified for Complainant. Complainant called three additional witnesses who are officials in MSHA's District 10 Office, Charles Dukes, William Craft, and Bobby Hill. Thomas Dupree, an MSHA inspector and president of Local Union 3340 of the American Federation of Government Employees (AFGE), testified on his own behalf. Respondent MSHA called no witnesses.

The parties have filed briefs on the issues presented and, having considered them and the record as a whole, I make the following decision.

FINDINGS OF FACT

1. During the period in question, many Local Union 9800 members were employed at Peabody Coal Company's Riverview Mine in Western Kentucky.

2. In August of 1979, officials of Local Union 9800 discovered that there may have been irregularities in certain inspections at the Riverview Mine conducted in late July of 1979 by MSHA inspectors. They concluded that records indicating that coal-dust samples and environmental noise samples had been taken were falsified and those samples had not, in fact, been taken.

3. The president and other officials and members of Local Union 9800 discussed their allegations with officials of MSHA's District 10 Office. They were assured by those officials that the matter would be investigated and they would be advised of any disciplinary action taken as a result.

4. By early December, 1979, members of Local Union 9800 decided that the matter was not being handled to their satisfaction. Houston Elmore, president of the local, then wrote a letter, dated December 2, 1979, to Joseph Cook, MSHA's Administrator for Coal Mine Safety and Health. The letter expressed the local's concern over the thoroughness of the investigation and went on to state: "We now have reason to believe that the practice of falsifying federal records and reports may be a widespread practice in MSHA District #10 and accepted as a normal way of doing business." (Complainant's Exh. No. 1). The letter was not mailed until early or mid-January 1980.

5. Employees of MSHA District 10, including its inspectors, are represented by AFGE Local Union 3340, whose president is Thomas Dupree. A copy of Elmore's letter became available to personnel in District 10 and was widely discussed by the inspectors. Dupree informed the inspectors that he intended to call the United Mine Workers' District 23 Office to see if district officials supported the above-quoted statement by Elmore.

6. On January 31, 1980, Dupree called Thomas Gaston, president of United Mine Workers of America District 23 from the MSHA District 10 Office in Madisonville, Kentucky. Dupree identified himself as a District 10 MSHA inspector and as a representative of an employees' union at District 10. He

told Gaston that he thought the above-quoted statement might be defamatory and intended to ask legal counsel whether, based on it, Elmore could be sued for libel. Gaston informed Dupree that he generally supported the sentiments expressed in the letter although he might not have phrased his criticism quite the same way. He stated that he did not think the letter was libelous.

7. After the call, Dupree sent Elmore's letter to his superiors in the AFGE with a note describing his constituency's distress over the quoted passage. No further action was taken by the AFGE, Dupree, or MSHA with respect to a lawsuit against Elmore or Local Union 9800, although Joseph Cook did respond to Elmore's letter.

ISSUES 1/

1. Did the letter from Elmore to Cook dated December 2, 1979, constitute activity protected under section 105(c) of the Act?

2. Were Dupree's statements to Gaston during their phone conversation of January 31, 1980, imputable to MSHA?

3. Were Dupree's statements to Gaston during the same phone conversation unlawful under section 105(c) of the Act?

STATUTORY PROVISION

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 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

1/ The complaint does not charge that the alleged falsification of records and MSHA's response thereto are unlawful, and I do not consider this an issue in this case. MSHA and Dupree both assert that Local Union 9800 did not formally authorize or initiate these proceedings. I know of no rule of law requiring such formal authorization. Officers and members of the local participated in the case. Counsel has appeared for the local, and there is a strong presumption that he is authorized to do so. Bethlehem Steel Corporation v. Deever, 389 F.2d 44 (1968).

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

DISCUSSION WITH ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Letter from Elmore to Cook, December 2, 1979

Respondent Dupree argues that the letter from Elmore to Cook was not protected activity under the Act. Both Respondents argue that the letter written, signed, and mailed by Houston Elmore, president of Local Union 9800, was not the act of the local.

The Act gives unique responsibilities to miners and their representatives in carrying out its provisions. Miner-representatives have the right to accompany MSHA inspectors "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." Miners or their representatives have the right to an immediate inspection if they notify the Secretary of an alleged health or safety violation or an imminent danger. They may be entitled to an informal review by the Secretary for any refusal to issue a citation with respect to any such alleged violation or danger. I have found in this case that the alleged irregularities in the MSHA inspection records were discovered by officials of Local Union 9800. I have found that the president of the local and other officials discussed the irregularities with MSHA officials. Clearly, these were activities related to safety in the mine and therefore were protected under the Act.

The letter in question was written because the local felt that MSHA was not properly handling the case. There is no evidence and no suggestion except in the arguments of counsel that Elmore wrote the letter because of a matter personal to himself. It grew out of the union concern over safety in the mine. Whether it was formally authorized by a membership meeting is irrelevant. Elmore was the local president and is presumed to be authorized to speak for the union in matters of union concern. I conclude that the letter was the act of Complainant and that it was activity protected under the Act.

B. MSHA's Liability for Dupree's Conduct

Based upon the testimony of Dupree and Gaston, the parties to the conversation, Dupree did not state that he was speaking for MSHA. There is no evidence that he was authorized, expressly or impliedly, to respond to the letter on behalf of MSHA. The fact that he was an MSHA inspector and used MSHA facilities hardly creates apparent authority, but even if it did, it was

expressly negated when he identified himself as "a representative of some union that represented [MSHA inspectors]" (Tr. 398, 424). It is not clear, furthermore, whether the doctrine of respondeat superior can be applied in a case such as this. See Monell v. Department of Social Services, 436 U.S. 658, 692-694 (1978). But even if the doctrine applied, Dupree's conduct involved herein cannot be attributed to MSHA. I find that Respondent MSHA cannot be held liable as a principal for the statements of Dupree in the telephone conversation in question.

C. Did Dupree's Remarks Constitute A Violation of Section 105(c)?

My finding as to the content of the telephone call is contained in Finding of Fact No. 6. I reject Complainant's contention that Dupree threatened Elmore or Local Union 9800. In deciding whether Dupree's statements violated section 105(c), the focus must be on the reaction of the ordinary listener in Gaston's circumstances. The way other United Mine Workers of America members understood the conversation as reported to them, is largely irrelevant. That they may have believed MSHA threatened to sue Local Union 9800 in retaliation for complaining about inspection irregularities is unimportant if no such threat was made.

Thomas Gaston was and remains the president of United Mine Workers of America District 23. He supervises the union's affairs in Western Kentucky and is familiar with legal matters, having helped to negotiate and administer collective bargaining agreements and having participated in litigation in which the union was involved.

According to Gaston, Dupree called him to see if District 23 supported the statements in Elmore's letter of December 2, 1979. Dupree supposedly stated further that he felt the letter was libelous and that he had talked to an attorney who agreed. In view of the short period of time which had elapsed since Dupree received Elmore's letter and in view of Dupree's subsequent action, I find that Dupree actually stated that he intended to consult an attorney on the matter. I find that Dupree did not threaten a lawsuit in so many words. The purpose of the phone call was to see if Elmore's letter was supported by District 23. This was the understanding of both Dupree and Gaston. I cannot conclude that the statements of Dupree constituted interference "with the exercise of the statutory rights of any miner, representative of miners * * *." Dupree was acting in good faith and was motivated by a concern for the members of his union.

Grave questions involving the first amendment protection of the right of free speech would be presented if I concluded that the Mine Safety Act authorized the Commission to punish (Complainant seeks disciplinary action against Dupree) speech of the kind shown in this record. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." Elrod v. Burns, 427 U.S. 347, 362 (1975). The communication involved here was not physically or economically coercive, nor did it threaten such coercion. Therefore, it is "communication" and not "action" and is

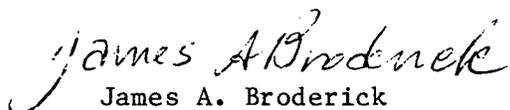
entitled to rigorous first amendment protection. See EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 423-425 (1970). See also TRIBE, AMERICAN CONSTITUTIONAL LAW (1978), 582:

[G]overnment regulation * * * aimed at the [communication] * * * is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger" constitutes defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.

To construe the Mine Safety Act in such a way that it would direct punishing the speech found herein to have taken place, even if possible under norms of statutory construction, would bring it in conflict with a most basic constitutional right. I cannot so construe it.

ORDER

Based upon the above findings of fact and conclusions of law, I find that Respondents did not violate section 105(c) of the Act as charged in the complaint, and the case is DISMISSED.


James A. Broderick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 16 1981

CLIMAX MOLYBDENUM COMPANY, : Contest of Citation
Contestant :
v. : Docket No. WEST 79-72-RM
: :
SECRETARY OF LABOR, : Citation No. 565898; 2/28/79
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Climax Mine
Respondent :

DECISION

Appearances: Raymond J. Turner, Esq., Rosemary Collyer, Esq., Sherman and Howard, Denver, Colorado, for Contestant;
Robert S. Bass, Esq., Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Respondent.

Before: Judge Charles C. Moore, Jr.

Nine cases alleging violations of the same standard 1/ were heard pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., in Golden, Colorado, on January 20, 1981. Eight of the nine cases were dismissed when the Government announced prior to hearing that it had no evidence to present in support of the citations involved. For reasons not entirely clear to me, the Government found it more convenient to have the citations dismissed for failure of prosecution rather than to vacate the citations and move for dismissal of the cases.

For reasons set forth hereinafter, I hold that Citation No. 565898 should not have been issued. Because a reviewing body may disagree with my opinion regarding the initial issuance of the citation, I will also discuss flaws in the testing procedures used to determine the amount of respirable dust.

The citation alleged:

The quartz-bearing dust level around the No. 2 crusher jaw floor operator was 1.02 Mg/m³ on the day shift from 0730

1/ The respirable dust standard for metal and nonmetal mines, 30 C.F.R. § 55.5-5, see infra.

to 1522 on 2/28/79, where the threshold limit value (TLV) was .49 Mg/m³. Feasible engineering or administrative controls were not being used to reduce this amount in order to eliminate the need for respirators. The violation occurred on 2/28/79. This citation is being written on 4/4/79, because of the delay to get the sample analyzed.

The standard in question, 30 C.F.R. § 55.5-5, states:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment * * *.

On March 17, 1981, the Commission received proposed findings of fact and conclusions of law from Climax. The Secretary had earlier announced that it would present no brief or proposed findings, and it has not responded to the materials submitted by Climax. I adopt the following from the proposed findings submitted by Climax.

The parties have stipulated and I find that:

On February 28, 1979, Climax was, in fact, in the process of developing and establishing accepted engineering controls to control exposure to harmful airborne contaminants in the No. 2 Crusher, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, and by dilution with uncontaminated air, to the greatest extent possible under the state of the art.

The time required for Climax to develop and establish accepted engineering controls for the control of employee exposure to harmful airborne contaminants in the No. 2 Crusher has been reasonable and necessary.

The employee sampled by Inspector Jardee on February 28, 1979, which sample gave rise to Citation 565898, was wearing an approved respirator.

On February 28, 1979, the Climax Mine had in effect a proper respiratory protection program.

Under current MSHA policy, whenever an operator, including Climax, demonstrates that it is in the process of developing and implementing accepted engineering controls for the control of employee exposure to harmful airborne contaminants, no citation under 30 C.F.R. § 55.5-5 is to be issued, as long as all exposed employees are protected by respirators and a proper respiratory protection program is in effect.

The Secretary offered no evidence regarding the feasibility of preventing airborne contaminants by "accepted engineering control measures" other than the stipulation. Not only was the Government unable to prove a violation, in my opinion it stipulated that there was no violation. These reasons alone provide sufficient grounds for vacating the citation and I hereby find that the citation should not have been issued.

I also find, however, that the procedures used to weigh the dust sample warrant vacation of the citation. The weighing procedure, in its simplest form, consists of allowing a cassette containing a filter to sit undisturbed for 30 days before being initially weighed. This permits outgassing from the plastic cassette which results in the deposit of minute particles on the filter. After 30 days and just before use, the cassette is desiccated (dried), and the filter is removed, deionized, and weighed. It is then replaced in the cassette, sealed, and given to an inspector for testing a mine atmosphere. When the cassette has been used and returned to the laboratory, it is again desiccated; the filter is removed, deionized, and weighed. The difference between the initial weight and the final weight is presumed to be the weight of the dust collected in the mine.

The laboratory technician's record (Deposition Exhibit No. 1) shows that the sample in question (No. 039007) was initially weighed on August 8, 1978, and that the final weighing was on March 6, 1979. ^{2/} Mr. Joseph Gallegos, the laboratory technician, stated that the filter and cassette were in the inspector's possession from August 8, 1978, until March 6, 1979 (p. 59 of deposition). However, Inspector Jardee says that he first got the cassette on February 26, 1979, and states in his citation that although the violation occurred on February 28, 1979, he did not write the citation until April 4, 1979, "because of the delay to get the sample analyzed." But according to the record, the sample was analyzed almost a month earlier on March 6, 1979. The Secretary has made no attempt to establish which of its witnesses was correct nor has it made any admission as to which one was incorrect. This discrepancy alone provides sufficient grounds for vacating the citation. A time lapse of 7 months between the initial weighing of the filter and the final weighing would allow outgassing from the plastic cassette containing the filter to distort and exaggerate the final reading of the weight of the dust on the filter.

^{2/} The years were not actually contained on the exhibit but the testimony makes it clear that 1978 was the year of the first weighing and 1979 the year of the final weight. Also, eight other samples listed on the exhibit show an 8-month time gap between weighings.

I would also vacate the citation because the deposition of Joseph Gallegos contains insufficient probative evidence to determine how he conducted the weighing operation. His testimony is replete with memory failures and vague and contradictory statements. He interchanged the terms "filter" and "cassette" so often that one unfamiliar with the procedure might conclude that Mr. Gallegos had weighed cassettes rather than filters. When asked how many times he weighed the filter to arrive at the initial weight, he stated, "I could probably say once, I think" (Deposition, p. 27). I cannot base conclusions on such uncertain and inconclusive testimony. Both expert witnesses, Dr. Lois Gerchman for Climax, and Richard Durand for the Government, expressed doubts as to what procedures were followed by Mr. Gallegos to determine the weight of the filter before and after exposure to the mine atmosphere. Although Mr. Durand had worked with Mr. Gallegos, neither expert had personal knowledge of the procedures used by Mr. Gallegos on this occasion, and they based their opinions solely on his deposition.

Both expert witnesses were well qualified. Most of Dr. Gerchman's criticism of the dust testing procedures was directed at the actions taken by Mr. Gallegos as best she could determine those actions from his deposition. She suggested several procedural changes to ensure greater accuracy. Mr. Durand stated that he had written the new testing procedures and that some changes had been made since the testing in the instant case. For example, as a result of a change of filter brands, desiccation lasts 2 hours rather than 15 minutes. But the new procedures were not introduced as evidence, and the record is unclear as to all the changes made in the testing procedures. While Dr. Gerchman was highly critical of the procedures used at the time the sample in question was weighed, I do not know how much of that criticism could be directed at MSHA's new procedures. The new procedures were not extant when this citation was issued and I cannot declare them invalid.

Those portions of the findings and conclusions submitted by Climax which are not adopted above are rejected. The citation is vacated for each of the three reasons given above, any one of which would justify vacation.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

CHARLES E. BLANKENSHIP, : Complaint of Discrimination
Complainant :
v. : Docket No. WEVA 79-336-D
: :
W-P COAL COMPANY, : No. 21 Mine
Respondent :

DECISION

Appearances: Larry Harless, Esquire, Charleston, West Virginia,
for the complainant;
Harold S. Albertson, Jr., Esquire, Charleston,
West Virginia, for the respondent.

Before: Judge Koutras

Statement of the Case

On May 29, 1979, complainant filed a discrimination complaint with the Secretary of Labor against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was in the form of a summary statement of the alleged discriminatory action, and it was filed with MSHA's District No. 4 field office in Logan, West Virginia. Subsequently, on July 10, 1979, MSHA informed the complainant that upon completion of an investigation concerning his discrimination complaint, MSHA determined that a violation of section 105(c) had not occurred. Complainant was advised that if he disagreed with MSHA's disposition of his complaint, he was free to file a complaint on his own behalf with the Commission.

By letter received August 9, 1979, complainant filed his discrimination complaint with the Commission, and asserted that he had been threatened, discriminated against, and punished unjustly because of his position as the chairman of the mine health and safety committee, and he enclosed a copy of his previous complaint filed with MSHA in support of his Commission complaint. He also asserted that "there were other actions taken against me that aren't in the report," but he failed to furnish any details in this regard, or to otherwise indicate the nature of the alleged "other actions." With regard to his original claims of discrimination, they are summarized as follows in a statement executed by the complainant:

(1) On or about April 4, 1979 a dispute arose about firebossing the mine after the fan shut down. Mr. Blankenship complained about this and the state mine inspector supported his position. As punishment, Mr. Blankenship was required to "shovel in the hole" by Freddy Vance. Witnesses: R. Evans, B. Sipple, Blevins, C. Bailey, Jr.

(2) On April 10, 1979 a dispute arose about Foreman Pedro Mendez transporting heavy rails into the mine on a mantrip carrying men to the section. Mr. Blankenship discussed this dispute with Ray Herndon and Dewey Wiley in the mine office. Dewey Wiley became very angry and told Mr. Blankenship "the first chance I get, I'll fire your rump". Witness: Danny Neace.

(3) On April 12, 1979 Mr. Blankenship was fired for allegedly instigating a work stoppage. The facts are that Mr. Blankenship was following the instructions of his local union president to stop the men from leaving the mine site, and instead to meet on the company parking lot to discuss the problem. The company had previously requested that the men meet on the parking lot instead of leaving the premises. The discharge of Mr. Blankenship thus put into concrete effect Mr. Wiley's April 10, 1979 threat to "fire your rump".

(4) On or about April 13, 1979 at the contractual "24-48 hour" meeting on Mr. Blankenship's discharge, Dewey Wiley offered to rescind the discharge if Mr. Blankenship would enter into a written agreement removing him from the Mine Health and Safety Committee for a period of one (1) years [sic]. Mr. Blankenship rejected this offer. Witnesses: B. Belcher, Pete Brown, D. Neace, T. Hodge, F. Robinette, R. Accord.

By letter filed August 30, 1979, Mr. Blankenship advised that he was seeking to clear his work record and to recoup⁴ back pay lost during his suspension. The suspension resulted from an arbitration proceeding concerning Mr. Blankenship's proposed discharge for allegedly instigating the work stoppage referred to in his complaint. In addition, in response to my order of August 19, 1980, directing the complainant to provide specific details concerning the "other actions" of alleged discrimination, Mr. Blankenship responded by letter filed September 22, 1980, as follows:

The other actions stated in the letter were other threats by Dewey Wiley (company personal director). Also, I feel I have been punished because of my position as Mine Health & Safety Committee.

I filed a grievance on #21 bathhouse for failure to comply with the federal law under MSHA, our district safety

coordinators Ronald Nelson and Richard Cooper responded to the grievance and went to the bathhouse. Dewey Wiley threatened me with my job as he had done before. I am sending a copy of the district report.

I submitted a safety grievance on toilet facilities in the mines after W-P Coal Company complied with the law by furnishing portable potties in the mines. W-P Coal Company stated who ever used one of the toilet facilities had to empty it. I asked the company to also comply with the article on keeping them sanitary. I asked the company to have it cleaned. Joe Bragg, day shift foreman, came to the section and acknowledged I asked them to have it cleaned and he removed me from my job and told me to take it to the track so it could be took outside and cleaned. I did not use the portable potties. I feel the company did this to punish me for filing a grievance on portable potties because of my position as Chairman of [sic] Health & Safety Committee. Witness: Randall Evans.

Mr. Dewey Wiley also stated that he would see to it that I would empty the potties if I filed a grievance on keeping portable potties sanitary. Witnesses: Frank Robinette, Field Representative, Ronald Nelson, safety director for District 17.

Respondent filed a response to the complaint filed by Mr. Blankenship and denied that it had discriminated against him. Further, respondent asserted that since the initial complaint and relief requested by Mr. Blankenship related to his suspension on April 12, 1979, no consideration should be given in this proceeding to any alleged acts of discrimination which the complainant claims occurred after May 29, 1979, the date his discrimination complaint was filed, and that no testimony regarding these alleged additional acts of discrimination should be permitted at the hearing. Respondent filed a written motion seeking to limit the hearing to events prior to May 29, 1979, and after oral argument on the record at the hearing of January 6, 1981, the motion was denied (Tr. 7-A), and testimony was taken concerning the "other actions" referred to by the complainant in his letter of September 22, 1980.

This matter was heard in Charleston, West Virginia, during the term January 6-7, 1981, and the parties appeared by and through counsel and participated fully in the hearing. Posthearing proposed findings, conclusions, and supporting briefs were filed by the parties and the arguments presented therein have been fully considered by me in the course of this decision.

Issue Presented

The principal issue presented in this case is whether Mr. Blankenship's suspension was in fact prompted by his mine health and safety activities, and whether or not the asserted acts of discrimination as detailed by the

complainant in his complaints of May 29, 1979, as well as September 22, 1980, constituted acts of discriminatory retaliation, intimidation, or harrassment as a result of complainant's protected mine health and safety activities in his capacity as chairman of the mine safety and health committee.

Applicable Statutory and Regulatory Provisions

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

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

Testimony and Evidence Adduced by the Complainant

Charles E. Blankenship testified that he is employed by the respondent as a continuous miner operator, that he has been so employed for approximately 7 years, and is assigned to the No. 21 Mine, one of two mines currently operated by the respondent. He is a member of UMWA Local Union 5922 and serves as chairman of the mine health and safety committee as well as the mine committee, and in these capacities he has represented the miners at both the No. 21 Mine as well as the No. 19-C Mine continuously since 1977. He also serves as chairman of COMPAC, a UMWA-endorsed political action committee relating to mining industry laws and community-related miner activities (Tr. 10-17).

Mr. Blankenship testified that on February 13, 1979, he filed a grievance with mine superintendent Ray Herndon concerning the lack of water at the bathhouse which had been installed at the then operating No. 20 Mine (Exh. C-2). Mr. Herndon assured him that water would be provided or the men would be paid \$1.75 each per day as compensation for the lack of water. Water was not provided and the men were not compensated, and this resulted in a strike or work stoppage on April 13, 1979. Prior to this time, another bathhouse grievance had been filed (Exh. C-3) but it was withdrawn after the respondent corrected the condition which was in issue, namely, the installation of floor safety strips to preclude stumbling hazards (Tr. 17-26).

Mr. Blankenship testified that on April 4, 1979, the main mine ventilation fan went down on the "hoot owl" shift. After he reported to work, he and Mr. Randall Evans were assigned to "police" and clean up the parking lot by his immediate supervisor, foreman Freddie Vance, while the other seven members of his crew were "standing around." While he was doing this, mine safety director Junior Oliver and he got into a dispute as to whether the mine had to be fire bossed before the men were permitted to go in. Mr. Blankenship believed that since the fan had been down for over 2 hours, the state law required the mine to be fire bossed, but Mr. Oliver did not. A telephone call was made to a state mine inspector and he confirmed Mr. Blankenship's position. Shortly thereafter, he and his crew were assigned by Mr. Vance to shovel coal spillage in and around the underground panline area known as "the hole" while another crew remained outside "laughing at us." Eventually,

after the fire bossing was completed at 11 a.m., he and his crew resumed their normal work duties in the mine (Tr. 27-31).

Mr. Blankenship testified that on April 10, 1979, safety committeeman Daniel Neace came to him with a complaint that the third shift mine foreman, Pedro Mendez, had permitted several inexperienced miners to be transported in a battery-powered car together with 80-pound steel rails positioned over their heads. A meeting was held over this incident, where Mr. Mendez, Mr. Neace, personnel director Dewey Wiley, and superintendent Ray Herndon were present. After the meeting was over and as they were leaving the room, Mr. Wiley remarked: "This nit-picking stuff - I'll get you yet" (Tr. 32-34). Several days later on April 12, when he reported to work at 8 a.m., he learned that the previous midnight or "hoot owl" shift had gone on strike, and Bill Belcher, president of the local, informed him of this fact. Mr. Belcher advised him that a meeting had been called at the No. 19-C bathhouse to discuss the strike and Mr. Belcher instructed him to go to the No. 19 Mine, 3 miles away, to advise the men not to go home and to remain for the meeting to discuss and settle the dispute. He went to the parking lot area of the No. 19 Mine and waited for Mr. Belcher with several of his fellow workers (Tr. 26, 35-36).

Mr. Blankenship stated that the strike dispute was over the fact that the men had not been compensated for the lack of water in the bathhouse. He stated that he tried to talk the men into going back to work because the work stoppage was illegal, but that they went home after the meeting. He also left and went home but returned on the evening shift and tried to get the men to stay. He then returned on the following third or "hoot owl" shift and finally convinced the men on that shift to go back to work. Upon reporting to work, the next day, Mr. Herndon gave him an envelope which contained a discharge slip and told him that "this wasn't my idea." Mr. Blankenship took the slip to his union field representative and initiated a discharge grievance (Tr. 37-41).

Mr. Blankenship indicated that the initial step in his grievance was the "24-48 hour" meeting with mine management, where each side presented testimony. He stated that throughout this meeting mine management requested him to relinquish his mine committee and safety committee positions, and that if he agreed, he would only receive a small suspension rather than a discharge. When he declined to relinquish the committee positions, his case proceeded to arbitration the following week (Tr. 42-46; Exhs. C-4 through C-7). The arbitration was resolved by Mr. Blankenship receiving a 30-day suspension, and Mr. Blankenship testified that his representative, Frank Robinette, told him that mine management had sought his resignation from his safety committee job but that the arbitrator denied that request. Mr. Blankenship was in fact suspended for 30 days without pay (Tr. 47-52).

After returning to work following his suspension, Mr. Blankenship indicated that he filed another grievance (Exh. C-8) concerning the bathhouse because the men still had not been paid for the periods when there was no water available. That grievance was settled when the men, including himself, were paid compensation (Tr. 54), but subsequent bathhouse problems

with water, lights, an exhaust fan, and lack of sufficient shower heads resulted in additional periodic grievances being filed (Tr. 55). A meeting was held at the bathhouse, where union district safety director Richard Cooper, Ron Nelson, Mr. Wiley, and Mr. Herndon were present. At that meeting, Mr. Wiley told him he would "fire me" and "get rid of me" (Tr. 56).

Mr. Blankenship testified that on one occasion, following his suspension, his immediate foreman, Freddie Vance, stated: "Charlie, you're going to keep it up and they've probably got a hit man after you right now" and that "the company will catch you in the wrong place one of these times and they'll get you." These statements were made in the presence of his entire crew, but Mr. Vance offered no further specifics (Tr. 58).

Mr. Blankenship testified that he requested the respondent to provide sanitary portable toilets for the men underground and that one was provided for his section. However, when the respondent failed to provide them for others, he filed a grievance insisting that the respondent comply with the law. Although the company policy dictated that each miner had to remove the toilet which he used from the mine, he was instructed by assistant mine foreman Joe Bragg to help another miner remove his used toilet. Mr. Bragg told him that it was not his idea and that "I just got orders to tell you to get it out of here" (Tr. 60). He helped Mr. Randall Evans carry the toilet to the track under protest and Mr. Wiley later told him that "I'll see that you empty it" (Tr. 61). The toilets weigh approximately 10 to 15 pounds (Tr. 62).

Mr. Blankenship stated that during his tenure as chairman of the mine safety committee, he has filed numerous bathhouse complaints concerning 30 C.F.R. § 75.1712, roof-control problems, manbus problems, and other violations, and when the respondent would not cooperate with him, he resorted to section 103(g) of the Act and requested MSHA inspectors to come in and obtain compliance (Tr. 66-67). He has also contacted state inspectors and union safety representatives both before and after his 30-day suspension (Tr. 68).

Mr. Blankenship explained the procedures for filing safety complaints and he identified several documents which constituted telephone complaints which he made or was somehow responsible for initiating (Tr. 88-93, Exhs. C-10 through C-18). All but the first two are dated after May 29, 1979, and they were received in evidence over the respondent's objections (Tr. 96). Mr. Blankenship stated that mine management accused him of "nit-picking" and being "radical" and that he would cause the mine to shut down because his complaints resulted in fines (Tr. 94).

On cross-examination, Mr. Blankenship confirmed that the strike or work stoppage occurred on April 12, approximately 2 months after his bathhouse grievance of February 13, 1979, was filed. He stated that he did not pursue the bathhouse grievance (Exh. C-2) further with the respondent because he relied on its word that the men would be paid (Tr. 98-101). He considered

the shoveling incident in the "hole" with his crew to be punishment and considered it "less desirable" work (Tr. 102). Regarding the incident concerning transporting inexperienced miners, he confirmed that Mr. Wiley "made the accusation to me that he'd get rid of me." Mr. Blankenship recalled no conversation concerning absenteeism or the respondent's policy concerning absenteeism, and he denied telling Mr. Wiley that the policy "was not worth the paper it was written on" (Tr. 104).

Regarding the strike, Mr. Blankenship stated that Union President Belcher conducted the meeting with the men and that it was his position that the dispute should be settled through the grievance procedure. He stated that he told the men to go to work but that they left spontaneously. Following the strike, the respondent accused him of being the instigator and advised him of its intent to suspend him with the intent to discharge (Tr. 105-111).

Mr. Blankenship confirmed the 24-48 hour meeting concerning his suspension grievance and stated that he was satisfied with Mr. Robinette's representation on his behalf at that meeting but was dissatisfied with the subsequent arbitrator's action in excluding him from the hearing room prior to rendering his decision (Tr. 112-114). He denied ever threatening Mr. Robinette with a lawsuit as a result of the arbitration decision but rather that Mr. Robinette and his union advised him to pursue the matter further through the instant discrimination action under the Act. He did so because he believed he was discriminated against through the proposed discharge because of safety reasons rather than for instigating the strike in question (Tr. 113-114).

Mr. Blankenship confirmed that at the 24-48 hour grievance meeting with mine management, he was asked to relinquish both his safety committee job as well as his union committee job. He believed that the April 12 or 13 strike was related to his mine safety committee activities because "the company brought this on me because of safety reasons" because the failure of the respondent to settle the miners' grievance resulted in the dispute which led to the strike. At the time he received Mr. Belcher's instructions to proceed to the parking lot meeting, he believed he was acting in his capacity as both the safety committeeman as well as the mine committeeman because of the combination of factors concerning the lack of water in the bathhouse as well as the failure by the respondent to compensate the men for this (Tr. 118). He also confirmed that Mr. Vance never threatened him and that he had never received any threatening phone calls at his home. While he has received obscene calls, he cannot attribute them to the instant proceeding and stated that his phone number is readily available (Tr. 120).

Regarding the portable toilet incident, Mr. Blankenship confirmed that on the day in question it was used by his continuous miner helper, Mr. Evans, and that the miner was temporarily down and idle. He conceded that mine management decided that he should help Mr. Evans carry the toilet out, and while he did not like it, he had no argument with the decision (Tr. 123-125). He also indicated that he advised Mr. Bragg that he was acting under protest and that Mr. Bragg told him that the order came from "outside" but he did not state

who gave the order (Tr. 130). Mr. Blankenship stated that several persons laughed about the incident (Tr. 131).

In response to bench questions, Mr. Blankenship stated that the portable toilet was carried three breaks and placed on the mantrip to be taken outside (Tr. 136). Regarding the shoveling incident, he stated that it was the first time he could recall an entire crew being assigned to shovel and clean the belt in question, and in the event of a breakdown it was not unusual for a shuttle car operator to be assigned such duties. However, he believed he was being punished at the time because he prevailed in the confrontation over the ventilation fan being down and the requirement for fire bossing the mine. When asked who assigned him the task of shoveling, Mr. Blankenship replied as follows (Tr. 140-141):

Q. Shortly after the telephone conversation, someone from mine management told you to go shovel in the hole.

A. Mr. Freddie Vance. He also stipulated it wasn't his idea.

Q. Now, that's the second time somebody from mine management has assigned you to do certain chores which you felt was retaliation and in both instances these individuals purportedly told you it wasn't their idea.

A. Yes, sir.

Q. Whose idea was it? Do you have any idea?

A. It had to come from outside, I figure from mine management -- from higher up than they are. See, a section boss -- you deal with them every day. You know what I mean. They're just like a working person with you. You get used to them.

Q. Is it possible the section bosses were trying to retaliate against you and used the outside as an excuse so you wouldn't know it was really them that was punishing you?

A. No, sir.

Q. Have you ever had a dispute with the section boss?

A. I've had a few times -- not really disputes. We've had things to happen over safety and stuff but the section boss -- it's in his power. He'll get it corrected even if he wants me to do it.

But see, on most of the section bosses, if you ask about a safety dispute they say you have to go to mine management.

You had to go to Ray or Dewey or someone like that. They ain't got no power to do nothing.

Mr. Blankenship conceded that there have been occasions where respondent has corrected safety complaints that he brought to its attention (Tr. 145), and he also conceded that mine management does not totally ignore his safety complaints (Tr. 148).

Richard C. Cooper, UMWA International Safety Inspector, testified that he has worked with Mr. Blankenship for a number of years and considers him to be a very good committeeman. Although he has not received too many recent safety complaints from Mr. Blankenship, there were quite a few received from him at one time concerning the respondent. Mr. Cooper stated that on two occasions he personally heard Mr. Wiley threaten Mr. Blankenship because of his safety activities. The first incident occurred at the bathhouse during the meeting referred to by Mr. Blankenship, and the second occurred during a telephone conversation he had with Mr. Wiley on the following day. He remembered the incidents because he found it unusual for mine management to threaten a union man in the presence of a union representative. Mr. Cooper prepared a memorandum dated September 26, 1979, regarding the incident and gave a copy to Mr. Blankenship upon his request (Tr. 70-74; Exh. C-9).

On cross-examination, Mr. Cooper stated that he has received a few complaints from safety committeeman Randall Evans but that most of them came through the committee chairman. He confirmed that his memorandum of September 26, 1979, regarding his conversation with Mr. Wiley was typed by his former secretary on the day he received the phone call from him. Although he could not recall the exact words Mr. Wiley used during the September 19th bathhouse meeting, he stated that the memorandum was accurate. He also distinctly recalled Mr. Wiley stating that "if Charlie Blankenship didn't like working with that company that he would find a way to get rid of him" (Tr. 74-78). He also recalled the phone conversation when Mr. Wiley stated that "if Charlie Blankenship keeps writing safety grievances that the company is going to get rid of him" (Tr. 79).

Mr. Cooper stated that it is the respondent's responsibility to keep the bathhouse clean but that some mines use a union attendant for this task (Tr. 86). He confirmed that he made the notation concerning Mr. Wiley's threats in order to keep a record of it, and if additional threats were made he would have taken some action himself (Tr. 82-83). Regarding the alleged statement at the bathhouse on September 19, 1979, Mr. Cooper stated that Mr. Wiley did not make the statement directly to him but made it in his presence as he was leaving, and he believed that he was speaking to Mr. Herndon at the time (Tr. 83). After the phone conversation, he assumed that Mr. Wiley was going to suspend Mr. Blankenship subject to discharge, but that was not done (Tr. 85). Mr. Cooper believed that it was easier to fire someone than to remove him from the safety committee (Tr. 85).

Randall Evans, testified that he is employed as Mr. Blankenship's continuous miner helper and that he is also a union safety committeeman. He

confirmed the facts concerning the dispute over the fire bossing of the mine after the ventilation fan went down, and confirmed the fact that Mr. Vance assigned the crew to clean the coal which had accumulated around the underground belt line. Another crew was laughing at them and after the mine was fire bossed, they resumed their normal work. Prior to shoveling, he and Mr. Blankenship were cleaning up the parking lot while waiting for the mine to be fire bossed (Tr. 150-154).

Regarding the strike meeting, Mr. Evans testified that Mr. Blankenship tried to get the men to go back to work (Tr. 156), and he confirmed the "hit man" comment made by Mr. Vance. Although he expressed concern over the statement, he stated that Mr. Vance had been "under a lot of medical attention" (Tr. 157).

Mr. Evans confirmed the incident concerning the portable toilet and confirmed that Mr. Bragg assigned Mr. Blankenship to assist him in taking the toilet to the track area and Mr. Evans then took it out of the mine. Mr. Evans had previously used the toilet (Tr. 160-162). During a previous meeting with mine management concerning the toilets, Mr. Evans stated that Mr. Ray Herndon had made the following statements (Tr. 158-159):

A. Well, on the portable potties, Charlie come to me and informed me -- he said some men on the hootowl were wanting portable potties put inside the mine. Charlie said they had to be there -- the law requires them to be in there, so we'll ask them to put them in there.

We asked them to put them up there -- to furnish all the sections with portable potties. Instead of furnishing all the sections, they furnished it on the one section we worked on. And I informed Charlie -- I said, "No, Charlie, that don't get it." I said, "The law requires it to be on all sections within five hundred foot."

So, we went down in a second-step meeting on portable potties and it was just an outrageous meeting. There wasn't nothing come out of it -- just threats. Character -- just downgrading of people. I, myself, got downgraded in it.

Q. Okay. I don't want to take up too much time. What was said by whom?

A. Mr. Ray Herndon stated plainly -- he said, "It's because of radicals like you all this company is going to be shut down." He said, "You all are not going to have to worry about portable potties. You're not going to be here long enough to worry about portable potties."

I said, "What?" And he said, "You're right. You heard me right. Just because of radicals like you" -- then he said

"Radicals like you -- this company's not going to be here long." And that was the outcome of the second-step meeting on the portable potties.

Q. Was there anything said at that meeting about the company said they would put them in?

A. Yeah. The company agreed to put them in but they said whoever used it would empty it.

On cross-examination, Mr. Evans stated that the shovels used to shovel the belt line were stored in a shed some 70 feet from the center of the parking lot. There were enough for the men, and two were located at the belt location. It was customary for a truck driver to clean the belt by shoveling after loading his truck, but "inside men" had never done this work in the past and he was not aware that a "belt-man" was assigned to shovel at the belt. He confirmed that he and Mr. Blankenship carried the portable toilet together for a distance of some 210 feet and placed it on a rail rover. He transported it out of the mine after being furnished safety goggles to wear while driving the rover, and Mr. Bragg rode out with him. He and Mr. Blankenship did it under protest because suitable transfer tanks were not available to transfer the toilet to the surface and he believed that this is a violation. He also indicated that he was the only person who ever used such a toilet (Tr. 162-167).

In response to bench questions, Mr. Evans stated that he protested handling the toilet because respondent did not furnish him with suitable equipment to transfer it out of the mine (Tr. 169). Mr. Evans stated that Mr. Vance was the section boss, that he had known him about a month, that Mr. Vance had never given him or Mr. Blankenship any problems over their safety activities, and he had never threatened or intimidated them (Tr. 171-172).

Mr. Evans testified that "policing" the parking lot while the mine is down is a normally acceptable chore. The miners simply stand around until one of the bosses tells them what to do and none of the miners have objected. His testimony with respect to this incident is as follows (Tr. 174-177):

Q. Is it normal -- okay. Is it normal for your fellow employees and the following crew guys when you're out with them one evening or out on the parking lot somewhere to say, "Ha-ha, you had to shovel the hole today?" Is that unusual? I assume you fellows kid a lot don't you. Not when you're working.

A. No, the company has a policy of no horseplay.

Q. I'm not talking about -- have you ever hollered or giggered [sic] or teased any of your fellow miners when they had to shovel the hole?

A. I haven't known any of the fellows -- miners that had to shovel the hole other than our section.

Q. Yours was the only crew that had ever been assigned to go down and shovel that belt?

A. Yes, sir.

Q. But if the section foreman told you to do it while you were spinning your wheels, so to speak, waiting to go underground you wouldn't object to it.

A. No, sir. I don't object to no direct order as long as it's within the law.

Q. Was this shoveling the hole this day within the law.

A. No, sir.

Q. Why wasn't it?

A. Because we was inside the hole shoveling and there was an endloader overtop of us loading coal trucks.

Q. Wait a minute.

A. We're in under a stockpile of coal. There's a conveyor right in the bottom of the stockpile. It comes out of the stockpile and feeds it into the truck. Okay, we're down here. Okay, the belt's not running. There is a bulldozer up here pushing coal back and forth (indicating) over our heads.

Q. Your objection to shoveling in the hole was because you felt it was an unsafe act?

A. No, I didn't object to shoveling in the hole, I did it because at the time I didn't know there was a bulldozer up there over our heads -- an endloader loading coal.

Q. I got the impression from Mr. Blankenship his objection about shoveling in the hole was the fact he felt he was sent there to be punished.

A. Yes, sir.

Q. Was that your objection?

A. That's my opinion of it. I didn't object to it because I was following a direct order, but my opinion of

the reason we had to do it was because of our actions we took in making them fire boss the mines is the reason they put us in there doing it.

Q. You're not suggesting -- or are you suggesting somebody from mine management assigned you to shovel in the hole knowing there was a bulldozer loading coal above you that put you in a position of possibly getting hurt as punishment for --

A. Well, they did put us in that position, but I don't know if they knew that endloader was up there working or not.

Q. Well, let's assume you finished your policing duties on the parking lot and the section was still not operational.

A. Yes, sir.

Q. And they've said okay, now we're finished policing. The next thing we're going to do now is we're going to clean up and shovel around this belt. Would that be a problem to you?

A. No, sir, as long as they told everybody to do it and not just one section of men.

Q. In other words, what you thought it was more than a coincidence you were put down there to shovel in the hole?

A. Yes, sir, they put one section down there and left one section up on the hill laughing at us.

Q. Now, where was -- okay, there were two sections down and two crews waiting.

A. Yes, sir, it was a two-section mines [sic].

Mr. Evans testified as follows concerning the allegation that Mr. Wiley threatened to fire Mr. Blankenship (Tr. 177-180):

Q. Did you hear Mr. Wiley or anybody else make any threats? Have you ever heard anybody from mine management make any threats to Mr. Blankenship or take any action against him?

A. Yes, sir, I sure have.

Q. Tell me about it.

A. Well, on a safety dispute on the bathhouse, me and Charlie -- we had to get hold of the district and we had

Mr. Richard Cooper and Ronald Nelson accompany us at a third-step meeting at the lab. And we went from the lab to the bathhouse, Number 20 bathhouse.

We got over there and when we got over there, we started making the -- the international safety coordinatory started making the safety run to see what was in violation. While we were doing that, Mr. Wiley looked at me and Charlie right in the face -- looked at us dead in the eyes and said, "This nit-picking safety matters like this, you're all not going to be here long." And I replied, I said, "Well, Mr. Wiley, if I'm not going to be here long, my house has got wheels on it. I'll just go find somewhere else to work when I get out of a job."

Q. And that's what he said?

A. Yes, sir.

Q. Who else was there besides you and Mr. Blankenship when he looked you in the eye and said that to you?

A. Well, Mr. Cooper and Ronald Nelson were present. Mr. Ray Herndon was present, and that's it.

Q. And this was when Mr. Cooper went there to look at the bathhouse?

A. Yes, sir.

Q. Now, when Mr. Wiley said this -- made this statement, what was his demeanor? I mean, was he angry? Was he calm? Was he frustrated? Was he ticked off?

A. My opinion of his emotions was he was ticked off because we are constantly asking them to try to cure some safety factor. And in this instance it was the bathhouse and he was ticked off because we took it further to the third step meeting where we couldn't get no -- we couldn't get nothing out of the second-step meeting, which if the company wanted to they could've went ahead and settled it.

They could've fixed the bathhouse and the matter would've been settled. It wouldn't have had to went anywhere. But in this instance, it went to the third-step and I feel they just got mad because we took it on to the third step.

Q. Were you here in the courtroom when Mr. Cooper testified this morning?

A. Yes, sir, I was.

Q. Mr. Cooper purportedly said -- I don't know what his direct statements were -- that he's a pretty busy man. He got a little irritated having to run to the mine all the time to the bathhouse.

A. Yes, sir.

Q. Let's assume Mr. Cooper was in that frame of mind when he went to the mine. Let's assume Mr. Wiley was in the same frame of mind. Let's assume Mr. Wiley, as he's going out the door, looks at you and Mr. Blankenship and says, "You fellows keep this nit-picking up, we're going to close this mine down." Is that the way it happened?

A. No, sir.

Q. Are we going to be out of business?

A. No, sir. Mr. Cooper never stated nothing like that?

Q. Did he specifically look at you and say, "I'm going to fire you over this?"

A. Mr. Wiley looked at me and Charlie Blankenship both right dead in the eyes just like I'm sitting here looking at you right now and he said -- he said, "If you don't quit this nit-picking, you're not going to be here much longer. I'm going to get rid of you." That's exactly what he stated.

I said, "Well, one thing about it, if you get rid of me, my house is on wheels and I can roll any time."

Daniel Neace testified that he has been employed as an electrician for 2 years and works on the "hoot owl" shift. He confirmed the incident regarding several new miners being transported together with some rails and stated that he advised Mr. Mendez that it was a safety violation. Although he was on the safety committee, Mr. Mendez told him it was none of his business, but after he lodged a complaint, Mr. Mendez apologized to him (Tr. 182-185).

At the conclusion of the meeting concerning the mantrip incident, Mr. Neace stated that Mr. Wiley made a statement that "Charlie would make a mistake and he would fire him" (Tr. 186). Mr. Neace testified as follows concerning this incident (Tr. 186):

Maybe he didn't use the word fire. He said, "I'll get you when you do make that mistake," or words pretty close to that effect. It's been a long time and in fact, I didn't

have any reason for remembering it. It's just -- I didn't know this was all going to come up again because I was in the original arbitration. I was there as a witness but they didn't call me or talk to me or anything. They just come out and informed us what their verdict was.

On cross-examination, Mr. Neace stated that he previously served on both the mine committee as well as the safety committee and that he considers the duties of each to be different. He has since resigned from both of those positions (Tr. 190-191). Mr. Neace confirmed that he had to meet once with Mr. Herndon over a written "slip" he received for absenteeism but that he could recall no discussions between Mr. Blankenship and Mr. Wiley concerning the subject. However, he has heard the men state that the absenteeism policy is "not worth the paper it's written on" (Tr. 193).

Mr. Neace stated that since he quit his mine safety committee position, he has worked solely as an electrician and is given assistance when he has to haul cables into the mine, whereas on previous occasions, while serving as committeeman, he had to handle cables alone (Tr. 195).

In response to further questions from the bench, Mr. Neace testified as follows (Tr. 197-199):

Q. When you were on the safety committee, were you employed as an electrician?

A. Yes.

Q. Did your normal duties require you to take cable in and out?

A. When I was on the safety committee I was on a section and I paneled outside. It required me to take cables in but I had more men to help me.

Q. Let me ask you this, Mr. Neace. Were you ever, during your tenure as committeeman, assigned such tasks as what I've heard today -- digging in the hole, shoveling in the hole, carrying out potties, anything of that nature?

A. No.

Q. Did you ever feel that you were --

A. Now, there was a dispute come up over the potties one time and I was involved in it. Let me think just a minute. But at that time I believe they told me -- I said it was the company's responsibility to see that these were emptied and they said the men that used them emptied them and I was the only one at that particular time who voiced

an objection and I think Mr. Wiley would substantiate that if you would ask him.

Q. Were you ever threatened or intimidated or feel intimidated by either Mr. Wiley or anyone else in mine management with regard to any of your safety activities when you were on the committee?

A. Well, I knew things were kind of rough for me but I never felt like -- I never felt like they put any extra heat or anything on me. I did feel like they put it on Charlie because they more or less held him responsible with a lot of actions I done because at the time I went on [sic] safety committee -- took the position of safety, I did not know how to write up grievances and things.

So, I would take them to Charlie and he would write them up for me. Therefore, he carried the brunt of the heat on everything whether I wrote it up or anybody else wrote it up.

And, at pages 200-202:

Q. I've heard testimony today that Mr. Herndon, for example, on the two instances concerning the mantrip -- when that dispute arose that Mr. Herndon purportedly indicated that Mr. Blankenship had a right which Mr. Herndon recognized to get involved in that because he was a safety committeeman.

A. Yes, sir.

Q. And that Mr. Herndon had purportedly dressed down Mr. Mendez.

A. Yes.

Q. I've also heard testimony that Mr. Herndon, on another occasion when a dispute arose on safety, also conceded that Mr. Blankenship had the right to be involved because he was on the safety committee. Okay?

A. Yes, sir.

Q. Now, if I can accept that as true, what am I to believe about Mr. Herndon's attitude with regard to Mr. Blankenship and his role as a safety committeeman?

A. Well, I always found him to be honorable in anything I went to him with -- calm. But he also takes his orders from Mr. Wiley. He may not take direct orders or something

from Mr. Wiley but he takes a lot of suggestions from Mr. Wiley and he takes orders from other people, too.

Q. Mr. Neace, you impress me as being a very candid, honest individual, now and you've sat here all day and heard all the testimony so far, right?

A. Yes, sir.

Q. And I think I made the statement earlier today that, you know, this whole dispute seems to center around or at least the starting point is the bathhouse and from then on everything was downhill.

Let me ask you this: Just from your own, can you give me a capsule view of what your impression is as to what the dispute is all about here. It seems to me on the one hand we've got a vigorous safety committeeman over there who has an interest in safety and is doing his thing on safety.

On the other hand, the picture that's being painted of the company is the company just doesn't care about safety. They're out to get this guy. Just what is your --

A. Well, you know, without being involved and seeing everything that's happening in all directions it's quite hard to understand. I felt, personally, that given half a chance they would dismiss him much quicker than they would dismiss me because he is a thorn in their side -- not saying they won't comply with safety. I've worked for companies that was worse.

But they don't comply as fast as they should at times and by -- Charlie is a very persistent, conscientious safety man and it did bring pressure upon him and I feel they would dismiss him quicker over a small thing than they would me or anybody else.

Mr. Neace testified that he was present during the 24-48 hour meeting of April 13, 1979, and he believed Mr. Wiley offered to rescind the proposed discharge of Mr. Blankenship if he would accept a suspension and give up his union activities. Mr. Neace stated further that he did not believe Mr. Blankenship was asked to give up his mine safety and health job and his testimony is as follows (Tr. 211-214):

Q. Were you present during this twenty-four, forty-eight-hour thing --

A. Yes.

Q. -- on April 13 --

A. Yes, I was.

Q. 1979?

A. Yes.

Q. Tell us in your own words what you recollect of that event?

A. There was an offer made to him. If he would give up his -- but I didn't think they said mine safety and health. I thought they said his union activities.

Q. To the best of your recollection, how was this offer -- or how did it happen?

A. For one year and they would rescind the firing. But they wanted him to accept a suspension.

Q. Who was they?

A. It was Mr. Wiley, I believe, is the one who brought the idea up and it was backed by Mr. Cliff Herndon.

Q. Mr. Cliff Herndon?

A. I believe he was presiding over the meeting.

Q. Is he related to Ray Herndon?

A. Yes, he is.

Q. What's the relationship?

A. I think he's your father isn't he, Ray?

Q. Why were you there at this?

A. I was one of the safety committeemen and I was there as a witness for Charlie.

Q. And your recollection of the offer was that Mr. Blankenship cease and desist or quit his union activities for a year and the company wouldn't go ahead and fire him but would suspend him.

A. Yes, sir.

Q. But you don't know who said that.

A. I'm pretty sure Mr. Wiley is the one that mentioned it. But it was substantiated by the company president at that time -- or superintendent.

* * * * *

Q. But in any event, Mr. Blankenship didn't take them up on the offer, is that right?

A. That's right. He didn't take them up on the offer, so they stood by the dismissal which is --

Q. But your recollection was it was just general union duties rather than Mine Health and Safety activities, specifically?

A. No. His reason for being there was, I believe, with all my heart -- stems from his mine safety activity.

Clarkson Browning testified that he has been employed by the respondent for approximately 8 years as a day shift miner operator, and served as a member of the mine committee until he resigned sometime at the end of 1979. He confirmed that he was present at the April 13, 1979, 24-48 hour meeting concerning Mr. Blankenship's proposed discharge. Mr. Herndon presided at the meeting and Mr. Wiley was present.

Mr. Browning testified that both union and management representatives were consulting with each other in their efforts to resolve the dispute but that no agreement was reached. He stated that Mr. Wiley made an offer to restore Mr. Blankenship's job if he were to agree to a 60-day suspension and give up his committee jobs (Tr. 6, January 7, 1981). Mr. Browning's testimony concerning this meeting is as follows (Tr. 8):

Q. As best you can, what were his exact words? As best you can remember, realizing it's been a while.

A. He said that Charley could have his⁶ job back, you know, with the agreement that he take a sixty-day suspension and be relieved of his committee jobs.

Q. Now you're saying "jobs"?

A. Yes, sir. He didn't specify safety or mine committee either one. He said, "Committee jobs".

Q. Did you or anyone on the union side ask him, Mr. Wiley -- to be clear, you said "committee jobs". I mean nothing was pursued along that or was it?

A. No, sir.

Q. What was the response? What was your all's -- you're a union rep -- what was your response or your other union officials' response to his offer?

A. Everybody got quite upset about it because the fact they wanted to suspend him for sixty days plus remove him from the committee, which, you know, you have steps to remove somebody from the committee. You just don't tell them to quit or ask them to quit.

You know, it looked like it was either quit the committees or lose his job, one of the two.

On cross-examination, Mr. Browning stated that he would not consider an offer by Mr. Wiley to Mr. Blankenship allowing him to relinquish only his union committee job, accept a 60-day suspension, but permitting him to retain his safety committee job, to be fair. He believed that Mr. Wiley's offer encompassed resignation of both committee jobs as well as a 60-day suspension (Tr. 11-12).

In response to further questions, Mr. Browning stated that removal of a miner from committee jobs is covered by their contract and he personally believed that Mr. Blankenship was a "victim of circumstances" and that mine management was trying to blame him for the strike incident because he was on the mine committee and was a tough mine safety committeeman (Tr. 13). Mr. Browning also stated that Mr. Blankenship never "stirred up strikes," and that since he and Mr. Blankenship have served on the safety committee, there have been no wildcat strikes, except for the one over the bathhouse (Tr. 15).

In response to bench questions, Mr. Browning testified that he no longer serves on the mine safety committee and that he resigned voluntarily for "personal reasons." He also stated that Mr. Ray Herndon was always fair with him but that some of his fellow miners did not like the idea that he and Mr. Herndon "were close" so he quit (Tr. 19). Mr. Browning also stated that any decision to accept Mr. Wiley's offer with respect to the strike incident would have been a personal choice for Mr. Blankenship to make, but he has never heard of any similar offers made in the past to other committeemen (Tr. 19). Mr. Browning stated that the function of a mine safety committeeman is to deal with safety matters, and the mine committeeman deals with pay and other management problems. The contract calls for a separation of the functions, although occasionally the same individual holds both positions. Both committeemen are paid and supported by the local union (Tr. 20-21).

Testimony and Evidence Adduced by the Respondent

Clifton R. Herndon testified that he has been employed with the respondent for 10 years and now serves as the general mine superintendent. He indicated that Mr. Dewey Wiley handles personnel matters and industrial relations, but has no authority over him. He stated that his position on the

bathhouse was that he would do his best to furnish water but then he explained the problems with the system. He also stated that the respondent's policy was to pay the men when water was not available (Tr. 22-26).

With regard to the shoveling incident, Mr. Herndon stated that it occurred at a time when the ventilation fan was down. He wanted to take the men to the end of the track and leave them there while the foreman fire bossed the faces and called out his reports. However, a dispute arose between the mine committee and the safety director, and after calling the State Department of Mines, he determined not to send the men in at all and he told the foreman to keep each crew busy while waiting for the mine to be fire bossed. He did not specify which crew was to be assigned to any specific task and did not order Mr. Blankenship's crew to shovel the belt, but he simply told the foreman what he wanted done. The so-called "hole" is a reclaim belt where coal dumps on to a stockpile and is fed on the belt to be taken out of the mine and dumped on a truck. He did not consider this to be a dangerous job and the belt is protected by corrugated steel and concrete and the entire stockpile rests on that structure. Although the area is damp, it is sheltered from the weather and is lighted (Tr. 27-30).

With regard to the incident concerning new miners being transported with steel rails, the meeting which was held concerning that event had finished and the issue resolved when Mr. Blankenship engaged Mr. Wiley in a conversation concerning the company policy of absenteeism. Mr. Blankenship made a comment that the policy "wasn't any good or wasn't worth the paper it was wrote on," and Mr. Wiley told him: "Charley, if you lay off we'll get you, too," meaning that if he violated the absenteeism policy he, too, would be held accountable. Mr. Herndon denied that Mr. Wiley threatened to fire Mr. Blankenship for his safety activities at that meeting (Tr. 32).

With regard to the April 12, 1979, strike, Mr. Herndon stated that the decision to discharge Mr. Blankenship over that incident was a joint decision made by him, Mr. Wiley, and mine manager John Demotta (Tr. 33). Mr. Blankenship was observed by his truck near the parking lot road between the two mines and he was observed stopping a vehicle and informing the driver about the meeting (Tr. 34). He confirmed that he was at the 24-48 hour discharge meeting and mine management made a joint decision to offer to settle the matter by Mr. Blankenship accepting a 60-day suspension and giving up his mine committee jobs, but management specifically did not want to mention safety because "that could bring trouble on down the road. So we stayed away from it" (Tr. 36). He was not sure who made the offer, and indicated that it could have been Mr. Wiley. He saw nothing unusual about the offer and stated that it is common for both sides to make settlement offers (Tr. 35). His father, Cliff Herndon, conducted the meeting, and he believed he made the following offer (Tr. 37): "Well, what we've decided is we'll give Charley a sixty-day suspension. If he will relinquish his job as a mine committeeman, we'll put him back to work at the end of sixty days."

Mr. Herndon stated that Union President Belcher advised Mr. Blankenship not to accept the offer and to pursue the matter further and the meeting ended. When asked why he wanted Mr. Blankenship to resign from the mine committee, he responded as follows (Tr. 37):

We felt because of Charley's position that's what instigated this work stoppage, his activities as a mine committeeman. Like I said, it was testified he was a victim of circumstances. It may have well been, but the circumstances all pointed toward Charley's activities that morning is the reason the men went home.

Mr. Herndon stated that he had no knowledge of the alleged "hit man" comment allegedly made by Mr. Vance and he heard it for the first time during the instant hearing (Tr. 38). Regarding the portable toilet incident, he acknowledged that company policy dictated that Mr. Evans bring it out because he was the one who used it and he did not order Mr. Blankenship to assist him (Tr. 39). He acknowledged that Mr. Evans complained about it and that the law required it to be sanitary but he did not know when it had been used. When Mr. Evans told him that the job of emptying toilets had to be posted, he responded that it was a mine management decision and that Mr. Evans' suggestion was not justified. He acknowledged making the statement that Mr. Evans had a radical attitude, but only after being provoked by Mr. Evans (Tr. 40).

Mr. Herndon acknowledged that he was aware of the fact that Mr. Blankenship had at various times made complaints to State and Federal mine safety officials. However, he also stated that he had a good working relationship with the mine safety committee before Mr. Blankenship and Mr. Evans came into office.

In response to a question as to Mr. Blankenship's ability to cooperate, Mr. Herndon responded as follows (Tr. 42):

It's hot and cold to tell you the truth in my opinion. What really upsets me is when they don't give us time to straighten up a problem or come to us and tell us we've got a problem, and they go directly to the agencies. They said yesterday there's a procedure they have to go through. They have to go through the first step and second step, and then they file one of these 103's.

That's not right. They don't have to go through any steps to file a 103. They don't even have to let you know you've got a safety problem to file one.

Q. Can you ever recall a 103 that was filed without consulting you first?

A. Yes, several of them.

Mr. Herndon recalled one incident when Mr. Evans called in an inspector after he (Herndon) thought the problem had been resolved, and when he confronted Mr. Evans, Mr. Evans admitted that he did so over the portable toilet incident where he was told to take it out of the mine (Tr. 43).

With regard to the condition of the bathhouse, Mr. Herndon stated that the "UMWA people" keep several others clean and he has had no complaints about those (Tr. 44). Regarding the alleged threats made by Mr. Wiley to Mr. Cooper concerning Mr. Blankenship, Mr. Herndon stated he was present during this exchange, and his recollection of the incident is as follows (Tr. 45-47):

A. Okay. Let me explain a little bit about the bathhouse situation. Mr. Cooper was called in twice. He never cited us for anything neither time. The UMWA man didn't. He wrote no paperwork on it. He didn't produce any. They found the bathhouse in good shape both times.

Q. Is it your testimony that Mr. Cooper found the bathhouse in good shape on both occasions?

A. Yes. And the UMWA man that was responsible for cleaning them traveled with him when he made those inspections on that shift. The federal man wrote one notice the ventilation fan was out of order. Someone had stuck a pop can up in it. And that's the only notice that was wrote on both inspections.

They found them in good operating order. Now on this one inspection we were going through one of the bathhouses and we weren't happy. I'll tell you the truth. We weren't happy with the situation. Mr. Cooper wasn't either.

He told me he was tired of running checking bathhouses when he had people getting killed underground. And we were walking through the bathhouse and Mr. Blankenship was telling me about other mines, how they done it, how they took care of their bathhouses, what kind of bathhouses they had, first one thing and another.

And I said to Mr. Blankenship, "Charley, if you're not satisfied with this place and these other places are so much better, why don't you go to one of them and get you a job?" And he said, "No, I plan on working here a long time."

And Mr. Wiley then said, "I wouldn't count on it." That's what was said.

Q. And how did you take that?

A. What Mr. Wiley as talking about, we'd already shut down one mine, Number 20 Mine. We were in the process, which the union didn't know at the time but we did, of shutting down the 19C Mine. It's shut down now.

Now we're in the process of phasing out 19L Mine. This is what Mr. Wiley was talking about.

Q. Did you understand Mr. Wiley to be threatening Charley Blankenship individually with the loss of his job?

A. No, sir. He was being truthful with him if you want to know the facts.

On cross-examination, Mr. Herndon admitted that he was discouraged when miners filed section 103(g) safety complaints because he believed that it should be brought to the first and second mine level before an outside agency is brought in. He acknowledged that some Federal safety regulations were at times "a little bit picky," but believed they are necessary (Tr. 48). He also acknowledged that Mr. Blankenship may have been "a victim of circumstances" concerning the meeting which preceded the strike, but that he was informed by a foreman that Mr. Blankenship stopped every miner who pulled in where he was parked and they congregated at his truck. Since he was the mine committee-man, mine management believed that he was in charge of what was going on at the time. Mr. Blankenship acted as the spokesman and told him that the men wanted a guarantee that they would be paid for the lack of bathhouse water and Mr. Herndon told him he would do his best to get water or pay the men. Mr. Herndon returned to his office, and 30 minutes later the men left the mine (Tr. 50).

Mr. Herndon stated that some of the men had been paid for the lack of water but that all of them probably had not because the water problems changed from day to day and shift to shift and he was having payroll computer problems (Tr. 50-51). He personally never heard Mr. Blankenship advise the men to strike and in the 6 years he has known him, the strike in question was the first one that he believed Mr. Blankenship had ^unstigated, and that was the company's position at the arbitration hearing (Tr. 51, 54).

In response to a direct question as to why Mr. Blankenship was discharged, Mr. Herndon replied as follows (Tr. 58-59):

Because we felt because of his position and his meeting and the actions we observed that morning, that he was the reason the men turned around and went home that day.

Q. Did he instigate a work stoppage?

A. Come eight o'clock, no one was at work. They were having a meeting. Eight o'clock is work time.

Q. And that's what you mean by interfering with management?

A. Right. At eight o'clock for the day shift, they become our employees. We expect them to start to work. At eight o'clock they were at a meeting. At eight thirty they were in a meeting.

Q. How do you know those men would have worked if Charley Blankenship hadn't been down there?

A. I don't know. I don't know that. You don't know that. No one knows that.

Q. You suspected that, right?

A. I suspected what?

Q. You suspected they would have worked if Charley hadn't been down there?

A. Yes, I do. 19C men anyway.

A. And based on suspecting, your company feels that is a legitimate basis for taking the job from a man who has worked there for six years?

A. Our company observed what we talked about and we put forth our position and went through the grievance procedure. If we had been proven wrong, we would have been proven wrong. And we would have accepted that, too.

Mr. Herndon stated that it was not unusual to use underground section crews to clean and shovel belts as it had been done several times prior to and after the incident in question when there was trouble with mantrips or crews could not be sent in for some reason, and he stated that "I'm a firm believer in people giving an honest day's work for an honest day's pay" (Tr. 64). He conceded that the offer made to Mr. Blankenship concerning his resignation from the mine committee was an unusual case, but that the strike was also unusual and management felt that a mine committeeman had caused it and it was an "unusual" offer simply for that fact (Tr. 65). He explained it further as follows (Tr. 66-69):

Q. Did you see this as a welcome opportunity to get rid of what you fellows might have considered to be a trouble-maker, or someone overzealous in enforcing safety?

A. No, sir, we did not. We felt to resolve the problem in a fair way [sic]. We felt because of his mine committeeman activities that he had been part of the reason that these men

had went home. He was the leading factor, we felt these men went home that day. And this would be part of the resolve of the problem.

Q. How could that be when you said you met with Mr. Wiley and the other Mr. Herndon and you discussed whether or not you could go into negotiations and ask for his safety committee job? You decided you might get into trouble on up the road.

A. We decided we'd better make a distinct difference in how we said that that day, because we didn't want safety involved in the issue.

Q. That's what I'm saying. I'm not talking about what you were saying. I'm talking about what you were thinking. The fact is you openly discussed with them about "Well, we'd better not bring up the safety matter". This was discussed openly, wasn't it?

A. Yes, it was.

Q. I want to know why you were discussing safety when this was over a wildcat strike and it was a mine committee function. What's safety got to do with it?

A. There's two separate distinct jobs. Safety committeeman and a mine committeeman. Safety had nothing to do with this issue whatsoever, so we did not want to try to take his safety position away from him; only his mine committeeman position. You don't understand what I'm saying?

A. I think I understand. You said, "If we took the safety away, we might get in trouble on up the road," you said.

A. Safety wasn't an issue. We had no right to ask for his safety position.

Q. And you did say that if you took his safety committee job, you decided not to do it because you might get in trouble on up the road. Isn't that what you said?

A. We didn't decide not to take his -- we decided to make sure we didn't mention his mine safety committee job because it wasn't an issue.

Q. All right. The record will speak for itself on that score. I want to ask you one final question. Why would you be worried about getting in trouble on up the road?

A. Because this was not a safety issue and we didn't want to involve safety in it. This was strictly a contractual issue interfering with mine management.

Q. Then why didn't you say, "We'll take the man's mine committee job and we won't worry about safety"?

A. That's all we did. We just decided to make a distinct difference and not say anything about his safety job, so someone might come along later like today and say that we were making that kind of inference, and we weren't.

Regarding the portable toilet incident, Mr. Herndon testified as follows (Tr. 69-70):

Q. And you say your policy was on the portable potty deals that each man would carry out his own?

A. Yes. If he used it, yes.

Q. Are you familiar with the situation where Charley Blankenship was told to help Randall Evans to help carry one out?

A. After it happened, yes, I was made familiar with it.

Q. Why did that foreman give that order?

A. You get in forty inches of coal and you try to carry a box. We talked about the box, a wooden box. The Port-a-Potty was in a three-quarter inch plywood box with handles on each side of it. And like the man said, try to pick it up and bend over and walk.

It was just a thing of helping your buddy. And he didn't take it outside. He helped him take it three hundred foot to the end of the track and Mr. Evans took it on outside. And he was the logical man to help because his machine was down and he was his helper.

Q. You mean individual miners working underground in low coal don't have to struggle and carry bigger loads than that portable potty?

A. Sure they do. But as the supervisor, you want to make it as easy as you can on a man whenever you can. Why should we leave Mr. Blankenship sitting there on a miner not operating and have Mr. Evans do something that would be twice as hard on him as it would if Mr. Blankenship had helped him?

Mr. Herndon testified that respondent operated five mines in 1979, but due to economic conditions, two have been closed and the three remaining ones are not in full operation (Tr. 82). He believed that the bathhouse in question has only been cited one time by MSHA, and that respondent has four bathhouses, each of which costs \$85,000 (Tr. 83).

Dewey L. Wiley testified that he has been employed by the respondent for 3 years and prior to that worked for the United Mine Workers as a district representative and in other underground mines. He is employed as respondent's director of industrial relations, but health and safety matters are handled by the general mine superintendent. He was not present on April 4, 1979, when the shoveling and fire-bossing incidents took place. Regarding the April 10 meeting concerning hauling steel rails on a mantrip, he explained the incident after the meeting as follows (Tr. 88-89):

Q. Did you speak with Mr. Blankenship about the Pedro Mendez dispute?

A. No. I don't think we had anything --

Q. Did you speak to Mr. Blankenship at all?

A. Yeah.

Q. What did you talk with Mr. Blankenship about?

A. Well, I might have just said, "Good morning, Charley," or something like that, or made a comment or something. But I know what you're referring to.

When Charley started to leave the thing broke up, and some of the people had already left. And I was quite interested in who he was talking to yesterday, because I couldn't remember who he was talking to.

Evidently, whoever it was had a problem. We have an absentee rule program and under this program -- it's a livable program -- it's progressive. You can just about not get fired for being under it. We think it's good. It's been in use since 1976.

Anyway, I overheard -- maybe I was walking out behind Charley or something -- but the man had a complaint. I can't remember who the man was. It was about the absentee policy. Charley made the comment, "Don't worry about it. It's not worth the paper it's written on."

Well, that didn't set too well with me, because knowing Charley's position as a mine committeeman, he does have a lot of influence on our employees. I don't want him

to go out and say to the other employees, you know, "Don't worry about that absentee policy. It ain't worth the paper it's written on."

Because he could lead them into believing that it wasn't and, you know, that nothing could happen to them under it. I said, "Charley, you shouldn't tell people that that thing is not worth the paper it's written on, because it could get somebody in trouble. It could lead them into feeling secure about something that is not there."

And he said something else. And I said, Well, now Charley, it's a good policy. There's nothing wrong with it. And if people lay off and they don't work and they are unexcused, you could cause them by telling them that to get themselves in trouble. And that includes you. If you lay off, it applies to you, too. So he left. That was it.

Q. Is the absentee policy a safety issue?

A. No.

Q. Is it an issue involving management of the mines?

A. Yeah, very much so. Yeah.

Regarding the April 12 strike, Mr. Wiley stated that he was not at the mine, but was in his office some 9 miles away and observed none of Mr. Blankenship's activities that day (Tr. 90). However, he was present at the 24-48 hour discharge meeting with Ray and Cliff Herndon, and he recalled the settlement offer made to Mr. Blankenship as follows (Tr. 90-91):

Q. Did you participate in the discussion with other management employees to determine whether an offer of settlement would be made?

A. Yes, sir.

Q. Who else participated in that discussion?

A. Ray Herndon and Cliff Herndon.

Q. As a result of that discussion, did someone ultimately make an offer of settlement?

A. Yes, sir. And I'm like Ray. It's been a year and a half ago, and I don't recall whether I said it or whether Cliff Herndon, the general manager, said it. What the contract does, it says, if we suspend Charley with intent

to discharge, he has a right to meet with the general superintendent or the mine manager in the twenty-four or forty-eight hours.

At that meeting, the mine management or the general superintendent, whichever one it may be, will make a decision whether or not, you know, to go ahead or whatever. And I'm sure that we all discussed the decision. I know we did.

And Mr. Cliff Herndon, the general manager, might have made the offer or I might have made it. You know, it was no big issue, so it wasn't something you could just nail down in your mind.

Q. What was the settlement offer?

A. It was a sixty-days suspension and him give up his right as a mine committeeman. Now let me explain that. We had discussed it and we felt, due to the fact what had happened, the way it came about -- and I think Pete said it lasted a couple of hours there -- that Charley had acted arbitrarily and capriciously in the way he conducted himself as a committeeman, and hadn't acted in the best interests of the local union or the company.

And it was to our best interest and the local union's maybe, that he relinquish his position as a mine committeeman. There's no way to force him to do it. It's something he could have done himself, and he certainly could have done it.

Regarding the arbitration hearing, Mr. Wiley testified as follows (Tr. 92-95):

Q. After Mr. Feldman cleared the room, was a settlement offer made?

A. Well, Mr. Feldman, he asked me -- he heard our testimony and then he heard, I'm sure, whatever Bill Jack had said. The other people would be like repetitious, you know, the same thing maybe. Maybe not. I don't know what his reasoning was -- if we actually wanted to fire Charley.

I told him, "We don't actually want to fire anybody." There's no way we set out to fire people. We wouldn't hire them in the first place, if we didn't need them or want them. And he said, "Would you be adverse to settling this dispute?" I said, "No, if it would resolve it and we'd have some kind of assurance it wouldn't happen again. I'm not adverse to any kind of a settlement."

And he asked Frank the same thing. He said, "Frank would you be against a settlement?" And he said, "It wouldn't have anything to do with going on with the case if you wanted to, wouldn't have any bearing on my decision after the settlement."

I said, "Well, what do you suggest?" And he said, "What do you suggest?" I said, "I'm not going to suggest anything. I got burnt for suggesting things before. That's why I'm here today, I guess, for offering settlements."

And he suggested the thirty-day suspension. And he asked Frank if he thought Charley would accept it. He said, "Well, I don't know." He said, "Will your people accept it?" I said, "I'll ask them." He told me and Frank to go ask them.

We went out and we talked. I talked to my people and I'm sure Frank talked to Charley and them, you know. We went out the back of the building and they stayed in the building.

My people said, "Well, all we want to do is make the people aware of what they've done. We feel like its' wrong, and we still do. If they can give us some kind of assurance this sort of thing won't happen again, sure. A thirty-day suspension is fine. We don't want to discharge him."

So we came back in and I told the arbitrator then. He said, "Fine. I'll make it into an Order. You know, I'll send it to you in writing."

But he also called Charley back in again. And Charley could tell you what he said to him. I don't know what he said to him.

Q. Was this a compromise settlement?

A. Yes.

Mr. Wiley testified that he knew nothing about the "hit man" comment made by Mr. Vance, and he had nothing to do with the decision concerning Mr. Blankenship's helping Mr. Evans remove the portable toilet from the mine (Tr. 95-96). Mr. Wiley denied ever threatening Mr. Blankenship with his job in Mr. Cooper's presence, and he recalled the meeting at the bathhouse as follows (Tr. 98-99):

But we was walking on down to the next bathhouses. There's two bathhouses there. I don't think we got anything on that one either. It wasn't very clean. They never are where miners change clothes. Just naturally due to the nature of the job you're going to get the thing dirty. It's for use. It's not to look pretty.

Charley kept saying what good bathhouses they have at other companies or something like that. You know, like they've got a good one over somewhere. But there was no big issue here, so this stuff -- we wasn't at each others throats. We was just walking along talking.

He kept saying that and I think Ray said, "Well, Charley, if it's a good place over there -- "wherever it was at he was talking about -- "at these other companies, why don't you go get you a job over there?"

He said, "No. I plan on being here a long time." And I said, "Well, I wouldn't plan on it." You know, just talking. And I didn't explain myself because like I said, it wasn't no big issue.

But what I meant was, the bathhouses we was in at that time had been moved from another mine we had shut down. We was in the process -- along about that time we had had some real problems. Even though we are captive, steel companies got to the point where they didn't need our coal anymore.

We'd already shut down the Number 20 Mine. I knew, which they didn't know, that Number 19C Mine was on the line to be shut down. And it eventually was. Also the 19L Mine was on the list to be shut down, which half of it is gone now. We just recently shut two sections down on it on the second shift.

I didn't bother to explain it myself, because I didn't think it was a big issue, you know, about that. And that's about where it ended at.

Findings and Conclusions

As correctly stated by the complainant at pages 8-10 of his posthearing brief, the reporting of safety violations to mine management or to governmental mine safety agencies is protected activity under the Act. Further, I believe that the parties recognize the fact that any safety activities engaged in by Mr. Blankenship in his capacity as chairman of the mine health and safety committee are clearly protected activities, and that any attempts by mine management to curtail those activities through discriminatory acts of harassment, retaliation, intimidation, or threats is clearly illegal and subject to severe penalties and sanctions under the law. The record in this case establishes that Mr. Blankenship is a conscientious and diligent safety committeeman who obviously has no fear of mine management insofar as his mine safety activities are concerned. Conversely, mine management concedes that Mr. Blankenship is a vigorous safety committeeman, but the record suggests that both Mr. Herndon and Mr. Wiley are not totally enchanted with the manner in which Mr. Blankenship exercises his day-to-day mine safety committeeman's

duties. However, the critical issue presented is not whether Mr. Blankenship and mine management like each other. The question presented is whether mine management, either directly or indirectly, has discriminated against Mr. Blankenship in the exercise of his mine safety activities. Further, with respect to the specific complaints lodged by Mr. Blankenship against the respondent in this case, the question presented is whether the record supports a conclusion that the incidents and events which complainant believes amount to discrimination and retaliation for his safety activities do in fact individually or collectively constitute discrimination under section 105 of the Act.

Complainant argues that all of the separate events preceding and following his 30-day suspension raise the spectre of retaliation for mine safety enforcement efforts on his part and establishes the respondent's discriminatory motive in suspending him from his job. The separate instances of alleged discrimination relied on by the complainant are identified and discussed in this case as (1) the April 4, 1979, fire-bossing dispute, (2) the April 10, 1979, mantrip safety meeting, (3) the events surrounding a work stoppage and mine walkout of April 12, 1979, (4) a section foreman's "hit man" comment, (5) the portable toilet or "pottie" incident, and (6) the September 1979, bathhouse dispute, and two alleged threats purportedly made by mine industrial relations director Dewey Wiley on September 19 and 26 to fire the complainant for making or filing safety complaints.

In addition to his argument concerning the separate alleged acts of discrimination, complainant argues that even if those separate acts were to be given little weight in and of themselves, when viewed in totality and taken in the aggregate, the tilt toward discrimination against the complainant is manifest. With regard to those alleged acts of discrimination which purportedly took place after the complainant's 30-day suspension, complainant argues that those events must be closely scrutinized with care since any discriminatory actions or implications thus established may retroactively go towards showing the motive which actuated the suspension itself. Complainant also asserts that the overall conduct of all company management officials in this situation, both past and present, must be considered.

In order to properly consider and evaluate complainant's arguments, it is necessary to closely examine the testimony and evidence concerning each of the incidents complained of by Mr. Blankenship, as well as the cast of mine management officials who Mr. Blankenship obviously believes have somehow collectively conspired to retaliate and discriminate against him because of his protected mine health and safety activities. The specific incidents have been itemized above and a discussion and analysis of each follows below. As for the accused mine management officials in question, they are identified in this case as (1) general mine superintendent Clifton R. Herndon, (2) director of industrial relations Dewey L. Wiley, (3) section foreman Freddy Vance, the individual who assigned Mr. Blankenship and his crew to shovel coal at the belt line, and the individual who purportedly made the "hit man" comment to Mr. Blankenship, and (4) shift foreman Joe Bragg, the individual who ordered Mr. Blankenship to assist Mr. Evans in carrying the portable toilet from the section.

The April 4, 1979, Fire-bossing Dispute

Mr. Blankenship contends that mine management retaliated against him for the dispute arising out of the fire-bossing incident of April 4, 1979, by requiring him and his crew to "shovel coal in the hole." The so-called "hole" is an underground reclaim belt which dumps coal onto a stockpile so as to facilitate its removal from the mine. At page 11 of his posthearing brief, counsel for Mr. Blankenship contends that, due to Mr. Blankenship's reluctance to permit his crew to go underground prior to completion of the firebossing that followed the ventilation fan problem, he and his crew were assigned a retaliatory transfer of work duties, when ordered to shovel and clean coal spillage from the belt. Respondent denies that this work assignment was in any way improper or discriminatory.

In his complaint, Mr. Blankenship states that the work assignment was made by section boss Freddy Vance, who purportedly told him it was "not his idea." Mr. Vance was not called as a witness in this proceeding and there is no credible evidence to establish his motivation in making this work assignment. Further, although Mr. Blankenship listed four members of his work crew as "witnesses" to the work assignment, only he and Mr. Evans testified, and both of them testified that Mr. Vance never threatened or intimidated them over their mine safety activities.

Mr. Evans conceded that he did not object to the shoveling chores because the work assignment was a direct order from mine management. His objections stemmed from his unsubstantiated assertion that the assignment of the crew to the shoveling detail somehow exposed the men to a safety hazard because of the presence of a bulldozer "overhead" which was loading coal. A close examination of this assertion reflects that the bulldozer was operating outside of the mine in an area which was well supported and in fact exposed no one to danger. Objectively viewed, I believe that Mr. Evans' displeasure with the shoveling chores was prompted by his own subjective opinion that he was somehow being punished, along with Mr. Blankenship, because of the difference of opinion concerning the fire bossing of the section. I also believe that it was prompted by the obvious fact that shoveling work is physically more demanding than "policing" a parking lot, and that the other section crew was needling Mr. Evans' crew. Further, I take note of the fact that Mr. Evans displayed no displeasure over the somewhat menial task of cleaning up the parking lot while the crew was waiting to enter the mine. As a matter of fact, the testimony reflects that such duties are routinely assigned to crews by mine management while they are idle and standing by to enter the mine.

There is no evidence or testimony that Mr. Wiley was in any way connected with the shoveling work assignment. Mr. Wiley's office is not on the immediate mine property and his duties do not entail the supervision of miners in their day-to-day work assignments. Mr. Herndon testified that it was not unusual for underground crews to be assigned to clean and shovel belts and that this has been done on several occasions, both before and after the incident in question. Mr. Herndon also testified that he did not specifically assign Mr. Blankenship to the shoveling chore but simply told the foreman to keep each crew busy while awaiting the completion of the fire bossing.

After careful consideration of the testimony of record in this case, I cannot conclude that the assignment of Mr. Blankenship and his crew to the shoveling duties in question was an act of discrimination or retaliation because of Mr. Blankenship's difference of opinion with mine management over whether the section should have been fire bossed after the ventilation fan problem was corrected. I conclude that mine management has the right to direct the work force and assign employees to work details, and absent any showing that such assignments are illegal or contrary to the contract, I am not persuaded that it is discriminatory merely by the fact that a miner is not too enchanted with the assignment.

The April 10, 1979, Mantrip Meeting

Mr. Blankenship's complaint asserts that at a meeting on April 10 concerning the mantrip incident, Mr. Wiley threatened to fire him at the first opportunity, and Mr. Neace is listed as a witness to this alleged statement by Mr. Wiley. There is some dispute as to when the alleged threat was made as well as a dispute as to the issue or event that prompted it. Mr. Blankenship testified that Mr. Wiley told him he would "get rid" of him during the meeting concerning the mantrip incident, and he denied any conversation concerning absenteeism at that meeting. He indicated that any comment concerning the company's absenteeism policy was made by Mr. Evans at the time Mr. Evans received the warning slip in question (Tr. 137, January 1, 1981).

Mr. Wiley attributed the alleged remark to a comment that he made to Mr. Blankenship while leaving the meeting over the company's absenteeism policy, and he readily conceded that he told Mr. Blankenship that any miner violating the policy would be in trouble, including Mr. Blankenship. In short, respondent argues that any discussion "to get rid" of Mr. Blankenship at the meeting in question resulted from a discussion concerning absenteeism, and that Mr. Blankenship obviously misinterpreted the statement.

Mr. Neace confirmed that he was present during the mantrip meeting and conceded that he previously received a warning slip from Mr. Herndon over the question of absenteeism. However, he denied that the subject was discussed at the mantrip meeting, and confirmed that he heard Mr. Wiley state that Mr. Blankenship would "make a mistake" and that Mr. Wiley would fire him. He then clarified his testimony as follows: "Maybe he didn't use the word fire. He said, 'I'll get you when you do make that mistake,' or words pretty close to that effect. It's been a long time and in fact, I didn't have any reason for remembering it."

Mr. Herndon's version of the conversation and the asserted threat by Mr. Wiley to fire Mr. Blankenship is that once the meeting concerning the mantrip incident had concluded and the issue resolved, Mr. Blankenship engaged Mr. Wiley in a conversation concerning the company absenteeism policy. During a conversation which followed, Mr. Herndon stated that Mr. Wiley did indicate to Mr. Blankenship that "[w]e'll get you too," but

that the statement was made in the context of the absenteeism policy, and that Mr. Wiley was upset over adverse comments made by Mr. Blankenship concerning that policy.

Having viewed the witnesses on the stand during their testimony, and after careful scrutiny of the record in this regard, I cannot conclude that Mr. Wiley threatened to fire Mr. Blankenship because of his involvement in the safety complaint which resulted from a section foreman permitting new miners to be transported on a mantrip with materials which may have posed a hazard. Both Mr. Herndon and Mr. Wiley impressed me as being credible witnesses and I believe their account that Mr. Wiley's statement was prompted by the rather heated discussion concerning the company absenteeism policy and that Mr. Wiley may have been provoked and lost his temper when he made the statement. More importantly, the record establishes that Mr. Herndon supported Mr. Blankenship's position concerning the mantrip incident, acknowledged that he had a right to be involved in the meeting concerning that incident, and in fact took the foreman to task over the incident. Furthermore, there is nothing to suggest that Mr. Wiley was directly involved in the mantrip incident, and he indicated that he did not speak with Mr. Blankenship about that issue, and that the meeting had ended when the absenteeism policy was brought up.

In view of the foregoing, I find that the complainant has failed to establish any connection between any comments Mr. Wiley may have made on April 10, 1979, at the mantrip meeting, and Mr. Blankenship's discharge which followed on April 12, 1979, for his purported role in the work stoppage.

The Work Stoppage of April 12, 1979

The focal point of the alleged discrimination in this case is the work stoppage of April 12, 1979, and the subsequent 24-48 hour grievance meeting which followed that event. The relief sought by Mr. Blankenship in this case includes payment of full back wages and benefits, with interest, for the 30-day suspension period, and expungement from his personnel records of all references to that suspension. From the complainant's point of view, the totality of the aforementioned incidents of alleged discrimination which have been discussed and analyzed, which occurred both before and after his proposed discharge and subsequent suspension, when considered together suggest a pattern of discrimination which culminated in a retaliatory response from mine management, namely, the proposed discharge of Mr. Blankenship because of mine management's bare unsupported "belief" that he was somehow responsible for the illegal work stoppage. In short, complainant believes that mine management found a convenient excuse to get rid of Mr. Blankenship and to rid themselves of his somewhat troublesome mine safety activities by proposing his discharge based on a charge that he instigated the work stoppage and subsequent walkout.

Complainant's argument that the basis of the respondent's assumption that Mr. Blankenship instigated the work stoppage stems solely from mine

management's "feelings" and unsubstantiated "assumptions" is not totally correct. Although Mr. Herndon conceded that it was altogether possible that Mr. Blankenship was a "victim of circumstances," he stated that the basis for his assumption that Mr. Blankenship instigated the work stoppage was the fact that he was observed by his truck at the parking lot, stopping and talking to miners who were driving by. None of the miners who were driving by progressed beyond the point where they were intercepted by Mr. Blankenship, and it appears that each of them pulled into the parking lot area where all of the miners were assembling for the meeting. In addition, Mr. Herndon testified that the men were attending the meeting at 8 a.m. and at 8:30 a.m., and they were supposed to start work at 8 a.m. He believed the men from the 19-C Mine would have gone to work if Mr. Blankenship were not present, although he was not sure as to what the other men would have done. Once assembled, and after the discussion with Mr. Herndon concerning the bathhouse issue, a discussion in which Mr. Blankenship acted as the principal spokesman for the miners, the miners went home rather than returning and resuming their normal work activities.

Under the foregoing circumstances, I cannot conclude that mine management was totally wrong in assuming that Mr. Blankenship had something to do with the walkout, notwithstanding Mr. Blankenship's assertions that he tried to get the men to go back to work. Even if he did, the fact is that viewed in perspective, mine management's perceptions, based on Mr. Blankenship's stopping and talking to miners on their way to work, which resulted in their assembling in the parking lot area for a meeting during normal working hours, lends some credence to mine management's contention that Mr. Blankenship's actions interfered with and interrupted the normal work activities of the miners. Of course, the merits of Mr. Blankenship's proposed discharge for allegedly instigating an illegal work stoppage was never resolved at the arbitration stage because the hearing was abruptly ended when the parties to that dispute agreed to a settlement. Significantly, Mr. Blankenship was represented at that arbitration proceeding by the president of his own local union, the same individual who represented him at the 24-48 hour grievance, and the same individual who recommended that he reject the asserted offer by mine management to resign from his mine committee positions and proceed to arbitration on the suspension and proposed discharge. More significantly, this individual was not called as a witness by Mr. Blankenship and he did not testify in this proceeding.

Complainant's arguments that I am not bound by any decision of an arbitrator and may decide this case on my de novo consideration of the evidence and my own view of the facts is correct. After careful evaluation and assessment of the testimony presented in this case, I cannot totally discount the result of the arbitration which culminated in Mr. Blankenship's acceptance of the 30-day suspension. The arbitration decision reflects that Mr. Blankenship voluntarily agreed to accept a 30-day suspension without pay through May 12, 1979, with no loss in seniority (Exh. C-7, p. 3).

Although Mr. Blankenship asserted that his decision to accept a 30-day suspension was based on his desire to insure his job security and to provide

continued support for his family, the fact is that the record supports a conclusion that his decision was reluctantly made and that his intention was to pursue the matter further with the "Feds" under the discrimination provisions of the Act after receiving advice from others in this regard. However, I believe that this decision was prompted by Mr. Blankenship's belief that by pursuing the matter further he could somehow be compensated and receive back pay for the period of time he was in suspension status from his mine employment. I also believe that his decision to accept a 30-day suspension was also prompted in part by his belief that he could possibly lose the arbitration case and end up without a job.

The 24-48 Hour Work-Stoppage Grievance Meeting

In his complaint, Mr. Blankenship asserted that during the 24-48 hour contractual meeting concerning his proposed discharge, Mr. Wiley offered to rescind the discharge if Mr. Blankenship would resign from his safety committee positions for a period of 1 year. Mr. Blankenship testified that he was asked to relinquish his position on the mine committee as well as his safety committee position, and to accept a "small suspension" in return for the respondent's offer to rescind his proposed discharge for interfering with the work force and instigating the work stoppage. Mr. Browning, who was present at the meeting, testified that the offer made by Mr. Wiley encompassed a proposed and suggested resignation by Mr. Blankenship from both of his committee jobs, and Mr. Browning believed that requiring Mr. Blankenship to resign from either committee as the quid pro quo for management's agreement not to discharge him was patently wrong.

Mr. Wiley's and Mr. Herndon's versions of the offer made at the 24-48 hour meeting stand in marked contrast to that of Mr. Blankenship and Mr. Browning. Mr. Herndon contended that it was common for both labor and management to make settlement offers to resolve a dispute without the necessity for formal arbitration. He testified that the offer to Mr. Blankenship was "probably made" by Mr. Wiley, but he insisted that it only encompassed Mr. Blankenship's resignation from the mine committee and not the safety committee. Mr. Herndon believed that the work stoppage had nothing to do with safety and that it was purely a labor-management dispute over compensation in lieu of water in the bathhouse, and that in this context, he saw nothing wrong in seeking Mr. Blankenship's resignation from the mine committee as a compromise offer of settlement.

Mr. Herndon candidly admitted that the reason mine management sought Mr. Blankenship's resignation from the mine committee was that they believed Mr. Blankenship's actions caused the work stoppage and was the reason the men went home that day. As a matter of fact, Mr. Herndon testified that mine management wanted to make it absolutely clear that Mr. Blankenship's safety activities had nothing to do with the decision to discharge him for interfering with the work force and instigating the work stoppage, and he maintained that this issue was openly discussed so that it would be clear that Mr. Blankenship's discharge had nothing to do with his safety activities. He also indicated that management had no right to deprive Mr. Blankenship of his

safety committee position and he wanted to insure that it was made clear that his proposed discharge was strictly a contractual issue dealing with his interference with the work force.

Mr. Wiley testified that he may have made the offer in question to Mr. Blankenship during the 24-48 hour discussions. He believed that Mr. Blankenship's conduct concerning the work stoppage was not in the best interests of the union or mine management, and during the discussions the suggestion was made that Mr. Blankenship resign from the mine committee and accept a 60-day suspension in lieu of being fired for his role in the walk-out. Mr. Wiley insisted that his intent was to insure that there was no repetition of future walkouts, and he sought assurances that it would not happen again. He also insisted that he did not wish to fire Mr. Blankenship, and that he accepted Mr. Blankenship's later arbitration offer of a 30-day suspension in lieu of a discharge because he was satisfied that the respondent's position was correct.

Complainant recognizes the fact that there is conflicting testimony concerning mine management's offer made during the 24-48 hour meeting that he resign from one or both of his mine committee jobs. Even so, complainant suggests that all of the events which transpired in this case make it far more likely that the company sought to strip him of both positions. Even if it were found that they did not, complainant emphasizes that the dispute which led to the work stoppage, and his subsequent suspension subject to discharge, were based upon alleged violations of Federal safety regulations.

The question of mine management's "offer" to Mr. Blankenship that he resign from one or more of his mine committees and accept a suspension in lieu of discharge is a troublesome one, particularly in light of the fact that Mr. Blankenship held both positions. Threatening or intimidating a miner to resign from his safety committee position is clearly a discriminatory action under the Act. Even though an "offer" of this type is made during grievance or settlement negotiations, there is an inference that such offers are subtle pressures that could be used by mine management to rid themselves of a safety committeeman who may not see eye-to-eye with mine management on matters dealing with safety and health. Whether the same can be said with respect to "offers" dealing with a miner's membership on a mine committee other than safety may be debatable, but the fact is that while a clear distinction may be made as to the separability of the two jobs, in this case it is somewhat difficult to separate the two because Mr. Blankenship served on both committees, as well as a third "political action" committee. Therefore, a critical question which must be addressed is whether a miner who serves on several mine committees may cry "foul" when mine management seeks to discipline him for conduct which may not be clearly isolated from his safety activities.

Mr. Blankenship testified that during the 24-48 hour meeting, he was asked to step down from both of his committee jobs. Mr. Neace, one of the signatories to Mr. Blankenship's initial grievance on his proposed discharge which was filed with the respondent, testified on two occasions in reply to

my questions during the hearing, that while he was present at the 24-48 hour meeting, his recollection of the asserted "offer" made by mine management focused on Mr. Blankenship's "union activities" rather than his safety committeeman position (see previous transcript references, pp. 211-213, January 6, 1981). Although Mr. Neace later testified that it was his belief that Mr. Blankenship's predicament stemmed from his mine safety activity (Tr. 214), his conclusion does not detract from his recollection of the asserted "offer" in question, and corroborates mine management's version of the event. On the other hand, Mr. Browning, who was also a signatory to the initial grievance, testified that the "offer" encompassed both committee jobs held by Mr. Blankenship (Tr. 8). Thus, Mr. Browning's testimony corroborates Mr. Blankenship's version of the incident.

After careful consideration of all of the testimony adduced in this case, I find mine management's version of the offer made to Mr. Blankenship to be plausible and believable, and when coupled with my analysis of this entire episode, which follows below, I simply cannot conclude that management's suggestion that Mr. Blankenship step down from his mine committee position in itself constituted an act of discrimination or intimidation.

The initial grievance filed with the respondent by Mr. Blankenship on April 18, 1979, with respect to his proposed discharge for interfering with the work force (Exh. C-4), states as follows:

There was a work stoppage on the 12:01 shift on April 12, 1979, because we had problems all winter long getting water in the bathhouse. Article XXII Bathhouse. The Company has promised to compensate the men and we are having problems getting paid under this Agreement, which resulted in the work stoppage.

Article XXIV Discharge Procedure, Sections (a), (b), (c), (d), and (f). I, Charlie Blankenship, ask to be reinstated and compensated for lost time.

Article XXV Discrimination. The Company has also discriminated against me under this Article.

Article XXII Section (r). It has always been a prior practice of the Local Union to use the bathhouse at 19-C for a union meeting at 8:00 a.m. when a work stoppage has occurred [sic] for the purpose of getting the men back to work. It has been posted on the bulletin board and the Company has agreed with us that we can hold the meeting there for the purpose of trying to get the men back to work.

Article XXII(a) of the contract (Exh. C-1), deals with providing bathhouse facilities for mine employees, and section (r) of that article deals with the use of the bathhouse as a union meeting place. Article XXV, which deals with discrimination, is limited to discrimination dealing with terms

of employment, race, creed, sex, age, or "political activity, whether intra-Union or otherwise." Significantly, while the three members of the mine committee who endorsed the grievance stated thereon that it was their belief that Mr. Blankenship had been discriminated against because of his membership on both the mine committee and mine safety committee, Mr. Blankenship made no such claim. His complaint, on its face, pertains to matters dealing with contract provisions which do not appear to have any direct connection with matters of safety.

As I view the dispute over the bathhouse, it goes beyond a simple question of a mine operator violating specific safety or health standards and then failing to correct the conditions. The essence of the dispute centered not so much on the fact that the bathhouse was not always kept tidy, but rather, focused on compensating the miners \$1.75 a day for the days that the bathhouse was without water. From the company's perspective, considering the number of miners affected and the periods of time in question, the compensation amounted to a relatively substantial amount of money. From the miners' point of view, I can understand their frustration over what they believed to be a recalcitrant mine operator who found convenient "computer breakdowns" as an excuse for not providing compensation. Viewed in this light, I believe that the bathhouse dispute became the focal point of a longstanding and continual labor-management dispute which affected both sides dearly, namely, their pocketbooks.

I believe that mine management has a legitimate interest and concern in preventing illegal work stoppages among its work force and insisting that its personnel adhere to normal work hours and schedules. I also believe that mine management has a legitimate interest in addressing questions concerning employee absenteeism so that normal production is not unduly interrupted by miners who may absent themselves from work without bona fide excuses. Although the latter issue is not directly involved in this proceeding, I detect an undercurrent concerning these and other labor-management confrontations cutting across this entire proceeding. As I stated to the parties during the course of the hearing, the discrimination provisions found in section 105 of the Act are there to protect miners from discriminatory acts by mine management which infringe on their clearly recognizable right to insist on a safe and healthy work environment. The Act should not be used to provide a Federal forum for settling labor-management disputes which have no rational relationship to the health and safety of the work force.

In Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001, 1980 CCH OSHD par. 24,878 (1980), the Commission established the following test for resolving discrimination cases:

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the

complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

Respondent argues that the suspension and proposed discharge taken against Mr. Blankenship for his perceived role in the work stoppage of April 12, 1979, would have been taken against any person similarly situated and would have been taken against Mr. Blankenship whether or not he was a member of the safety committee and whether or not he ever participated in safety complaints against the respondent. In support of this argument, respondent points to the unequivocal testimony of Mr. Wiley, which appears at pages 132-133 of the January 7, 1981, hearing transcript:

MR. ALBERTSON: My question is a hypothetical question. If Mr. Blankenship had not been a member of the mine committee -- strike that.

If Mr. Blankenship had not been a member of the safety committee, but he was a member of the mine committee, and your management people had observed his activities on the day of the strike, would you still have taken the action that you took?

A. Yes, sir. If Mr. Blankenship would have been an employee, we would have taken the action.

Q. The fact he was a member of the mine committee, and especially the fact he was a member of the safety committee, would not have affected your decision in dismissing or discharging him?

MR. HARLESS: Objection.

JUDGE KOUTRAS: Overruled.

THE WITNESS: That wouldn't have had anything to do with it. Had he been an ordinary employee, just an employee, then his activities would have warranted a suspension with intent to discharge.

MR. ALBERTSON: Mr Wiley, would you have taken the adverse action even if Mr. Blankenship were not a member of the mine committee?

A. Yes.

It seems clear to me that respondent's counsel was well aware of the Pasula guidelines when he posed the above questions to Mr. Wiley since he used that decision as a reference point while posing his questions (Tr. 133-134). However, having viewed Mr. Wiley on the witness stand, I find him to be a credible witness, and I accept his testimony on this question. Further, the facts surrounding the work stoppage and the resulting suspension action which flowed from that event establish that mine management took swift and almost instantaneous action in giving Mr. Blankenship notice that the respondent intended to suspend him with a view to his ultimate discharge because of his actions in interfering with the work force and instigating the work stoppage. Exhibit C-5, a copy of the notice served on Mr. Blankenship by Mr. Herndon on April 13, 1979, the day following the work stoppage, informed Mr. Blankenship of the respondent's intent to discharge him for the following stated reasons: "Violation of Article I, Section D, interfering with direction of work force management of the mines and instigating and participating in an unauthorized work stoppage."

Although Mr. Herndon testified that he personally never heard Mr. Blankenship advise the men to strike, and that the work stoppage in question was the first "strike" at the mine, it seems clear to me from Mr. Herndon's testimony that he considered Mr. Blankenship's leadership role at the mine as one of a "spokesman" for the rank and file for practically all matters flowing from his mine committee positions. Viewed in this context, and considering Mr. Herndon's perceptions of the role played by Mr. Blankenship with regard to the work stoppage, I conclude that Mr. Herndon's testimony supports mine management's position that the suspension and proposed discharge of Mr. Blankenship on April 13, 1979, was prompted solely by Mr. Blankenship's conduct and activities which led to the work stoppage. I also take note of the fact that complainant does not dispute the fact that the stated charges filed against him are in fact offenses for which an employee may be disciplined under the contractual agreement.

Section Foreman Vance's Alleged "Hit Man" Comment

Although the "hit man" comment by Mr. Vance is not included as part of Mr. Blankenship's original complaint, he brought the matter up for the first time during the course of his testimony at the hearing in this case. The comment by Mr. Vance was purportedly made sometime after Mr. Blankenship's return to work at the conclusion of his 30-day suspension.

Although Section Boss Vance purportedly made the "hit man" comment to Mr. Blankenship, I cannot conclude that this constituted a threat by mine management. The record suggests that at the time the alleged statement was made, Mr. Vance may have been having some personal problems, and notwithstanding that Mr. Vance was the individual who directed Mr. Blankenship and his crew to police the parking lot and shovel the coal at the belt on the morning the ventilation fan was down, safety committeeman Randall Evans testified that Mr. Vance never caused him or Mr. Blankenship any problems over their safety activities and had never threatened or intimidated them.

Mr. Vance did not testify at the hearing, and there is no credible testimony or evidence to suggest that the "hit man" comment was intended as a mine management threat to Mr. Blankenship. After careful consideration of all of the testimony presented, I have discounted this alleged statement as a threat by mine management.

The Portable Toilet Incident

Complainant asserts that the respondent discriminated against him and punished him for his mine safety activities by removing him from his job and assigning him to remove one of the toilets from the mine. He also asserts that Mr. Wiley made the statement that he would see to it that Mr. Blankenship would empty the portable toilets if he filed grievances concerning keeping them sanitary.

Although Mr. Blankenship contends that Assistant Foreman Bragg told him he "had orders" to assign Mr. Blankenship to assist in removing the toilet in question from the mine, Mr. Bragg was not called as a witness. Furthermore, while Mr. Blankenship stated in his original complaint that a field representative and a safety director of his union were witnesses to Mr. Wiley's purported statement that he would see to it that Mr. Blankenship emptied the toilets, they were not summoned or called as witnesses either. In short, the only corroboration for Mr. Blankenship's conclusion that Mr. Wiley was punishing him by directing others to make sure Mr. Blankenship empties the potties is Mr. Blankenship.

There is no evidence that Mr. Blankenship was ever directed or ordered to remove, clean, or otherwise dispose of any portable toilets from the mine except for the one which Mr. Evans had used. Taken in context, and considering the circumstances surrounding the removal of that toilet, I cannot conclude that Mr. Blankenship has established that it constituted an act of discrimination or was part of any plot by mine management to punish or otherwise intimidate him because of his mine safety activities. To begin with, Mr. Blankenship's assertion that he was "removed from his job" and forced to take the toilet of the mine is not totally accurate. The incident occurred at a time when the continuous miner Mr. Blankenship was operating was down and idle. His helper, Mr. Evans, was asked to remove the toilet which he had used from the section, and Mr. Blankenship was asked to assist him. The toilet was not hand-carried completely out of the mine by Mr. Blankenship or Mr. Evans. They transported it some 300 feet to the end

of the track and it was subsequently taken out by mantrip. Furthermore, while Mr. Blankenship testified that he assisted Mr. Evans under protest, he conceded that he had no argument with the right of the foreman to order him to do it.

The toilet incident occurred sometime after Mr. Blankenship's return to work following his suspension. After due consideration of this incident, I cannot conclude that assigning Mr. Blankenship to assist his miner helper in carrying the portable toilet a relatively short distance and placing it on a mantrip during an idle moment underground, constituted an act of discrimination or intimidation by management because of Mr. Blankenship's safety activities. There is no evidence to establish that Mr. Blankenship had been ordered or directed to clean or remove portable toilets as punishment for insisting that they be kept sanitary. As for the company's policy requiring the person who used it to empty it, there is no showing that this is in any way illegal or discriminatory, and even though Mr. Blankenship did not use the portable toilet in question, I view the incident as a rather innocuous and isolated occurrence. The toilet was rather cumbersome, and was enclosed in such a manner which made it difficult for one man underground to remove it by himself. Furthermore, there is no evidence that Mr. Herndon or Mr. Wiley gave the orders for the toilet to be removed by Mr. Blankenship. In short, complainant has established no connection between the toilet incident and his suspension and proposed discharge which preceded that event.

Mr. Wiley's Alleged Threats of September 19 and 26, 1979

Mr. Blankenship has alleged that subsequent to his return to work following his 30-day suspension, Mr. Wiley threatened to fire or get rid of him because of additional complaints and grievances concerning the bathhouse. In support of this contention, UMWA Safety Inspector Cooper testified that during a meeting at the bathhouse on September 19, 1979, he overheard a comment made by Mr. Wiley to Mr. Herndon as they were leaving to the effect that, "if Charlie Blankenship did not like working with the company he (Wiley) would find a way to get rid of him." He also confirmed a telephone conversation of September 26, 1979, with Mr. Wiley, during which Mr. Wiley purportedly stated that the company would get rid of Mr. Blankenship if he continued making safety complaints. Mr. Cooper identified a copy of a memorandum typed by his secretary concerning the two conversations and confirmed that it accurately reflected the conversations with Mr. Wiley (Exh. C-9). He also confirmed that he made a notation of Mr. Wiley's comment while at the mine and drafted a memorandum for his file after the telephone conversation, and he did so because he thought it highly unusual for a representative of mine management to make such statements to a UMWA official such as himself. He also indicated that Mr. Blankenship had previously advised him about several threats he had received, and this also prompted him to make a memorandum of what he heard. Although conceding that he had no present recollection of precisely what was said by Mr. Wiley, he distinctly recalled the statement that Mr. Wiley would find a way to get rid of Mr. Blankenship if Mr. Blankenship did not like working for the company (Tr. 78).

Mr. Wiley's recollection of the bathhouse meeting is stated in his previous testimony at pages 98 and 99 of the transcript. Mr. Wiley denied threatening to fire Mr. Blankenship, but confirmed making a statement that if Mr. Blankenship was not happy working for the respondent company he should look for employment elsewhere. Mr. Wiley also indicated that his statement was made in the context of the threatened closure of some of the mines due to economic conditions as well as the continued controversy over the condition of the bathhouse.

Mr. Herndon testified that he was present at the bathhouse while Mr. Cooper was there and while the group was walking through the area, Mr. Herndon responded to a comment by Mr. Blankenship concerning bathhouses at other mines. Mr. Herndon stated that he suggested to Mr. Blankenship that he seek employment with another mine if he was not happy with the bathhouse, and that when Mr. Blankenship responded, "[n]o, I plan on working here a long time," Mr. Wiley commented, "I wouldn't count on it." Mr. Herndon testified that Mr. Wiley's comment was made in the context of a truthful assessment of the existing economic conditions at the mine and he did not view it as a threat to fire Mr. Blankenship because of his bathhouse complaints.

There is a direct conflict between the testimony of Mr. Cooper and Mr. Wiley concerning the purported threatening remarks made by Mr. Wiley to fire or get rid of Mr. Blankenship because of his complaints concerning the bathhouse. Mr. Cooper expressed surprise that Mr. Wiley would make such statements initially in his presence and later to him over the telephone. On the other hand, Mr. Wiley indicated that one would have to be stupid to make threats to a miner in the presence of a union official, let alone making them directly to that official.

The purported statement by Mr. Wiley on September 19 was not made directly to Mr. Cooper. He testified that he overheard a remark made by Mr. Wiley to Mr. Herndon, and both Mr. Herndon's recollection of the statement, as well as Mr. Wiley's, stand in marked contrast to Mr. Cooper's recorded recollection of what he overheard that day as well as his subsequent conversation with Mr. Wiley. Apparently, no one else overheard the remarks since none of the other witnesses who testified in this proceeding mentioned the incident of September 19, and the ~~remarks~~ were not made directly to Mr. Blankenship. He first learned of the purported remarks when Mr. Cooper mentioned the incident to him and gave him a copy of his memorandum some time after Mr. Blankenship filed his complaint in this case.

Significantly, the asserted threats by Mr. Wiley to fire or get rid of Mr. Blankenship came after his return to work following his suspension and there is nothing of record to suggest that mine management has since attempted to fire or otherwise discipline Mr. Blankenship because of his mine safety activities. As I view Mr. Blankenship's complaint in this case, he is arguing that the adverse action by mine management in suspending him for 30 days without pay was a discriminatory act taken against him because of his protected mine safety and health activities, and that the reasons given by the respondent for the suspension, namely, the charge that Mr. Blankenship

interfered with the work force in violation of the contract by instigating an illegal strike, was merely a pretext and a convenient excuse by the company to conceal their real reason for suspending him. Recognizing that the alleged threats of September 19 and 26, 1979, came after his suspension, complainant nonetheless argues that these threats may be retroactively considered in establishing mine management's true motives in seeking his discharge. In short, complainant argues that Mr. Wiley's statements of September 19 and 26, purportedly made more than 5 months after the company instituted removal action against him, may be shown to retroactively establish mine management's state of mind and true motivation for this action.

After careful review of all of the testimony and evidence concerning the asserted remarks made by Mr. Wiley on September 19 and 26, 1979, and having viewed the witnesses on the stand during the course of their testimony in this regard, I believe the testimony of Mr. Wiley and Mr. Herndon with respect to their version of the statement in question and I conclude that Mr. Wiley did not threaten to fire Mr. Blankenship because of his complaining about the bathhouse on the two occasions in question. My reasons for this conclusion follow.

Since the work stoppage in question was precipitated by the earlier bathhouse controversy over pay, it seems to me that mine management had ample opportunity to get rid of Mr. Blankenship when they proposed his discharge over that incident by simply refusing to accept a 30-day suspension and continuing ahead with its initial proposal to discharge him for instigating the work stoppage. Furthermore, none of the threatening remarks attributed to Mr. Wiley by Mr. Cooper were directed to Mr. Blankenship, and he obviously was unaware of them until well after he filed his initial complaint. I reject complainant's argument that those remarks made 5 months after his suspension establish a retroactive illegal motive on the part of mine management. Since Mr. Herndon testified that the decision to seek Mr. Blankenship's discharge over the work stoppage was a joint decision made by himself, Mr. Wiley, and the mine manager (John Demotta), acceptance of complainant's theory would necessarily require a finding of a retroactive joint conspiracy by three mine management officials based on the asserted threats purportedly made by one of them well after the proposed discharge. On the basis of the evidence presented in this case, I simply cannot make that conclusion.

In the final analysis, I believe that the thrust of Mr. Blankenship's complaints concern alleged acts of discrimination taken against him by respondent's director of industrial relations, Dewey Wiley. Although mine superintendent Ray Herndon is part of mine management, the testimony and evidence adduced in this proceeding does not establish that he has discriminated against Mr. Blankenship, or has otherwise harassed, threatened, or intimidated him because of his mine safety activities. The testimony reflects that Mr. Herndon recognized Mr. Blankenship's right as the chairman of the safety committee to become involved in the grievance meeting concerning the mantrip incident, and in fact, Mr. Herndon chastised Foreman Mendez over the incident. Furthermore, former Safety Committeeman Neace testified that Mr. Herndon always acted honorably with him on safety matters. As a matter

of fact, although Mr. Neace admitted that Mr. Herndon had issued him a "slip" for absenteeism, Mr. Neace nonetheless conceded that he never felt that any "extra heat" was ever put on him because of his mine safety activities.

Former safety committeeman Clarkson Browning testified that Mr. Herndon was always fair to him, and that while his decision to voluntarily quit his safety committee job was for personal reasons, his decision to quit that position was also prompted by the fact that the men did not like the close relationship he had with Mr. Herndon.

The only concrete testimony concerning statements purportedly made by Mr. Herndon which could conceivably be construed as a "threat" is the testimony by safety committeeman Randall Evans that Mr. Herndon referred to him as a "radical" during the grievance meeting concerning the underground portable toilets. Mr. Herndon readily admitted making the statement, but indicated that he was provoked by Mr. Evans.

Having viewed Mr. Herndon during the hearing, I find him to be a candid and credible witness. Taking into consideration the fact that other witnesses called by the complainant were of the opinion that Mr. Herndon treated them fairly in matters concerning safety, and considering the fact that Mr. Evans may have believed that Mr. Herndon was responsible for the incident concerning the removal of the portable toilet which Mr. Evans had used from the mine, I find Mr. Herndon's statement that he may have been provoked by Mr. Evans to be credible. When viewed in perspective, and considering the un rebutted testimony that respondent's mining operations have apparently been seriously curtailed due to economic and other reasons, I cannot conclude that Mr. Herndon's statement made to Mr. Evans was a threat to discharge Mr. Blankenship.

Mr. Herndon conceded that he has not been completely enchanted with Mr. Blankenship's performance as chairman of the mine safety committee, and he candidly admitted that his displeasure stemmed from the fact that Mr. Blankenship has on occasion filed complaints directly with the agencies responsible for mine safety enforcement rather than first bringing them to the attention of mine management. Even so, Mr. Herndon readily conceded that safety complaints may be filed directly with MSHA pursuant to section 103 of the Act without notifying mine management and that this has been done on several occasions. Furthermore, Mr. Blankenship conceded that respondent has corrected safety complaints that he brought to its attention and that mine management does not totally ignore his safety complaints. And, while Mr. Neace stated that he believed the respondent considered Mr. Blankenship to be "a thorn in their side," he did not indicate that the respondent would not comply with safety. He further indicated that "I've worked for companies that was worse," and he characterized respondent's safety attitude when he stated: "They don't comply as fast as they should at times."

During the course of the hearing in this matter it was brought to my attention that Mr. Blankenship has another complaint pending with MSHA which is currently being investigated (Tr. 63, 138). In addition, after

Mr. Blankenship was called to the stand by me for the purpose of eliciting additional clarifying testimony, he asserted that he had also been threatened by the mine safety director at some unspecified time, and also discussed other alleged acts of discrimination which he characterized as "punishment" because of his safety activities (Tr. 134-138). After consideration of this information, I have given it no further weight or consideration in this proceeding. Complainant is free to pursue those alleged acts of discrimination independent of the instant proceeding. Only in this way may a fair and impartial determination of those allegations be made by the Secretary of Labor as part of his investigative authority under the Act. If the complainant is not satisfied with the results of the Secretary's determination in this regard, he is free to file a subsequent separate action with the Commission.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that respondent's initial suspension and proposed discharge of Mr. Blankenship was not motivated in any part by any protected activities engaged in by Mr. Blankenship in his capacity as chairman of the mine safety committee. I further conclude and find that the record adduced in this proceeding does not establish that respondent has otherwise discriminated against the complainant by virtue of his mine safety activities. Accordingly, the complaint filed in this matter is DISMISSED, and the requested relief is DENIED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

17 1968

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-539-PM
Petitioner : A.C. No. 13-01368-05003 F
v. :
: Lisbon Quarry
B. L. ANDERSON, INC., :
Respondent :

DECISION

Appearances: Eliehue Brunson, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Robert D. Houghton, Esq., and Thomas M. Collins, Jr.,
Esq., for Respondent.

Before: Judge William Fauver

This case was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, for assessment of civil penalties for alleged violations of mandatory safety standards at Respondent's No. 2 Plant, Lisbon Quarry, Linn County, Iowa. The case was heard at Cedar Rapids, Iowa. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript. Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, B. L. Anderson, Inc., operated a limestone quarry known as the Lisbon Quarry in Linn County, Iowa.

2. Respondent has four portable crushing plants, one sand plant, and two washing plants. The equipment at the plants includes crushing equipment, trucks, loaders, drills, and trailers. Respondent also has a drilling crew, a stripping crew, and an asphalt crew that operate the plants. Respondent's limestone product is used in the highway construction and maintenance industry. Respondent normally locates a quarry and sets up a crushing plant near its customers' projects.

3. At all relevant times, the mining process at a rock quarry generally involved drilling holes in the floor of the quarry to blast the rock, scooping the blasted rock with a front-end loader, and dumping the material into the crusher. The rock was passed through crushing and sizing equipment and dumped on a conveyor belt that transported it to trucks that stockpiled the material nearby. The loader's cycle of scooping blasted rock at the face, dumping a load in the hopper and returning to the face for another load would take about 2 minutes.

4. When a new plant was assembled and ready to begin production, Respondent's safety director, Mr. Dennis Goettel, would inspect the equipment to see that the plant was in compliance with state and federal safety and health standards and that all employees were provided with the required personal protective equipment. His inspection included noise surveys of the crushing equipment and mobile equipment, checking the condition of the equipment, and seeing that the backup alarms on the mobile equipment functioned properly.

5. On September 15, 1978, Mr. Goettel and Mr. Craig Thompson, a control representative from United States Fidelity and Guarantee Company, checked decibel readings on the equipment of the No. 5 Plant at the Lisbon Quarry, including a Michigan 275 B loader that was equipped with a Model 861 "Warn-Alarm" backup alarm on the right rear wheel and an electronic alarm on the rear of the vehicle. Mr. Thompson used a sound level meter approved by the National Institute for Occupational Safety and Health (NIOSH). He calibrated it with a battery-operated tone signal instrument to 93.6 dba, and used a wind screen to offset the effect of wind on the meter readings.

6. To determine the "surrounding noise" of the crushing and dumping operations, sound-checks were made at six locations, with peak readings from 90 to 98 decibels. Ramps were located on either side of the primary crusher. Readings were taken from both directions as the loader went up the ramp, dumped blasted rock in the hopper and backed down the ramp. Mr. Thompson, who held the noise level meter, stood about 10 feet from the right side of the loader while taking readings of its noises. Generally, decibel readings drop about 6 decibels for every 10 feet. The loudest reading near the loader was taken when the primary crusher was between the loader and Mr. Thompson. Noise level readings varied with the amount of material that was dumped into the crusher. Differences in terrain, equipment, and type of muffler could also cause noise level readings to vary.

7. On September 26, 1978, Mr. Goettel and Mr. Thompson ran similar tests at Respondent's No. 4 Plant at the Ballheim Quarry; No. 3 Plant at the Garrison Quarry; and No. 1 Plant, a sand plant, at the Spaight Sand Pit. They did not check the No. 2 Plant because, after checking the other three plants, the results were all found to be within acceptable limits. All readings were below 100.

Conditions and Events at the No. 2 Plant on October 13 - 15, 1978

8. On October 13, 1978, Mr. Goettel inspected the No. 2 Plant, which had just begun the first day of operations at the Lisbon Quarry. It was in full

production when he arrived at the plant, about 3 p.m. He remained until the equipment shut down at 5 p.m. Mr. Goettel's inspection included checking the employees' personal protective equipment and the condition of the equipment, including the backup alarms on the trucks and loaders, the windshields on the trucks, and the guards on the crushing equipment. Normally, if a piece of equipment was not working properly, he would notify the plant foreman and the maintenance shop in Cedar Rapids.

9. The crushing equipment was located on the east side of the quarry, the quarry face on the south, and the drill on the west. Crushing equipment included a primary crusher, a surge bin, and secondary crushing equipment. There was a dirt ramp leading to the primary crusher. A conveyor transported material from the primary crusher to the rest of the equipment and finally to a bin where it was dumped into stockpile trucks. The bin could be filled in about 15 minutes.

10. Respondent used Michigan Clark 275 B front-end loaders at the No. 2 Plant. This model was about 13 feet 3 inches high, 22 feet long, 11 feet 3 inches wide, and was equipped with an accoustical-lined ROPS cab. From the ground to the top of the hood in the rear was about 9 feet; in addition, a large muffler was horizontally attached to the rear hood, above the radiator, and the radiator extended a substantial distance rearward beyond the rear wheels. From the operator's position, there was a substantial blind spot behind the radiator at the back end. The loader came with an electronic backup alarm, which was connected to the transmission and operated off the engine. Respondent disconnected the electronic alarm and replaced it with a mechanically-operated backup alarm, known as a Model 861 "Warn-A-Larm." Mr. Howard Peckham, Respondent's maintenance superintendent, decided to replace the electronic alarm because he believed it was not as dependable as the mechanical alarm and was more difficult to maintain.

11. The Warn-A-Larm is designed to be attached to a wheel and to sound a bell when the wheel turns counterclockwise. As the wheel so rotates, four steel ball bearings fall against the inside of a bell and produce a bell alarm. The device is thus designed to be used only on the right rear wheel. The faster the vehicle backs up, the faster the bell sounds. The Warn-A-Larm has a decibel output range of 100 to 110. The electronic alarm produces a repeating beeping noise and the Warn-A-Larm produces a bell sound; however, their decibel outputs are similar.

12. On October 13, 1978, when Mr. Goettel inspected the loader and its backup alarm, he stood in the general working area of the loader and near the primary feeder as the loader dumped its load and backed down the ramp. He could hear the backup alarm from the right side while the loader was backing down the ramp and as it returned from the quarry face in a reverse direction. Mr. Goettel heard the alarm over the surrounding noise from many areas in the plant. However, he was always toward the right of the loader when he checked the sound.

13. On October 14, at about 2 p.m., Mr. Kevin Bonney, who was operating a stockpile truck, placed his empty truck under the surge bin to receive a load. Mr. Bonney loaded his truck with material that had already accumulated

in the surge bin and shut it off after the bin had emptied. He then drove the partially loaded truck to the fuel trailer while the bin was refilling.

14. He returned to the bin and continued to fill the truck. Mr. Martin Haker, the drill operator, observed Mr. Bonney get out of his truck, walk around to the front of the truck and start to cross a vacant ground area that was bordered on the south by the quarry face, on the west by the drill operation, and on the east by the crushing operation. The loader used a good part of this area in its cycle of scooping at the face, backing away in a northerly direction, then going forward to drive up the crushing site ramp on the east, backing down the ramp and into the vacant area and then going forward to the face, on the south. Mr. Haker observed that Mr. Bonney was headed toward his drill; this seemed normal, as Mr. Bonney had often crossed the area to visit Mr. Haker. After seeing Mr. Bonney head toward him, Mr. Haker turned his attention to the drill because it became stuck in rock. When he freed the drill and looked up, Mr. Bonney had changed direction and now was walking south, toward the loader. Both the loader and Mr. Bonney were traveling toward the face; Mr. Bonney was 30 to 40 feet behind the loader; and the loader was about 50 yards from the face. Mr. Haker's drill became stuck again, and he returned his attention to the drill. About 30 to 60 seconds later, he freed the drill and looked up, and this time he saw Mr. Bonney lying on his back. The loader was backing away from the face and moving toward Mr. Bonney. Mr. Haker ran to the scene and waved his arms to stop the loader operator. Mr. Flagel, the loader operator, saw his signal and immediately stopped the loader, about 18 feet from Mr. Bonney. As the loader was backing up, Mr. Haker, who was far to the right rear of the loader, could hear the sound of the backup alarm.

15. An ambulance was summoned. The ambulance personnel determined that Mr. Bonney was dead. For reasons not satisfactorily explained in this record, but not relevant to the backup alarm issue, the ambulance personnel decided they had no authority to remove the body until a coroner inspected the body and scene undisturbed. They left the body on the ground, in place, for a considerable time while awaiting the coroner.

16. Mr. Dow E. Prouty, Respondent's Director of Technical Services, was notified of the accident at about 2:30 p.m., arrived at about 3 p.m., and took photographs of the accident scene. The ambulance had already arrived; however, the body had not been moved.

17. The lower right side of Mr. Bonney's body was severely injured, including injuries to his lower abdomen and upper part of his right leg. The nature of the wound and the direction of the flow of blood would indicate that a great pressure had moved down that side of his body from the lower torso to the leg in a line generally toward the quarry face.

18. Mr. Prouty observed a trail of blood spots left by the left rear tire of the loader. He measured the circumference and diameter of the wheel, the distance between the blood spots, and determined that the blood spots trailed in by the body toward the face, and not out by the body.

19. By the time Mr. Prouty finished taking photographs, the coroner arrived, examined the body and scene, and the body was removed.

20. On October 15, 1978, Inspectors Worsham and Paul investigated the accident. Also present were Mr. Goettel, Mr. Bill Dahms, quarry foreman, Mr. Dow Prouty, Mr. Tom Anderson, Treasurer, and Mr. Dave Lyon, Assistant Operations Manager of the Aggregate Division. The mine was not in operation.

21. The exact position of the loader at the time of the accident could not be determined because, when the accident was discovered, the loader was making its return from the quarry face.

22. The quarry foreman, Mr. Bill Dahms, operated the loader to test its brakes and the backup alarm. Mr. Dahms drove the loader a short distance forward and in reverse to test the brakes, and then drove forward about 75 feet before backing up that distance to test the backup alarm. When the loader was moved forward, Inspectors Worsham and Paul were standing about 5 feet from the machine on the right side. Mr. Prouty and Mr. Anderson were standing about 15 feet from the right side of the loader and Mr. Lyon was standing left of center and about 10 feet directly behind the loader. Mr. Goettel was standing near the toolhouse shed trailer, which was to the left of the loader and several hundred feet away. Inspector Worsham testified that, when this test was made, he was able to hear the alarm. He then moved about 5 feet to the left side of the machine and the machine was again moved forward and in reverse. From the left side of the machine, he was unable to hear the backup alarm when the loader's engine was running.

23. After the sound tests, Mr. Worsham told the B.L. Anderson personnel that he was unable to hear the backup alarm from the left side of the loader; however, the B.L. Anderson personnel told him that they were able to hear the alarm from where they were standing.

24. On October 15, 1978, Inspector Worsham issued Citation/Order of Withdrawal No. 178846 for a violation of 30 C.F.R. § 56.9-2 (equipment defects affecting safety shall be corrected before the equipment is used). The citation reads in part:

The front-end loader is equipped with a wheel-mounted, bell-type backup alarm. The alarm is not audible above the engine noise of the loader except on the side of the loader where a bell is mounted. Loader is to be operated only from quarry to shop for installing an audible alarm.

25. Inspector Worsham found that the operator knew or should have known of the defect by making a sound inspection on the left side of the loader. He believed that the cited condition was serious and a contributing factor to Mr. Bonney's death.

26. The condition was found to be abated on October 16, 1978, by reconnecting the electronic backup alarm on the front-end loader.

27. On December 10, 1979, the citation/order of withdrawal was modified to substitute a charge of a violation of 30 C.F.R. § 56.9-87 (failure to provide audible reverse signal alarm which is audible above the surrounding noise level).

28. B. L. Anderson's safety program includes the following:

(a) A copy of the company's safety policies are mailed annually to each employee and new employees receive a copy of these policies. Included in these policies are the mandatory MSHA regulations. The company requires the wearing of hardhats, safety shoes and safety glasses around crushing operations.

(b) At least two safety meetings for management personnel are held each year.

(c) "Toolhouse talks" are held for individual crews to discuss specific safety issues related to the particular crew.

(d) Mr. Goettel tries to spend at least 1 day each week in the field to visit the crews and plants and to make written safety checks to see that the crews are adhering to the company's and MSHA's safety policies.

(e) Seminars are held for all loader operators and truck drivers and they are shown films on safety and proper maintenance techniques.

(f) "Quarry Notes," a company newsletter, is mailed to all employees and customers four times a year. It includes a column called "For Safe Keeping," which addresses safety issues.

(g) Mr. Goettel tries to instill a positive safety attitude in the employees so that they have pride in their work and exercise care. Four times each year, Mr. Goettel publishes the names of crews that have worked without a lost-time injury. Also, hardhat decals are given to each company employee to show how many years the employee has worked without a lost-time injury.

DISCUSSION WITH FURTHER FINDINGS

Based on the citation/order of withdrawal issued on October 15, 1978, and amended on December 10, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. § 56.9-87, which provides:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The Secretary contends that, because a backup alarm was installed only on the loader's right rear wheel, it was not audible to employees to the left

side of the machine and that this inaudibility contributed to the fatal accident on October 14, 1978.

The Secretary proposes a penalty of \$3,000.

Respondent first argues that its operations do not affect "commerce" within the meaning of the Act because materials mined from the Lisbon Quarry and other quarries are sold only to local asphalt and cement-paving contractors, trucking vendors who resell the product, and local ready-mix businesses. Respondent contends that there is no evidence that its products enter interstate commerce or that the operations affect interstate commerce.

Respondent then argues that the Secretary failed to prove by a preponderance of the evidence that the view to the rear of the loader was obstructed so as to require a backup alarm. Finally, Respondent argues that the Secretary failed to prove by a preponderance of the evidence that the backup alarm was inaudible above the surrounding noise level.

Commerce Coverage

Section 4 of the Act provides: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of a mine, and every miner in such mine shall be subject to the provisions of the Act."

Section 3(b) of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or * * * between points in the same State but through a point outside thereof." By enacting the 1969 Coal Mine Act, the predecessor to the 1977 Act, "Congress intended to regulate interstate commerce to 'the maximum extent feasible through legislation.'" Secretary v. Shingara, 418 F. Supp. 693, 694 (1976), citing S. Rep. No. 1055, 89th Cong., 2nd Sess. 1, reprinted in (1966) U.S. Code Cong. & Ad. News, 2072.

In Fry v. United States, 421 U.S. 542, 547 (1975), the Supreme Court said:

Even activity that is purely intra-state in character may be regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with foreign nations. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255, 13 L.Ed. 258, 85 S. Ct. 348 (1964); Wickard v. Filburn, 317 U.S. 111, 127-128, 87 L.Ed. 122, 63 S. Ct. 82 (1942).

In Wickard v. Filburn, supra, the Supreme Court held that wheat grown by an individual farmer for his own consumption is subject to federal regulation if it exerts a substantial economic effect on interstate commerce. The Court said that, even though one farmer's contribution to the demand for wheat

may be trivial, that is "not enough to remove him from the scope of federal regulation where, as here, his contribution, when taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-128.

Highway construction and maintenance have been held to be within interstate commerce coverage of federal statutes. See, e.g., N.L.R.B. v. Custom Excavating Inc., 575 F.2d 102 (7th Cir. 1978).

I conclude that Respondent's mine operations come within the Mine Act's commerce coverage. The material mined by Respondent is regularly used to build and repair primary and secondary state roads that abut or are near the state border and are used in the regular stream of regular interstate commerce. Also, there is evidence to support a finding that some of Respondent's equipment, including the Michigan Clarke 275 B front-end loader, was purchased out of state.

The Charge of a Safety Violation

From the loader operator's position, there was a substantial blind spot behind the radiator at the rear of the loader. I find that the height and structure of the loader created an obstructed rear view so as to require the use of an automatic backup alarm or the presence of a flagman under the subject safety standard.

I also find that a preponderance of the evidence shows that, from the left rear side of the loader, the mechanical backup alarm mounted on the loader's right rear wheel was not audible above the surrounding noise of the loader engine. Inspector Worsham testified that, while standing on the left side of the loader, he was unable to hear the sound of the backup alarm over the loader's engine. He was the only person to stand close to and on the left side of the loader during the tests. Mr. Prouty and Mr. Anderson, who testified that they could hear the backup alarm, were standing on the right side of the loader (the same side as the wheel-mounted alarm); and Mr. Lyon, who also testified that he could hear the alarm, was standing more behind the machine than on its left side. Mr. Goettel testified that he could hear the backup alarm about 100 yards from the left side of the loader; however, at such a distance, a bell sound might not be masked by the sound of the engine even though at a distance of 5 feet the engine could have such a masking effect. I find that Mr. Goettel's ability to hear the backup alarm from that distance is not necessarily relevant to the audibility of the alarm close to the loader, and does not rebut the inspector's testimony.

The sound level tests conducted by Mr. Goettel and Mr. Thompson on the crushing equipment at the No. 5 Plant at the Lisbon Quarry are not helpful in determining whether a person on the left rear side of the loader at the No. 2 Plant could hear the backup alarm. Their tests concluded that the combined noise from operation of the crushing equipment and the loader was below the decibel output of the Warn-A-Larm, and they both testified that they heard the sound of the backup alarm from the left side. However, Mr. Goettel testified that the front-end loader at the No. 5 Plant that day was also equipped

with an operating electronic backup alarm. The front-end loader they tested was not the one involved in the accident on October 14, and the differences in equipment and plant environment could affect sound level readings. Differences in equipment and environment also lessen the probative value of tests at Plants 1, 3, and 4.

Mr. Goettel also testified that, on the day before the accident, he inspected the No. 2 Plant at the Lisbon Quarry and heard the sound of the backup alarm. However, the path he followed during this inspection did not bring him as close to the loader's left side as Inspector Worsham was on the day after the accident and he was not specifically trying to determine if the backup alarm could be heard from the left side.

I credit Inspector Worsham's testimony, and find that, from the left rear side of the loader at the No. 2 Plant, the Model 861 Warn-A-Larm mounted on the right rear wheel was not audible above the surrounding noise. I therefore conclude that the alarm did not meet the requirements of the safety standard.

The Secretary has not proved by a preponderance of the evidence that Mr. Kevin Bonney was backed over by the loader or that the inaudibility of the backup alarm on the left side of the loader contributed to his fatal accident.

There were no eye witnesses to the accident. When the drill operator last saw Mr. Bonney, Mr. Bonney was walking behind the loader and both the loader and Mr. Bonney were traveling toward the face. Within about 1 minute, Mr. Bonney was run over.

Mr. Flagel, the loader operator, last saw Mr. Bonney when the loader was backing down the ramp of the primary crusher. At that point, Mr. Bonney was about 20 feet away and appeared to be walking toward the drill. Mr. Flagel then completed his reverse motion, shifted into forward gear, and drove to the face. When he was backing up from the face, he saw Mr. Haker motion him to stop. Mr. Flagel had no knowledge of the accident, and could not determine whether the loader backed over Mr. Bonney or struck him when it was going forward.

The Secretary contends that, when Mr. Flagel backed down the ramp of the crusher, he failed to see Mr. Bonney and backed over him with the left rear wheel. However, the evidence is not clear as to whether Mr. Bonney was struck by the front of the rear wheel or by the back of the rear wheel. The most specific evidence: the trail of blood spots left by the left rear tire, the nature of Mr. Bonney's injuries, and the blood from the body, would tend more to indicate that the loader was going forward when it struck Mr. Bonney. At the minimum, the evidence does not preponderate to a show that Mr. Bonney was backed over or that the condition of the backup alarm contributed to the accident.

Nonetheless, I conclude that the failure to provide an adequate backup alarm was a violation of the safety standard and that this created a high

degree of gravity. The blind spot obstructing the driver's rear view and the inaudible zone (left rear side), where the backup alarm on the right wheel was ineffective, combined to create a serious risk of death or serious bodily injury. This condition resulted from the operator's negligence, since the operator, by the exercise of reasonable care, should have known that an inaudible zone was not reached by the right-wheel backup alarm.

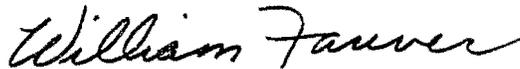
CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Respondent violated 30 C.F.R. § 56.9-87 by failing to provide the front-end loader at its No. 2 Plant with an adequate backup alarm, as alleged in Citation/Order of Withdrawal No. 178846. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of \$2,500 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of \$2,500, within 30 days from the date of this decision.



WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AW 20 1122

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	
	:	Docket No. LAKE 79-284-M
	:	A/O No. 47-02550-05003
	:	
v.	:	Bohn Pit and Frederic Plant
	:	
YELLOW RIVER SUPPLY CORPORATION, Respondent	:	Docket No. LAKE 79-285-M
	:	A/O No. 47-00906-05002
	:	
OSTERMANN SAND AND GRAVEL, INC Respondent	:	Wittenbreer Pit
	:	
	:	Docket No. LAKE 79-301-M
	:	A/O No. 47-02537-05002
	:	
	:	Spooner Pit & Plant

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Robert G. Schlegel, for Respondents.

Before: Judge Cook

I. Procedural Background

On October 19 and 25, 1979, the Mine Safety and Health Administration (Petitioner) filed proposals for assessment of civil penalties against Yellow River Supply Corporation (Respondent) in the above-captioned proceedings. The proposals were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (Supp. III 1979) (1977 Mine Act), and allege violations of four provisions of the Code of Federal Regulations. Answers were filed by Respondent. As a result of motions filed by Petitioner the captions of the cases were amended to include Ostermann Sand and Gravel, Inc. as a Respondent. On December 1, 1980, in a prehearing report Yellow River Supply Corporation and Ostermann Sand and Gravel, Inc. appeared by Roger G. Schlegel, Controller.

Notices of hearing were issued on January 8, 1981, and February 25, 1981. The hearing was held on March 12, 1981, in Eau Claire, Wisconsin. Representatives of both parties were present and participated.

II. Violations Charged

Docket No. LAKE 79-284-M

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>
291943	06/14/79	56.12-25

Docket No. LAKE 79-295-M

291945	06/15/79	56.12-25
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Docket No. LAKE 79-301-M

291946	07/11/79	56.12/25
291947	07/11/79	56.12-25

III. Proceedings at Hearing

Evidence was presented during the hearing by both parties up to a point where, as a result of a conference off the record, the Petitioner presented a motion to vacate the four citations involved. The following statements appear in the record of proceedings on this point:

THE COURT: All right. Then, we'll proceed back on the record. I might mention that we have had a conference off the record between representatives of both parties to discuss some of the detailed matters in the proof that is required as it relates to the violation we've now been discussing; and as a result of this conference, I believe, Mr. Carmona--and further as a result of his conferring with his own inspector--has reached some conclusion as to what his next step is going to be in this case; so would you like to explain that now, Mr. Carmona?

MR. CARMONA: At this point, we would like to express our position in the case indicating that we are willing to withdraw--vacate the citation, the four citations involved in this case because we feel we don't have sufficient evidence to show that the operator didn't comply with the standard that required grounding. We find that there is no detail with reference to the definition of grounding to determine at what point when the equipment is tested can be determined whether it's grounded, or not. Based upon this fact, we discussed with the operator the problem that we're facing with the possibility if we vacate the four citations, that it is very important that his mine be kept in a safe condition; so that the operator is willing to continue his program making every possible effort to keep electrical equipment and check the equipment tested is adequate to ensure that there is no

danger for the men working in that place. I plan to request from the Mine Safety and Health Administration a revision of this particular standard to provide sufficient information to the operator as to the proper way to enforce this particular standard, providing more details about what type of reading is supposed to be obtained when the equipment is tested, or any other way that they can have some guidelines to follow and determine what they have to do to be in compliance.

THE COURT: Very well. Now, Mr. Schlegel, you've heard the statement of Mr. Carmona. He apparently is making a motion now to vacate the four citations, and he is actually moving to vacate his petition in this case and for the dismissal of the case; but, of course, you've heard his statement as to procedures that should be carried out between MSHA and your companies to try to resolve this question. Now would you like to make some statement about that?

MR. SCHLEGEL: Yes, I would. I would like to make the statement that both Yellow River Supply Corporation and Ostermann Sand and Gravel, Incorporated will fully and completely cooperate with Mine Safety and Health Administration in providing a safe place to work in all of our facilities. This has been our policy in the past, and it will continue to be in the future.

THE COURT: All right. So Mr. Carmona, you will have your Inspector then contact Mr. Schlegel's people to work out what you have described earlier as far as what really has to be shown in order that grounding is proper, is that correct?

MR. CARMONA: That is correct.

THE COURT: And that is agreeable, Mr. Schlegel?

MR. SCHLEGEL: Yes, it is.

THE COURT: All right. Then under those circumstances, I'll grant your motion, Mr. Carmona; and then we'll enter an order after the transcript has been received providing for the vacation of the four citations and for the dismissal of the proceeding under the circumstances as stated here today.

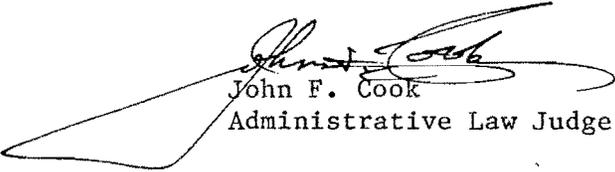
* * *

(Tr. 78-80).

ORDER

Accordingly, IT IS ORDERED that Citation Nos. 291943, June 14, 1979, 30 C.F.R. § 56.12-25; No. 291945, June 15, 1979, 30 C.F.R. § 56.12-25;

No. 291946, July 11, 1979, 30 C.F.R. § 56.12-25; and No. 291947, July 11, 1979, 30 C.F.R. § 56.12-25 be, and hereby are, VACATED and that the proposals for penalty herein be, and hereby are, DISMISSED.



John F. Cook
Administrative Law Judge

Distribution:

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Roger G. Schlegel, Controller, Yellow River Supply Corporation, Ostermann Sand & Gravel, Inc., Turtle Lake, WI 54889 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 20 1981

UNITED STATES STEEL CORPORATION, : Contest of Order
Contestant :
v. : Docket No. PENN 80-318-R
: :
SECRETARY OF LABOR, : Order No. 841730
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
and :
: :
UNITED MINE WORKERS OF AMERICA :
(UMWA), :
Respondents :
: :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 81-48
Petitioner : A.C. No. 36-05018-03060V
v. :
: Cumberland Mine
UNITED STATES STEEL CORPORATION, :
Respondent :

DECISION

Appearances: Louise Q. Symons, Esq., United States Steel Corporation,
Pittsburgh, Pennsylvania, for Contestant-Respondent;
David Street, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent-Petitioner.

Before: Judge Melick

Expedited hearings were held in these cases in Meadow Lands,
Pennsylvania, on January 29 and 30, 1981, pursuant to sections 105(d) and
110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801
et seq., the "Act," and in accordance with Commission Rule 52, 29 C.F.R.
§ 2700.52. A bench decision was rendered following those hearings. That
decision, which I now affirm, is set forth below with only non-substantive
modifications.

The contest of Order No. 841730 and the civil penalty case associated with that order have been consolidated for hearing. The validity of the order of withdrawal issued under the provisions of section 104(d)(1) of the Act 1/ is therefore before me as well as the question of whether there have been any violations of mandatory standards. If I find that there have been such violations, then I must also determine the amount of civil penalty that should be assessed considering the criteria under section 110(i) of the 1977 Act.

Because these cases have been heard on an expedited basis (indeed the parties agreed to proceed with only 2 days' notice), some evidence relating to the penalty criteria is not yet available. I will not, therefore, be in a position to make a final determination as to the amount of any penalty at this time, but I will nevertheless make whatever findings I can based on the evidence that is available.

The order at issue here actually charges eight separate violations which appear to fall within three categories. 2/

1/ Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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 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."

2/ The order reads as follows:

"The approved roof control plan was not being complied with in the Nos. 3 and 4 West Main track haulage entries. Loose and overhanging ribs were observed by this inspector and George Rantovich, inspector on both sides of the No. 3 entry from No. 31 crosscut to No. 27 crosscut where mantrips and supply wagons were parked, and on both sides of the West Main parallel track haulage entry from No. 31 crosscut to the No. 1 track switch. The width of the West Mains

The first category involves loose and overhanging ribs which are alleged to have existed in violation of the mandatory standard at 30 C.F.R. § 75.200. That section, in relevant part, provides that the roof and ribs of all active underground roadways, travelways and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The second and third categories of alleged violations concern the operator's roof-control plan. Although the relevant part of the standard at 30 C.F.R. § 75.200 requires only the filing of a roof-control plan that is approved by the Secretary, those provisions have been construed to also require that the operator comply with that plan. The second category of violations charge more particularly that the entry widths in certain areas of the mine were in excess of 16 feet as called for in the roof-control plan. The third category of violations charge more particularly that excessively long diagonal distances existed at various intersections.

For the reasons I am going to set forth later in this decision, I conclude that none of the violations in these cases was caused by "unwarrantable failure." "Unwarrantable failure" has been defined as the failure by an operator to abate a condition that he knew or should have known existed or the failure to abate because of indifference or lack of due diligence or reasonable care. Zeigler Coal Corporation, 2 IBMA 280 (1977).

I find however that violations nevertheless did exist here with respect to the first and second of the eight

fn. 2 (continued)

parallel track entry between No. 31 crosscut and the No. 1 track switch was measured to be 18 feet or more in width for approximately 15 hundred feet. The diagonal distances of 4-way intersections located in the West Main parallel track entry were measured as follows: No. 9 intersection 34-1/2 ft. by 26 feet; No. 8 intersection 36 ft. by 22 ft.; No. 3 intersection 40 ft. by 21 ft.; No. 2 intersection 32 ft. by 27 ft.; intersection at sta. No. 1283 measured 37 ft. by 38 ft. The approved roof control plan requires that the roof and ribs of all active underground roadways be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs, and that the width of entries not exceed 16 feet. The plan also states that the total diagonal distance of 4-way intersections not exceed 56 feet and that neither diagonal distance exceed 31 feet. Additional supports had not been set to reduce the width of the entries or intersections to allowable limits. This area is traveled daily by assistant mine foreman and miner examiners who should have observed the conditions."

charges--those relating to loose and overhanging ribs. The testimony of the two inspectors is entirely credible and I find from their testimony that significant portions of the cited ribs were cracked, that 2- to 3-foot sections of rib extended into the entry from 6 to 12 inches and that these conditions existed sporadically throughout 300 to 400 feet of the No. 3 entry between crosscuts No. 31 and No. 27 and in the West Mains parallel track haulage entry from the No. 31 crosscut to the No. 1 switch entry.

This evidence of the rib conditions is indeed even supported by the testimony of the operator's own witnesses. For example, the company inspector-escort, Charles Lemunyon, admittedly saw portions of the cited rib fall to the floor after being tapped by a sounding stick. Other witnesses for the operator claimed not to have seen the conditions described by the inspectors but that evidence certainly does not contradict the affirmative findings by the inspectors. Much of the difficulty these witnesses were having was clearly only one of semantics. According to their definition an unlawful "overhanging rib" is only an overhanging rib that is above head level. No authority has been offered such a narrow interpretation and I find it to be totally erroneous. That explains, however, why the operator's witnesses could never reach the conclusion that any of the ribs cited here were in fact "overhanging."

In dealing with the question of unwarrantable failure and negligence, I am not convinced that management was aware of the existence of overhanging or loose ribs. The testimony of union safety committeeman Robert Sollar and safety committee chairman Gregory King in this regard is inconclusive. Although Sollar and King had complained to mine superintendent Sullivan about various general safety problems, neither sought to have the ribs scaled. They asked only to have management look at various conditions to see if management thought they warranted attention. That indicates to me that there was no specific or serious concern with any obvious rib condition. They apparently could not reach the conclusion themselves that the ribs were, indeed, overhanging or loose but merely requested management to have a look. Furthermore, while I do not doubt that Art Guty, a miner assigned to clean up sloughage along the ribs in the West Main haulage, may have also made various complaints to management about conditions in the mine, it is not that clear that he had complained specifically about the overhanging and loose ribs at issue in the order at bar. Guty admitted that before the order was issued, he had indeed already scaled those ribs he thought posed a danger as he cleaned up sloughage alongside the ribs.

I am also persuaded by the testimony of the operator's witnesses that the cited rib conditions were not very unusual when compared to other uncited sections in this mine and, indeed, in other mines in the Pittsburgh seam. Although, as I say, I believe violations did occur here, I do not believe that the violative conditions were so obvious and clear that the operator could be charged with having knowledge that the violations existed or that it should have known of the conditions before they were cited in the order. I do not therefore find that the violations were the result of "unwarrantable failure" or any significant negligence.

I find the gravity of the hazard created by these rib conditions to have been moderate to serious. Mr. Guty testified that he continued shoveling sloughage alongside some ribs that purportedly were overhanging without apparent serious concern for his safety. Moreover, the persuasive evidence in this case is that the overhanging portions of the ribs were not above head level where clearly the most dangerous hazard would exist. Nevertheless, the overhanging portions here did create a hazard of serious injury to someone who might be bending over and to the lower portions of the body of someone working adjacent to the ribs. There is no question that there was rapid good faith abatement of these violations.

The next series of violations related to provisions on page 4 of the roof-control plan which specify that entry widths shall be 16 feet. As I stated when the motion to dismiss was filed and throughout this proceeding, I believe that the operator is bound by the plain meaning of the language in its roof-control plan and must strictly comply with its terms. It is not the province of the Administrative Law Judge to create a new roof-control plan or rewrite the plan under the guise of construction. Thus, when the roof-control plan calls for entries not to exceed 16 feet, the entries must not exceed 16 feet. If the entries are wider than 16 feet it is at least a technical violation of the plan.

There is no dispute that the widths of the cited entries were in excess of 16 feet where noted by the inspector. There is no question about that and therefore the violations have been proven as charged. The gravity of the violations and the negligence of the operator must then be considered. In this regard, the inspector himself indirectly admitted that these conditions were not necessarily a hazard under the facts of this case because of the operator's roof-bolting practices. Indeed the inspector admitted that the pattern of four roof bolts set across the entry that was in fact followed here would have been an acceptable method of abating the cited condition had those bolts been installed after the excess

width violations had been discovered by him. Inexplicably, the inspector concluded that because the roof bolts here had been inserted before his discovery of the excess widths, it was not therefore an acceptable mode of abatement. Under the circumstances I cannot conclude that the excess widths created any hazard.

Under the circumstances, I also cannot conclude that U.S. Steel was negligent or that the violation was the result of "unwarrantable failure." It certainly was operating under the reasonable belief that its four-roof-bolt pattern provided adequate roof support even where the entry widths slightly exceeded 16 feet. Moreover, MSHA now appears to concede that such a bolting pattern did indeed provide the necessary support. The foregoing discussion points out one of the many problems I have with this roof-control plan. I believe that clarification is needed with respect to exactly what is going to be required of the operator where sloughage (which everyone concedes is going to occur) causes these entries to exceed 16 feet. The plan as it now exists unfortunately does not deal with that problem.

With respect to the final series of charges in the order at bar, I find that there are actually two possible violations of this section of the roof-control plan. The last paragraph on the page containing drawing No. 4 states that the sum of diagonals A and B (which are the diagonals in the intersections) shall not exceed 56 feet. That is an unconditional requirement of the plan and no exceptions are set forth. In examining the relevant exhibits, I find as a matter of fact that the sum of the diagonals in each and every cited intersection exceeds 56 feet. Now, with respect to these measurements, I observe that the notes of the inspector made at the time he was underground differed in many cases from the measurements on the corresponding exhibit submitted by MSHA. However, in either case, regardless of which measurement you take, the sum of the diagonals is in excess of 56 feet. The operator has not produced any affirmative evidence of its own to contradict these measurements so I find for purposes of the violations here, that the differences in the inspector's notes are immaterial. So again I must find that at least technical violations of intersection widths have been proven as charged.

I observe, however, that the plan also specifies that if either diagonal A or diagonal B exceeds 31 feet, then additional support consisting of posts or cribs may be provided to abate that condition. I find that in each of the cases cited that, indeed, such additional support was provided within the general vicinity of the intersection. The Government seeks to have me write into the roof-control plan

a requirement that this additional support must be located precisely within the direct line of the diagonals. I find no such requirement in the roof-control plan and I do not intend to write such a requirement into the plan. As I said before, I believe it is improper in construing these plans to consider the secret beliefs, the secret intentions or the uncommunicated interpretations that either party has regarding the plan. I observe that in any event MSHA admitted that it could produce no scientific or empirical evidence to support its contention that the additional support in these wide intersections should be placed in the direct line of the diagonals to provide maximum support or that the support actually provided by the operator was in any way less safe. This is also an area where amendments to the roof-control plan ought to be made to obviate future litigation of this issue and so that the operator knows exactly what is required of it.

Under all the circumstances, although I conclude that the sum of the diagonals was in excess of 56 feet and that therefore there was at least a technical violation of the roof-control plan, I believe the operator had made good faith efforts to do what it understood to be required to abate such a condition i.e. install additional support using cribs and timbers. It was not an unreasonable interpretation of what the roof-control plan called for so I do not find that the operator was negligent in any of these circumstances. For the same reason I do not find that the violation was the result of "unwarrantable failure."

Since MSHA could not say that the location of the added support in these intersections was not at least as good as within the direct line of the diagonals, I cannot find that the condition here was hazardous. In the absence of any such scientific or empirical evidence that there was any greater hazard created by the actual location of these cribs and posts, I am unable to assess gravity.

I find in accordance with the stipulations entered at the beginning of this case that the operator and this mine are certainly of large size. There is no evidence that the operator would be unable to pay any penalties that I might impose in this case.

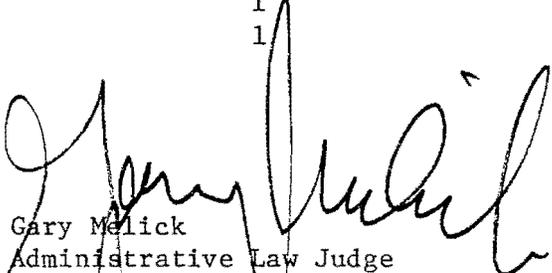
As I say, I will not issue a final order regarding the amount of penalty until such time as I see the history of any prior violations. 3/

3/ A computer printout entitled "Assessed Violation History Report" which was submitted posthearing indicates a significant history of violations at the Cumberland Mine including 28 violations between August 11, 1978, and August 10, 1980, of the standard here at issue.

ORDER

Order of Withdrawal No. 841730 is vacated. The following penalties totaling \$406 shall nevertheless be paid within 30 days of this decision for violations of the cited mandatory standard. Secretary v. Island Creek Coal Company, 2 FMSHRC 279 (1980).

<u>Violation No.</u>	<u>Penalty</u>
1	\$200
2	200
3	1
4	1
5	1
6	1
7	1
8	1


Gary Melick
Administrative Law Judge

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The order here at issue actually alleges three separate violations of the mandatory standard at 30 C.F.R. § 75.200. While the relevant part of that standard facially requires only that the operator adopt a roof-control plan approved by the Secretary of Labor, it has been construed to mean that the operator must also comply with its approved plan. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976). As clarified at hearing, the order first charges that the roof-control plan was violated in that the "measured width of the roadway into the No. 6 pillar block on the three miner section was 19 feet and 6 inches and only a single row of posts were [sic] installed on the left side of the roadway." The operator's plan then required that the final split in a pillar that is being full-pillar retreat mined be limited to a single roadway 14 feet wide and that double rows of posts be installed before starting that final split.

The plan itself is silent as to whether these requirements for the final split are applicable where the remaining block of coal or "stump" is of sufficient size so as to provide adequate roof support in itself. MSHA conceded in closing argument, however, that if that stump of coal was at least 12 feet by 20 feet in size then it would not have been necessary to comply with those provisions of the roof-control plan cited herein. Thus, whether there was a violation of the operator's roof-control plan as charged here depends in part upon whether that remaining stump in the pillar being retreat mined was less than 12 feet by 20 feet in size. In this regard, Badger's safety director, John McKnight, testified that the stump was 12 feet by 20 feet. Delbert Campbell, Badger's safety inspector who accompanied MSHA inspector George Schrader on the day at issue, concluded that the stump was "twenty foot square." It is noteworthy that McKnight and Campbell had been sequestered during the hearing and therefore were not subject to the influence of the other's testimony. Moreover, the significance of their testimony in this regard was not apparent until later in the hearing when MSHA conceded there would be no violation if the stump was of sufficient size.

On the other hand, when Inspector Schrader was asked about the size of this stump, he responded: "It's been awhile, Your Honor, I just couldn't say." He later approximated that it was 4 to 6 feet wide on one side, 10 feet wide on the other side and, from his sketch, about 20 feet long. ^{2/} In light of the inspector's admitted uncertainty, I accord lesser weight to his estimates. Under all the circumstances, I find the testimony of Campbell and McKnight to be the more credible and I therefore conclude that the stump of coal remaining in the pillar at issue was at least 12 feet by 20 feet in

^{2/} Although the witnesses did not seem to agree on the precise location of this stump as depicted on the various mine maps in evidence, it is nevertheless apparent that McKnight and Campbell were indeed describing the same stump as Schrader. Campbell was with Schrader and actually helped him measure the roadway at issue. Schrader told him that the width was 19 feet 6 inches and that it constituted a violation. It was the only violation of that same specific nature. In addition, Schrader subsequently pointed out the precise location of this violation to McKnight.

size. Accordingly, there was no need for the final split in that pillar to have been limited to a single 14-foot roadway protected by double rows of posts as might otherwise have been required by the roof-control plan. The first violation alleged in the order is therefore vacated.

The order charges, secondly, that "breaker posts were not installed across the roadway on the right side of the No. 6 pillar block which was mined out." According to Schrader, those posts should have been located at the position indicated on Government Exhibit G-1 by the numbers 9 through 16. Schrader admitted at hearing, contrary to what he depicted on his sketches, that the cited area was actually in an entry adjacent to a permanent barrier pillar protecting a gas well. That location corresponds to what is depicted in the roof-control plan as unsupported gob. Under the circumstances, I do not find that the roof-control plan required breaker posts to have been located where the inspector has suggested. The second violation alleged in the order is therefore also vacated.

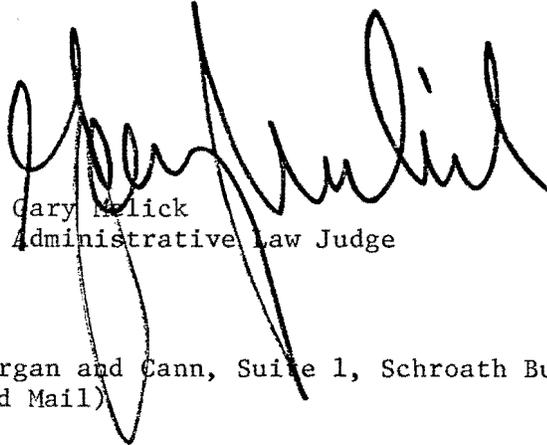
The order charges, lastly, that breaker posts were not installed across the roadway into the mined-out area between the No. 3 miner (O21) section inby the last open crosscut, 4 and 5 blocks. Although Badger contended at hearing that the order did not provide adequate notice of the specific location of this alleged violation and that the order should therefore have been partially dismissed (see MSHA v. Jim Walter Resources, Et Al., 2 FMSHRC 1827 (1979), regarding the sufficiency of notice), I find that its challenge is not to the sufficiency of the notice per se but rather to the question of whether the condition cited actually existed at the location specified by the inspector in his order. The only issue before me then is whether the violation existed as charged.

Whether or not there was a violation here does indeed depend on the precise location of the cited condition. If the location was as depicted by the numbers 1 through 8 on Government Exhibit G-1, and as alleged by MSHA, then there was a violation of the roof-control plan. If on the other hand the cited area was as depicted by the letter "C" on Operator's Exhibit No. 4, and as alleged by Badger, then clearly there was no violation. After evaluating the testimony from the sponsors of these opposing views, I find that Badger's contention should prevail. I am impressed by the consistency of the testimony from Badger's witnesses McKnight and Campbell, regarding the layout of the mine and the location of significant features therein. Understandably they were able to demonstrate a more thorough and accurate knowledge of their mine and their testimony in this regard is corroborated by engineering drawings prepared from surveys. The testimony of, and the sketches by, Inspector Schrader on the other hand are fraught with inconsistencies. As previously noted, Schrader was unaware of the location of a rather significant feature, a barrier pillar, in the immediate vicinity of the conditions cited. Indeed, this barrier was erroneously depicted in his sketches as partially mined-out blocks of coal. I observe also that other significant coal pillars were given numbers on one of Schrader's original sketches that did not coincide with the numbers given corresponding pillars in the subsequent sketch prepared by him for the hearing. Schrader admitted to these and other inconsistencies.

I am persuaded by these factors to believe that Schrader was indeed dis-oriented when he prepared the last charge in the order. Accordingly, I cannot give any weight to his testimony regarding the location of this alleged violation. Since that precise location is critical to the Govern-ment's case, that case must fail. The third violation alleged in the order is therefore also vacated.

ORDER

Order of Withdrawal No. 805795 and the violations cited therein are VACATED.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 20 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 81-22
Petitioner : A/O No. 46-02061-03040V
v. :
: Peytona No. 4 Mine
CANNELTON INDUSTRIES, INC., :
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA for
Petitioner, MSHA;
William C. Miller II, Esq., Cannelton Industries,
Inc., Charleston, WV for Respondent, Cannelton
Industries, Inc.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the government against Cannelton Industries, Inc. A hearing was held on April 7, 1981.

Order of Withdrawal 668147

At the hearing, the Solicitor moved the approval of a settlement for this violation in the amount of \$500. The original assessment for this violation was \$750. This order was issued for a failure to comply with the approved ventilation plan which requires that line curtain be maintained to within 10 feet of the face and that 3,000 cubic feet of air per minute be maintained at the face. In support of the reduction, the Solicitor advised that negligence was less than originally assessed since the continuous miner had just finished mining in this section and had knocked down the curtain as it was backing out. In addition, gravity was less because no power had been turned on in the section, no other work was in progress there and there was no methane detected in the area. Further, the condition was abated immediately by the rehangings of the curtain and the size of both the mine and the company is medium. I accepted the Solicitor's representations. Noting that the recommended amount was a substantial amount, I approved the proposed settlement.

Order of Withdrawal 665636

At the hearing, the parties agreed to the following stipulations (Tr. 4):

- (1) The operator is the owner and operator of the subject mine.
- (2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) I have jurisdiction of this case.
- (4) The inspector who issued the subject order was a duly authorized representative of the Secretary.
- (5) A true and correct copy of the subject order was properly served upon the operator.
- (6) Imposition of a penalty will not affect the operator's ability to continue in business.
- (7) The alleged violation was abated in good faith.
- (8) The operator had 182 assessed violations in the 24 months preceding the alleged violation, which is an average history.
- (9) The operator is a medium size company and the mine in question is medium in size.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 8-138). At the conclusion of the taking of evidence, the parties waived the filing of written briefs and agreed to make oral argument and have a decision rendered from the bench (Tr. 138). A decision was rendered from the bench setting forth findings, conclusions and determinations with respect to the alleged violation (Tr. 142-144).

BENCH DECISION

This case is a petition for the assessment of a civil penalty based upon an alleged violation of 30 C.F.R. 75.200. The alleged violation is of the operator's roof control plan. It is now well established that the roof control plan has the effect of law and of a mandatory standard.

The pertinent section of the operator's roof control plan is Paragraph 11(a), which provides as follows: "Sidecuts shall be started only in areas that are supported with permanent roof supports. During development, except where old workings are involved, working places shall not be holed through into accessible areas that are not supported on 5-foot maximum spacing lengthwise and crosswise to within 5 feet of the face."

The basic conflict here is one of credibility. There is no dispute that there was a punch-through or a hole-through in the

last open crosscut from the No. 2 crosscut into the No. 1 Room. There is, however, a conflict between the two inspectors and the operator's two witnesses with respect to whether the area in the No. 1 Room punched through from the No. 2 crosscut was supported. The inspectors testified that they saw no such supports. The operator's safety inspector and the operator's supervisor of health and safety testified that there were such supports and in particular, two temporary supports right in the punch-through and four to six temporary supports in the No. 1 Room, which was reached by the punch-through.

After consideration of the demeanor and the statements of all the witnesses, I accept the operator's testimony in evidence on this point and most particularly the testimony of the operator's supervisor of health and safety. I accept the operator's evidence given at the hearing with respect to the temporary supports marked on the documentary exhibits, and I further accept the testimony with respect to a photograph taken of these temporary supports.

I further believe that the Government's case is weakened by the fact that there was so much confusion and inconsistency regarding the map of the area in question. No such confusion and inconsistencies were present in the operator's case.

I also accept the operator's evidence regarding temporary supports in the subject area because it was undisputed that the operator was very careful when it set supports and dangled off the No. 1 Room. It simply makes no sense for the operator to have been so careful in the No. 1 Room and then immediately thereafter undertake such dangerous activities in punching through from the No. 2 crosscut.

Moreover, I accept the testimony of the operator's supervisor of health and safety that the only reason for the temporary supports being set in the affected area was because it was going to be a punch-through from the No. 2 crosscut.

It does appear to me that there was some confusion, as testified to by the operator's witness, with respect to the basis on which the order was issued, and this evidence as well supports the operator's version of the case.

Based upon the foregoing, I find that there was no violation and, therefore, no civil penalty will be assessed.

ORDER

The foregoing decisions issued from the bench are hereby AFFIRMED.

The operator is ORDERED to pay \$500 within 30 days from the date of this decision.

A handwritten signature in cursive script that reads "Paul Merlin".

Paul Merlin
Assistant Chief 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

APR 21 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 79-16-M
Petitioner : A.O. No. 31-00582-05003
: :
v. : Castle Hayne Quarry & Mill
: :
IDEAL BASIC INDUSTRIES, :
CEMENT DIVISION, :
Respondent :

DECISION

Statement of the Case

On April 10, 1981, the Commission remanded this case to me for the purpose of assessing a civil penalty for a citation which I vacated from the bench on March 5, 1980, and my decision in this regard was reduced to writing in my original decision of June 9, 1980. The citation (No. 103843), was issued by an MSHA inspector on July 25, 1978, and charged the respondent with a violation of mandatory safety standard 30 CFR 56.9-2.

After due consideration of the previous record containing the testimony and evidence adduced by the parties with respect to the citation, I make the following findings and conclusions pursuant to the Commission's remand order:

Fact of violation

The Commission has reasoned that based on their consideration of the record a violation has occurred. Accordingly, the citation must be AFFIRMED.

History of Prior Violations

In my previous decision sustaining several other citations which are not in issue in this remand, I concluded that respondent's prior history of violations did not warrant any increased civil penalty assessment and I reaffirm that finding here.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

In the prior proceeding, the parties agreed that the mine in question employed 162 employees and that annual production is 600,000 tons of marl, the basic substance used to produce cement, and that annual production for the respondent as a whole was some four million tons. I concluded that respondent was a large operator and that its mining operation at the quarry and mill in question was medium in scope. I reaffirm those findings.

Respondent did not contend in the prior proceeding that the assessment of civil penalties will adversely affect its ability to remain in business and I conclude that the assessment levied in this instance will not adversely impact on respondent's mining business.

Good Faith Compliance

A copy of the citation termination notice reflects that the condition cited was corrected and abated through the replacement of the defective coupler in question. While the date of the termination is subsequent to the time initially fixed by the inspector, the testimony of record does not support a conclusion that good faith compliance was not exercised. To the contrary, all of the remaining citations which I affirmed in this case reflected that they were abated rapidly, and it is altogether possible that the actual termination date reflects the actual date of termination of the citation rather than the actual date that repairs were made. I conclude that the citation in question here was abated in good faith, but there is no evidence to suggest that abatement was achieved rapidly or that the respondent was dilatory.

Negligence

The record supports a finding that the citation resulted from the respondent's failure to exercise reasonable care to insure that the defective coupling was repaired before it was discovered by the inspector.

Gravity

The Commission's own interpretation of section 56.9-2, supports a conclusion that the conditions cited in this case constituted a serious violation.

Penalty Assessment

The initial proposed civil penalty assessment made by MSHA in this case for the citation in question is \$38. Considering all of the statutory criteria found in section 110(i) of the Act, including the foregoing findings and conclusions, I cannot conclude that the initial assessment is unreasonable, and IT IS AFFIRMED.

Order

Respondent IS ORDERED to pay a civil penalty in the amount of \$38 for the citation in question here, payment to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment this matter is DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 21 1980

KAISER STEEL CORPORATION,	)	CONTEST OF CITATION
)	
Contestant,	)	DOCKET NO. WEST 80-301-R
	)	Citation No. 0246571
JOINT VENTURE -)	
UNITED STATES STEEL CORPORATION	)	DOCKET NO. WEST 80-483-RM
AND KAISER STEEL CORPORATION,	)	Citation No. 0246571-6
)	
Contestant,	)	MINE: Sunnyside No. 2
v.)	
SECRETARY OF LABOR, MINE SAFETY)	
AND HEALTH ADMINISTRATION (MSHA),)	
Respondent.)	

Appearances: Louise Q. Symons, Esq.
Law Department
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David B. Reeves, Esq.
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For the Contestants

Robert A. Cohen, Esq.
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4015 Wilson Boulevard
Arlington, Virginia 22203,
For the Respondent

Before: Judge Jon D. Boltz

DECISION AND ORDER

STATEMENT OF THE CASE

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (here and after called the Act), Kaiser Steel Corporation (here and after called Kaiser) contested the issuance on April 8, 1980, of Citation No. 246571, which alleged a violation of 30 C.F.R. 77.216-3(b).¹ The citation stated, inter alia, that a potentially

1/ When a potentially hazardous condition develops, the person owning, operating or controlling the impounding structure shall immediately: (1) Take action to eliminate the potentially hazardous condition; (2) Notify the District Manager; (3) Notify and prepare to evacuate, if necessary, all coal miners from coal property which may be affected by the potentially hazardous conditions; and (4) Direct a qualified person to monitor all instruments and examine the structure at least once every 8 hours, or more often as required by an authorized representative of the Secretary.

hazardous condition exist[s] at the Grassy Trail Reservoir in that the spillway structure is inadequate. The citation refers to a report submitted by the contestant which states that the embankment of the dam would be overtopped by 5.72 feet of flood and that a deep seated slide may exist in the right abutment and should be investigated. In its amended notice of contest, Docket No. WEST 80-301-R, Kaiser denied the alleged violation and alleged that respondent had no jurisdiction to issue the citation because the reservoir is not a "coal or other mine" as defined by the Act.

On August 25, 1980, Citation No. 246571-6 was issued to the operator designated as "Joint Venture Kaiser Steel-U.S. Steel." The citation stated, "The U.S. Steel Corporation [hereinafter referred to as U.S.S.] has been included with Kaiser Steel Corporation as joint operators of the Grassy Trail Reservoir" U.S.S. filed its notice of contest, Docket No. WEST 80-483-RM, and therein denied that a potentially hazardous condition existed at the Grassy Trail Reservoir and alleged that neither the joint venture nor U.S.S. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

FINDINGS OF FACT

1. On September 17, 1951, Kaiser and Geneva Steel Company entered into a joint venture agreement to construct and maintain the Grassy Trail Dam. (Ex R-13). U.S.S. succeeded to the interest of Geneva Steel Company.

2. Pursuant to the agreement, U.S.S. owned an undivided 61.2% interest and Kaiser owned an undivided 30.8% interest in the reservoir and its appurtenant works. (Ex R-13).

3. The earth filled dam was built in 1952 and measured approximately 85 feet in height and approximately 600 feet in length. Approximately 1,000 acre feet of water are contained in the dam when it is full to the top. (Vol. I, p. 19).

4. The State of Utah, Division of Water Rights, is required by Utah statute to approve construction of earth dams and to continue to inspect such dams after they are constructed. (Vol. III, p. 59, 61).

5. The purpose for which the dam was constructed was to provide a stable year round supply of water for household, commercial, and lawn watering purposes to the towns which became known as East Carbon City and Sunnyside. The agreement provided that the water would be used primarily for domestic use, and, if there was excess water, it could be used for industrial or miscellaneous purposes at the coal mine. (Ex R-13).

6. The crest of the dam is 7,620 feet above sea level. The normal pool elevation of the dam is at an elevation of 7,580 feet above sea level. The coal mining complex of Kaiser, called Sunnyside, is at an elevation of approximately 6,708 feet above sea level and is located approximately 4 1/2 miles down stream from the dam. (Ex. R-2, Vol. I, p. 25).

7. Approximately one mile below Kaiser's mine complex is the town of Sunnyside. The town's elevation is 6,523 feet above sea level and it is approximately 5 1/2 miles down stream from the dam. Further down stream, approximately one mile, is the town of East Carbon City, at an elevation of 6,303 feet. (Vol. I, p. 25).

8. Estimates are that from 2,000 to 6,000 persons reside in the towns of Sunnyside and East Carbon City. (Vol. I, p. 52, Ex. R-20).
9. An employee of U.S.S., an outside foreman at their Geneva Mine, which is located approximately 10 miles East of Grassy Trail Creek, drives to the dam generally once daily, including Saturdays and Sundays, spending approximately two hours there in order to look over the facilities, check for possible slide areas, and check "dam overflow, if needed." Depending upon the water level of the tanks in the towns of Sunnyside and East Carbon City, he adjusts water outflow from the dam to maintain an adequate water supply. (Vol. III, p. 108; Vol. I, p. 165, 166, 175; Vol. I, p. 166).
10. There is one mutual valve at the dam that releases water into a 10 inch pipeline. The water from this line is distributed to East Carbon City and the town of Sunnyside. Water from the line also flows to the 500,000 gallon tank at the Kaiser mine complex. This tank supplies some water for facilities at Kaiser. Water from the tank is also used for the needs of the town of Sunnyside. (Vol. I, p. 166, 167).
11. The water from the dam passes through a chlorinator on Kaiser property and then goes into the 500,000 gallon storage tank. From the storage tank, the water is piped to the town of Sunnyside. (Vol. III, p. 103).
12. From the main water line below the storage tank, another line diverts water for use on Kaiser property. The water is then used at the bathhouse, shop area, and office area for showers or drinking water, and also to fill the boiler. (Vol. III, p. 104).
13. The boiler provides heat for the coal preparation plant, the shop, the bathhouse and the warehouse. During the winter months it provides hot water for showers at the bathhouse. (Vol. III, p. 99).
14. A diversion in the water line coming from the dam pipes water to the upper bathhouse for the shower facilities. (Vol. III, p. 103, 104).
15. During the last three to four years, no water from the dam has been used at Kaiser's coal preparation plant, except for the water applied to domestic purposes, which includes the boiler system. (Vol. III, 98).
16. Water that is collected at the bottom of the shaft of Kaiser's coal mine, amounting to approximately one and one half million gallons per day, is pumped to 500,000 gallon storage tanks located on Kaiser property. The water is then gravity fed back to the coal preparation plant where approximately 200,000 gallons of water are used daily in the preparation of coal. Water not used in coal preparation is sent through pipelines to provide water for such outside uses as the watering of alfalfa fields, the city park, golf course, high school athletic fields and lawns. Any additional water not used is discharged into Grassy Trail Creek. (Vol. III, p. 96, 97, 98).
17. None of the water from the dam is used by or in any mines owned or controlled by U.S.S. (Vol. I, p. 175).
18. U.S.S. initially pays all expenses of the joint venture, including the following: the salary of the employee (called the water master, who attends the dam), expenses associated with truck or equipment operation, repairs incurred in maintaining and operating the dam, the cost of operating the Big Springs Ranch and the cost of an annual study on the stability of the dam. (Vol. III, p. 112).

19. All of the costs incurred by U.S.S. in connection with the joint venture are reimbursed by the East Carbon City municipal government and Kaiser, so that U.S.S. does not make a profit nor incur a loss on the venture. (Vol. III, p. 112, 122).

20. The dam's vertical drop inlet spillway has a round, morning glory-shaped entrance into which water enters from all directions. The top of this round spillway is approximately 6 1/2 feet below the crest of the dam. The discharge rate of the spillway is 1,600 cubic feet per second when the water level is at the crest of the dam. (Vol. II, p. 111, 112).

21. The watershed supplying the dam is an area of approximately 20 square miles. The average annual precipitation for the area is 18 inches. (Ex. R-2).

22. The probable maximum precipitation for the watershed area of the dam in one hour's time is 6.5 inches and for a time interval of six hour's duration is 7.5 inches. (Ex. R-2)².

23. The 100 year flood would result with precipitation of 1.35 inches occurring within one hour in the watershed of the dam, and precipitation of 1.8 inches in six hours. (Ex. R-2)³.

24. The embankment of the dam would be overtopped by 5.72 feet during the passage of probable maximum flood storms. (Ex R-2).

25. After the dam is overtopped, it would breach in approximately one hour. (Vol. II, p. 40; Ex R-3).

26. In the event of the occurrence of the probable maximum flood, the dam would begin to overtop approximately two hours and thirty minutes after the storm begins. (Ex R-3).

27. If the dam does breach as a result of the probable maximum flood, the water level of Grassy Trail Creek, where it flows past the mine, would be 3.7 feet higher than if the dam does not breach during the probable maximum flood. (Vol. II, p. 143).

2/ The concept of probable maximum precipitation is the theoretically greatest depth of precipitation that is physically possible for a given time interval, over a particular drainage basin, at a particular time of year. (Vol. II, p. 51).

3/ A 100 year flood is a storm that has a one percent chance of occurring in any given year. (Vol. I, p. 98).

28. The damage resulting from the probable maximum flood would be approximately the same whether or not a breach of the dam occurred. (Vol. II, p. 153).

29. In case of a breach of the dam as a result of the probable maximum flood, the water from Grassy Trail Creek would not reach Sunnyside No. 2's bathhouse or air shaft, but would probably enter the lowest portal of the coal mine. This portal travels uphill and water would not go in far enough to flood the mine. (Vol. p. 122, 123; Vol. II, p. 154).

30. In the event that the lower portal of the coal mine is blocked by flood waters, there are numerous other exits from the mine. (Vol. III, p. 94).

31. The probability of the probable maximum precipitation occurring in the watershed of the dam is 10,000 or 20,000 to 1. (Vol. III, p. 38; Vol. II, p. 198).

32. The spillway of the dam will adequately handle the 100 year floods since the spillway of the dam has a maximum discharge rate of 1,600 cubic feet per second, and the inflow into the dam during the 100 year storm or flood would be 504 cubic feet per second. (Vol. II, p. 93, 94; Ex. K-1).

33. The spillway would be insufficient to discharge the inflow of water to the dam during the probable maximum flood because the peak flow rate into the dam would be approximately 26,000 cubic feet per second. (Vol. II, p. 204).

ISSUES PRESENTED

1. Is the Grassy Trail Dam and Reservoir subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977?

2. If so, has the Secretary established a violation of 30 C.F.R. 77.216-3(b)?

APPLICABLE LAW

The following sections of the Act are applicable to the question of jurisdiction:

Section 3(h)(1) "'coal or other mine' means ... impoundments⁴ ... used in, or to be used in, ... the work of preparing coal...[.]"

Section 3(i) "'work of preparing coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of ... coal, and such other work of preparing such coal as is usually done by the operator of the coal mine[.]"

⁴/ The Dictionary of Mining, Mineral, and Related Terms defines an impounding dam as one in which tailings are collected and settled; also, a water storage dam. An impounding reservoir is defined as a reservoir which stores water from a wet season to a dry one, as distinct from a service reservoir. U.S. DEP'T OF THE INTERIOR, BUREAU OF MINES. A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 572 (1968).

DISCUSSION

It is undisputed that the Grassy Trail Dam is owned by the joint venture and that the joint venturers are Kaiser and U.S.S. A joint venture is a legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit. Tex-CO Grain Co., v. Happy Wheat Growers Inc., 542 S.W. 2d 934, 936. The joint venture of Kaiser and U.S.S. is a legal entity separate from either Kaiser or U.S.S. as individual corporations. The mutual rights and liabilities of these joint venturers in respect to their common enterprise are substantially those of partners. Taylor v. Brindley, 164 Fed. 2d 235 (1947). Since the ownership and operation of the Grassy Trail Dam is vested in the separate entity of the joint venture, any rights or liabilities accruing from the application of the Federal Mine Safety and Health Act of 1977, would be directed to Kaiser and U.S.S. only to the extent of their respective interest in the joint venture.

U.S.S. argues in its post hearing brief that since the joint venture does not own any coal mines, does not mine any coal and does not prepare any coal for market, it is not subject to the jurisdiction of the Act. This argument overlooks the implication of section 3(i) of the Act. If water from the dam is used in, or to be used in, the "work of preparing the coal", it is a "coal or other mine" and thus subject to the jurisdiction of the Act.

The Secretary asserts that the Act gives jurisdiction over the dam because the dam is owned, operated and controlled by a mining company; that the dam is a surface facility close to the mine; and that the dam is used in the mine operation and for the preparation of coal. (Vol. I, p. 83, 111, 144).

The Act does not concern itself with the question of ownership. Whether the dam is owned by a mining company, or by the town of Sunnyside, or by the joint venture is not controlling as to the question of jurisdiction of the Act. Whether the dam is close to the mine (approximately 4 1/2 miles in this case) or whether it is 20 miles away is equally not controlling. If the water from the impoundment or dam is used or to be used in the "work of preparing the coal" it is a coal mine according to the definition contained in section 3(h)(1) of the Act. Thus, the dam would be subject to the jurisdiction of the Act regardless of the ownership of the dam or its location.

The final question is whether the water in the dam was used in the "work of preparing the coal" as that phrase is defined in section 3(i) of the Act. Is the water from the dam used, or to be used, in the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of ... coal" or "such other work of preparing such coal as is usually done by the operator of the coal mine?"

The Manager of Engineering and Quality Control for Kaiser described the manner in which water is used at the mine in the preparation of coal. The raw coal out of the mine goes into one of two wash boxes where a pulsating action of water separates reject material from the coal. The rejected material falls to the bottom and is transmitted to a refuse belt and trucked to a refuse disposal site. The clean coal passes over the wash box and into the water. Water is also used at the mine in long wall mining. The emulsion oil, consisting of 95% water and 5% oil, charges the hydraulic system on Kaiser's long wall mining units. (Vol. III, p. 95. 96).

An MSHA inspector who worked at the Kaiser coal mine for approximately one year, and whose last day of work there was August 31, 1975, testified that water from the dam was used to fill the wash boxes on two occasions for short periods of time when water from the mine was inadequate. Less than eight hours use of water from the dam was required during these two periods. (Vol. II, p.9). The witness speculated that water from the dam may also have been used in making emulsion oil which was used in the hydraulic system for long wall mining. (Vol. II, p. 11). In these cases, the water from the dam was being used in the "work of preparing the coal."

There was no evidence that water from the dam has been used since 1975 for these purposes. Specifically, it is undisputed that water from the dam has not been used for such coal preparation for the last 3 to 4 years. (Vol. III, p. 99). Water from the dam that is subsequently purified is used at the coal mine for drinking purposes, showering, sanitation, and also in the boiler. The boiler provides heat for the coal preparation plant, the shop, bathhouse and the warehouse. During the winter months it provides hot water for showers at the bathhouse.

Within the last five years, an underground sump capable of holding millions of gallons of water has been developed at Kaiser's mine. All of the water used at the coal mine for the purpose of cleaning and washing coal comes from this underground source. This collection of water amounts to approximately 1 1/2 million gallons daily. Of this amount, approximately 200,000 gallons of water per day are used in the preparation of coal. (Vol. III, p. 97). This ground water is also used in the preparation of emulsion oil. Thus, the water "used in, or to be used in, the work of preparing coal" does not come from the Grassy Trail Dam.

In support of the position that the Secretary has jurisdiction, the Secretary argues in his post hearing brief that mining activities around Sunnyside and East Carbon City directly depend on a stable water supply provided by the Grassy Trail Dam. Water from the dam serves the towns where the majority of the miners live and also supplies the domestic needs of Kaiser Sunnyside Mine No. 2. The domestic use of water includes water for drinking, bathing facilities and for the boiler, "which allows the operators of the mine to comply with many of the health requirements of the Act." The problem with this argument is that it would have jurisdiction extend to include the dam based on use of the water therefrom for purposes other than in the work of preparing the coal. The uses of the water from the dam, as stated by the Secretary, are for domestic purposes. The definition of the work of preparing coal contained in section 3(i) does not include water for domestic purposes at a mine or at a town where many coal miners may happen to reside.

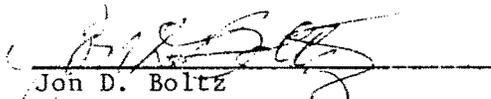
The Secretary also argues that the Act should be given a broad and liberal interpretation and any doubts concerning jurisdiction should be resolved in favor of granting jurisdiction. I agree that the Act should be given a broad interpretation, but the words contained in the definition of "work of preparing coal" are words of limitation and are unequivocal. The definition does not include impoundment water used for domestic purposes at a coal mine, as distinguished from the defined use, such as washing or cleaning the coal itself. To conclude otherwise would be to extend jurisdiction of the Act to any facility, municipal corporation, or other entity that might happen to provide nothing more than drinking water to a coal mine operation.

CONCLUSION OF LAW

The Grassy Trail Dam is not a "coal or other mine" and is, thus, not subject to the jurisdiction of the Act. It is, therefore, not necessary to decide the issue of whether or not 30 C.F.R. § 77.216-3(b) was violated.

ORDER

There being no jurisdiction over the impoundment, Citations No. 246571 and 246571-6, alleging a violation of 30 C.F.R. 77.216-3(b), are hereby VACATED. There was also a written motion to strike Exhibit R-21 filed by Kaiser several weeks after the hearing was concluded. This motion is DENIED.



Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 22 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-62-PM
Petitioner : Assessment Control
: No. 40-00806-05001
v. :
: Pit No. 436 and Mill
NOLICHUCKEY SAND COMPANY, INC., :
Respondent :

SUMMARY DECISION

This proceeding involves a Petition for Assessment of Civil Penalty filed on October 26, 1978, by counsel for the Mine Safety and Health Administration, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking assessment of a civil penalty for an alleged violation of section 103(a) of the Act by respondent because respondent had declined to permit an inspector to examine respondent's Pit No. 436 and Mill on the ground that a search warrant was required.

Counsel for respondent filed on July 6, 1979, a request that the hearing in this proceeding be continued until such time as the Sixth Circuit Court of Appeals had rendered a decision bearing upon the constitutionality of section 103(a) of the Act. I deferred the setting of a hearing until the Sixth Circuit had issued its decision in Ray Marshall v. Nolichuckey Sand Company, Inc., 606 F.2d 693 (6th Cir. 1979), and until the Supreme Court had denied certiorari (446 U.S. 908 (1980)). The Sixth Circuit affirmed a district court decision (Ray Marshall v. Nolichuckey Sand Company, Inc., 490 F. Supp. 1041 (E.D. 1978), which had upheld the constitutionality of section 103(a) providing for warrantless inspections of respondent's Pit No. 436 and Mill and which also had denied respondent's motion for preliminary and permanent injunction to prohibit MSHA from carrying out the provisions of the Act.

After I became aware of the fact that the Supreme Court had denied certiorari of the Sixth Circuit's decision, I issued a prehearing order on October 15, 1980, setting forth the facts to which petitioner and respondent had stipulated in the Nolichuckey case before the district court and requested that counsel for the parties advise me as to whether they could agree upon those stipulations of fact for the purpose of resolving the civil penalty issues in this proceeding. MSHA's counsel filed on November 24, 1980, a response to the prehearing order indicating that he was willing to adopt the proposed stipulations for the purpose of deciding the issues in this proceeding. Counsel for respondent filed on

November 28, 1980, a response to the prehearing order in which he stated that MSHA's counsel did not wish to settle the issues 1/ and that he was requesting a hearing.

Counsel for MSHA thereafter filed on December 1, 1980, a motion for summary decision, pursuant to 29 C.F.R. § 2700.64, stating that there is no genuine issue as to any material fact in this proceeding and that MSHA is entitled to a summary decision as a matter of law. Attached to the motion for summary decision is a copy of the district court's Nolichuckey decision, supra. The motion states that the court's decision sets forth the facts with respect to issuance of Citation No. 107809 which is the basis for the violation of section 103(a) of the Federal Mine Safety and Health Act of 1977 alleged in the Petition for Assessment of Civil Penalty filed in this proceeding. The motion also points out that the court's decision in the Nolichuckey case avers that the parties have stipulated that respondent's Pit No. 436 and Mill are subject to the provisions of the Act.

Counsel for respondent filed on December 17, 1980, a reply to the motion for summary decision in which, among other things, he stated that evidence was required as to the issue of negligence because respondent had raised a valid constitutional issue in good faith. Respondent noted that although it lost the issue of the constitutionality of section 103(a) before the Sixth Circuit, the correctness of its argument had been recognized by the Ninth Circuit's decision in Ray Marshall v. Elden Wait, 628 F.2d 1255 (1980), finding that warrantless searches are not constitutional, thereby disagreeing not only with the Sixth Circuit's decision in Nolichuckey, supra, but with the decisions of the Third, Fourth, and Fifth Circuits which had also found warrantless searches to be constitutional (Marshall v. Stoudt's Ferry, 602 F.2d 589 (3rd Cir. 1979), cert. den. 444 U.S. 1815 (1980); Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980); and Marshall v. Texoline, 612 F.2d 935 (5th Cir. 1980)).

Section 2700.64(d) provides that if a judge finds it necessary to deny a motion for summary decision because an evidentiary hearing is required, he shall issue an order specifying the factual issues as to which a substantial controversy exists. Inasmuch as it appeared to me that the issue of respondent's negligence, if any, was dependent upon uncontroverted facts as to which no hearing was required, I issued on December 24, 1980, a second prehearing order requiring respondent's counsel to specify the facts which he would adduce if a hearing were to be scheduled in this proceeding. Respondent's counsel filed on January 30, 1981, a response to that order stating that he had now decided to agree to the stipulations of fact set forth in my first prehearing order of October 15, 1980, and that he did not wish to present any witnesses at a hearing for the purpose of adducing facts in addition to those stated in my prehearing order of October 15, 1980.

1/ MSHA's counsel also filed a response to the letter from respondent's counsel stating that respondent's version of his telephone conversation with respondent's counsel was contrary to his understanding of that conversation.

I conclude from respondent's reply to my second prehearing order that respondent is now agreeable to my granting MSHA's motion for summary decision and to my rendering a decision in this proceeding upon the basis of the stipulations of fact set forth in my first prehearing order. The facts which the parties have agreed to stipulate are:

1. Charles E. McDaniel, an authorized representative of the Secretary of Labor, went to Nolichuckey Sand Company, Inc.'s Pit No. 436 and Mill on April 11, 1978, for the purpose of making a regular inspection pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a).
2. Thomas Bewley, Nolichuckey's vice-president, refused to permit Inspector McDaniel to make an inspection of the pit or mill on the ground that the inspector needed a search warrant authorizing him to make such an inspection.
3. Inspector McDaniel returned the next day, April 12, 1978, and was again refused permission to inspect the pit or mill because he did not have a search warrant.
4. After Inspector McDaniel had been denied permission to inspect Nolichuckey's pit and mill, he issued Citation No. 107809 dated April 12, 1978, under section 104(a) of the Act alleging that Nolichuckey had violated section 103(a) of the Act.
5. Nolichuckey's pit and mill are subject to the provisions of the Act.
6. Inspector McDaniel was not harmed or threatened with physical assault or verbal abuse on the 2 days when he was not permitted to inspect the pit and mill.
7. Nolichuckey's business involves 20,754 man-hours per year. Therefore, Nolichuckey operates a small business.
8. Payment of penalties will not cause Nolichuckey to discontinue in business.

The issues in a civil penalty case are whether a violation of the Act or the mandatory health or safety standards occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Occurrence of Violation

The Petition for Assessment of Civil Penalty in this proceeding alleges that respondent violated section 103(a) of the Act. Section 103(a), in pertinent part, provides:

- (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year * * *.

[T]he Secretary shall make inspections * * * of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

There can be no doubt about the fact that section 103(a) gives MSHA inspectors "a right of entry to, upon, or through" a mine for the purpose of making inspections. The findings of fact, supra, show that respondent's vice-president on 2 successive days declined to allow an MSHA inspector to enter its pit or mill for the purpose of making an inspection. While respondent is entitled to assert a constitutional right in contesting the validity of section 103(a)'s provision for warrantless searches, in doing so, it runs the risk of being cited for a violation of the Act. The legislative history leaves no doubt but that Congress intended for the inspectors to be able to make inspections without obtaining a search warrant. Page 27 of Senate Report No. 95-181, 95th Cong., 1st Session, contains the following comments regarding warrantless searches (Legislative History of the Federal Mine Safety and Health Act of 1977, Subcommittee on Labor, July 1978, p. 615):

* * * The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant. This intention is based upon the determination by legislation. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.

The Committee has specifically adopted the prohibition on advance notice of inspections which is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice.

I conclude on the basis of the clear language of section 103(a) and the legislative history of that section that Congress wanted inspectors to be able to enter all mines for the purpose of inspecting them without having to give any advance notice or having to obtain a search warrant. Consequently, I find that a violation of section 103(a) occurred when respondent refused to allow the inspector to enter his pit or mill for the purpose of making a regular inspection (Finding Nos. 1-3, supra).

Assessment of Penalty

Section 110(a) of the Act provides that "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty * * *". Since I have found that a violation of the Act occurred, it is now necessary that a penalty be assessed after consideration of the six criteria set forth in section 110(i) of the Act. Stipulation of Fact Nos. 7 and 8, supra, have already covered two of the six criteria, namely, the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business.

As to the criterion of respondent's history of previous violations, the Proposed Assessment in the official file shows that the Assessment Office assigned zero penalty points under that criterion when it determined a proposed penalty under the assessment procedures set forth in 30 C.F.R. § 100.3. On the basis of the Proposed Assessment, I find that no increase in a penalty otherwise determinable under the other criteria should be made under the criterion of respondent's history of previous violations.

The criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance should be applied in relation to the fact that respondent found it necessary to bar the inspector from making a warrantless inspection so that an appeal of the constitutional issue could be made. In Bituminous Coal Operators' Association, Inc. v. Ray Marshall, 82 F.R.D. 350 (D.D.C. 1979), the court denied BCOA's attempt to obtain review of an interpretative bulletin published by the Secretary of Labor with respect to the walk-around rights of miners under section 103(f) of the Act. The court noted that it would be necessary for an operator to violate that section of the Act in order to obtain judicial review of the enforcement procedures which MSHA intended to use with respect to a miner's walk-around rights. The court also recognized that the operator would be subject to a civil penalty for violating the section just to test MSHA's enforcement procedures. The court then stated (82 F.R.D. at 354) that "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety". Since respondent in this proceeding found it necessary to violate section 103(a) for the sole purpose of testing the constitutionality of a provision of the Act, I find that no portion of the penalty should be assessed under the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance.

As to the criterion of negligence, here again, respondent deliberately had to violate section 103(a) for the purpose of raising a constitutional issue. A willful violation could be considered to be in the category of gross negligence if respondent had not in good faith raised a valid constitutional issue. As indicated in the first part of this decision, although respondent lost the constitutional issue in its own litigation,

the Ninth Circuit held section 103(a)'s warrantless search provision to be unconstitutional in the Wait case, supra, and a district court held that provision to be unconstitutional in Marshall v. Douglas Dewey and Waukesha Lime & Stone Co., 493 F.Supp. 963 (E.D. Wis. 1980), appeal pending, U.S. Supreme Court No. 80-901. The fact that two courts have held the warrantless search provision to be unconstitutional and that the matter is now pending before the Supreme Court of the United States show that respondent raised a valid constitutional issue.

In the Dewey case, the court was critical of another court's holding in the Sink case, supra, to the effect that the injunction procedure in the Act permits an operator to present his objections to a district court before any sanctions are imposed. The court then noted in the Dewey case that Dewey had to pay a civil penalty of \$1,000 for a violation of section 103(a). The court in the Dewey case then stated (493 F.Supp. at 965):

While the preliminary injunction proceedings may get the defendants into court to vindicate their constitutional rights, the cost to them is indeed quite high. It seems a strange procedure to impose such a burden on a citizen in order to enjoy the fruits of the Fourth Amendment which courts are enjoined to liberally construe, and to which all owe a duty of vigilance for its effective enforcement, lest there be an impairment of those very rights for which it was adopted. Ker v. State of California, 374 U.S. 23, 83 S. Ct. 1623, 10 L.Ed.2d 726 (1963). This is a particularly high cost to pay to protect valid privacy claims. The mine operator must choose between protecting valid privacy interests or his pocketbook. In essence, the injunctive procedure does not present a fair means for protecting privacy interests.

The Ninth Circuit made similar comments in its Wait decision when it stated (628 F2d at 1259):

* * * While we accord Congress great deference in matters within its constitutional competency, we cannot allow it to determine by statutory definition the privacy expectations of American citizens. It is the duty of this court to preserve the constitutional values embodied in the Bill of Rights. In this day of ever-increasing federal health and safety regulation, it is especially important that we view encroachments upon individual privacy with exacting scrutiny. Blanket application of this type of regulation to businesses large and small demands that we carefully avoid the trampling under of the rights of those whose expectation of privacy in their enterprises may be real and substantial.

In view of the courts' belief that an operator ought to be able to test the constitutionality of the Act without being exposed to large civil penalties, I believe that the criterion of negligence should be given very little weight in assessing a civil penalty in this proceeding.

The final criterion to be considered is the gravity of the violation. The district court in the Nolichucky case at 490 F.Supp. 1041 stated at page 1043 that the inspector had gone to respondent's mine for the purpose of making a periodic safety and health inspection and that the sole purpose of the attempted inspection was to check routinely for possible violations of the Act. The court said that the inspector had no knowledge of any specific violation at respondent's pit or mill.

If the inspector had had reason to believe that dangerous conditions existed in respondent's pit or mill, he could have issued a withdrawal order and could, if necessary, have sought an injunction to require respondent to comply with the order. Moreover, if the inspector thereafter found any serious violations when the inspector examined respondent's pit and mill subsequent to respondent's losing its constitutional challenge to warrantless searches, those alleged violations became the subject of civil penalty proceedings, and if those violations are found to merit large penalties, they will no doubt be assessed in future cases.

There is no evidence that respondent's constitutional challenge of section 103(a) left any of respondent's employees exposed to dangerous conditions while the constitutional issues made their way through the courts. It would be just as speculative for me to assume that employees were exposed to dangerous conditions as it would be for me to find that they were not. Therefore, as to the criterion of gravity, I find that little weight should be given to that criterion in assessing a civil penalty in this proceeding. In view of the fact that a small operator is involved and that the inspector was not exposed to any threat of assault or verbal abuse, I find that respondent should be assessed only a nominal penalty of \$50 for the exercise of a valid constitutional right in challenging the warrantless search provisions of section 103(a) of the Act.

WHEREFORE, for the reasons given above, it is ordered:

(A) The motion for summary decision filed December 1, 1980, by counsel for the Secretary of Labor is granted.

(B) Within 30 days from the date of this decision, respondent shall pay a civil penalty of \$50.00 for the violation of section 103(a) of the Act alleged in Citation No. 107809 dated April 12, 1978.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 22 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 80-304
Petitioner : Assessment Control
: No. 15-11581-03007 F
v. :
: Triway No. 1 Mine
TRIWAY MINING COMPANY, :
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Charles J. Baird, Esq., Baird & Baird, P.S.C., Pikeville,
Kentucky, for Respondent.

Before: Administrative Law Judge

Pursuant to a notice of hearing dated November 17, 1980, as amended on January 13, 1981, a hearing in the above-entitled proceeding was held on March 4, 1981, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 315(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 273-284):

This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-304, on August 25, 1980, by the Secretary of Labor seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.200, by Triway Mining Company.

I shall make some findings of fact on which my decision will be based:

1. The Triway Mining Company produces approximately 5,300 tons of coal per month and employs about 14 miners, including a co-owner who does work underground on occasion, but who mostly works on the surface dealing with managerial problems and financial matters.

The testimony by the co-owner in this case shows that the company has not been very profitable. Exhibit A, for example, shows that the company had a net income of \$15,904.95 as of December 31, 1979. The operator was unable at the hearing to give his exact income or loss for the year 1980, but he did

testify at some length concerning his financial situation and he has shown in Exhibit B, page 2, that he has outstanding obligations totaling \$182,644.92. During his testimony we took the prices that he receives for coal on a tonnage basis and multiplied them by the number of tons that he sells each month and found that that amounted to approximately \$88,000.00. Then when we had subtracted from that sum the amount that he had to pay for trucking the coal and for his payroll, including his salary and that of the other co-owner, for roof-bolting cost, for electricity, for maintenance of electric motors, for tires for the equipment, and other expenses we found that he doesn't seem to have enough gross income to meet all of his obligations. The operator indicated that ever since he began operating the No. 1 Mine in 1978, he has been able to survive financially only by asking his coal purchaser to advance him money each month above and beyond that which he would be entitled to receive as of the 10th of the following month. Based on the testimony summarized above, I find that, as to the statutory criterion of whether the payment of penalties would cause the operator to discontinue in business, that payment of penalties would have a very adverse effect on his ability to continue in business.

2. The violation which was alleged in this case resulted from a fatal accident which occurred at Triway Mining Company's No. 1 Mine on September 28, 1979. On that day, the operator of the roof-bolting machine was observed by his assistant going beyond permanent support for the purpose of prying down some loose roof. In the process of doing the prying, a portion of the roof fell upon the operator of the roof-bolting machine and he was crushed by a section of the falling roof.

3. On October 2, 1979, a group of MSHA inspectors made an investigation at the mine and interviewed a number of people who worked at the mine on September 28, 1979, when the accident occurred. The transcript from that investigation was admitted into evidence as Exhibit 6, and on the basis of the testimony of the various people at the mine, a roof-control specialist wrote an order of withdrawal under section 107(a) and section 104(a) of the Act citing a violation of section 75.200. The primary violation alleged in that order and citation is a violation of respondent's roof-control plan, a copy of which is Exhibit 4 in this proceeding. The plan provides on page 12, in safety precaution No. 9, that where loose material is being taken down a minimum of two temporary supports on not more than 5-foot centers shall be installed between the workmen and the material being taken down unless such work can be done from an area supported by permanent roof supports installed in sound roof.

4. The roof bolter's helper on September 28, 1979, stated unequivocally at the hearing and during the interview by the inspectors on October 2, 1979, that the deceased person had proceeded beyond the permanent supports and had pried down some loose roof without setting the temporary supports. Consequently,

there is no doubt that a violation of section 75.200 occurred in that the roof-bolter operator did go beyond permanent supports without installing the necessary and required temporary supports.

5. Order of Withdrawal No. 708133 also alleged two other violations of the roof-control plan. It was alleged that there had not been torque testing of the roof bolts and it was also alleged that test holes had not been drilled as required by the roof-control plan. At the hearing, the section foreman testified that he had observed some test holes being drilled on September 28, the day of the accident, and the helper for the roof bolter testified that torques had been tested on September 28, 1979. While it is true that some of the transcript of the interview conducted by the inspectors on October 2, 1979, appears to show that the helper for the roof-bolting operator didn't always drill the test holes and that there might have been some failure to do some testing of the torque, I think the preponderance of the evidence here today supports my finding that those two portions of the roof-control plan were not violated on September 28, 1979.

6. One of the witnesses who testified at the hearing today was a person who conducts training for the miners in the No. 1 Mine and he testified that both the person who was killed in the accident and the two miners who normally helped him in his roof-bolting installation attended a class that he conducted during which they were instructed in proper roof-bolting procedures. His testimony and that of the operator give indication that the operator of the mine here involved was a safety-minded person who took safety as a serious matter and who had made every effort to have his miners do their work in a safe manner.

I believe that those findings are sufficient for the purposes of this case. Since I have already found that a violation occurred, it is now necessary to consider the six assessment criteria set forth in section 110(i) of the Act because those criteria have to be evaluated when a penalty is assessed. I have already indicated in Finding No. 1 above that the operator is in a marginal financial condition at best and that payment of penalties would have an adverse effect on his ability to continue in business.

Insofar as the criterion of history of previous violations is concerned, Exhibit 5 in this proceeding shows that there have been no previous violations of section 75.200 by the operator. The exhibit shows some other citations of section 75.200 by another inspector on October 2, 1979, but they would not be prior to the violation here alleged. Therefore Exhibit 5, does not show any prior violations of section 75.200. It has been my practice over the years that I have been hearing cases under the 1969 Act and the 1977 Act to increase a penalty if I find occurrence of previous violations of the same section of the regulations which is before me in a given hearing. Since the record does not show any previous violations of section 75.200, it is unnecessary under that criterion either to increase or decrease the penalty otherwise assessable under the other five criteria.

As to the criterion of whether the operator showed a good faith effort to achieve rapid compliance, there is some lack of proof one way or the other on that criterion because a different inspector from the one who wrote the order and citation here involved wrote the termination of the order and it appears that he lost the actual termination order. Consequently, the inspector who testified today and who wrote the original order, was unable to say exactly when the order was terminated. We normally find a good faith effort to achieve rapid compliance when abatement is accomplished within the amount of time given by an inspector in a citation. But where a withdrawal order is involved, a time is not given within which to comply, and the result is that we normally have some difficulty in a case involving a withdrawal order in determining whether the criterion of good faith compliance is applicable at all.

In this instance, I believe that the testimony we have heard today would merit a finding that the operator did demonstrate a good faith effort to achieve rapid compliance because, as I have indicated in Finding No. 6 above, the men who were acquainted with this violation were trained in proper roof-bolting techniques. There has been testimony by several witnesses to the effect that the operator constantly told the men not to go out from under permanent support for any purpose and the men who testified here today all explained that it was not their practice to go out from under permanent roof control for prying down roof or installing roof bolts. Consequently, I think the testimony supports my finding that there was a good faith effort to achieve rapid compliance of the section of the roof-control plan which was violated in this instance.

In finding No. 1, I have already discussed the fact that this mine produced 5,800 tons of coal per month and only employed 14 people. Those figures support a finding that a small operator is involved.

Next we come to the criterion of negligence. As to that criterion, I think that the testimony would support a finding that the operator was not personally negligent. The same factors which I used in making a finding as to good faith effort to achieve rapid compliance would also apply to the criterion of negligence in that the operator had seen that the men were instructed in the proper procedures and all of them who testified here today indicated that they had been instructed in those procedures and had been constantly reminded of safe operating procedures and the operator had supplies of roof bolts and timbers on hand in the mine at the time this violation occurred.

Mr. Baird in his closing argument made a good point in stressing that the quitting time at this mine was 2:00 p.m. and that this accident occurred around 1:30 p.m. He suggested that perhaps the deceased miner, in his haste to finish up bolting in the No. 4 heading, might have gotten careless at this particular time and just didn't take the precautions that he would ordinarily observe,

and that he had simply failed to put in the temporary supports. He failed to do it at a time when the mine roof happened to be very fragile and gave way.

Mr. Baird has asked me to find that the order was improperly written if I should find that the operator was not negligent. The Commission held in Secretary of Labor v. Ace Drilling, Inc., 2 FMSHRC 790 (1980), that liability for the occurrence of violations in coal mines is not conditioned upon fault. The Commission also held to the same effect in U.S. Steel Corporation, 1 FMSHRC 1306 (1979), and in Peabody Coal Company 1 FMSHRC 1494 (1979). Consequently, even though an operator may not be negligent in the occurrence of a given violation, that does not excuse him of the absolute liability to account for or be responsible for violations which occur in his mine.

We now come to the final criterion which is the question of gravity. The unfortunate aspect of a violation of the roof-control plan is that any violation of the roof-control plan at any time may result in a person's death. I have always considered violations of the roof-control plan generally to be the most serious of all violations. I think that the evidence in this case supports such a finding because, here, even assuming that the deceased had never before gone out from under supported roof either to install roof bolts or to pry down loose material, it just takes one time to fail to comply with the roof-control plan or any safety aspect of the roof-control system, for that oversight to result in a fatality. Therefore, it was without any doubt a very grave violation in this instance because the failure to install the temporary supports prevented the deceased from being able to get back to a safe place when the roof gave way.

The Commission held in Secretary of Labor v. Co-Op Mining Company 2 FMSHRC 3475 (1980), that judges are not bound by assessments recommended by the Assessment Office and Mr. Stewart for the Secretary has indicated in his closing argument that he did not think that the one recommended in this case by the Assessment Office was appropriate in light of the evidence that we have received here today. The Assessment Office, of course, when it recommended the penalty that was proposed originally in this case, did not have before it the evidence that we have heard here today. Consequently, there was reason for the Assessment Office to have suggested a very large penalty originally, and there are reasons for Mr. Stewart to believe, after hearing the testimony in this proceeding, that a mistake may have been made in proposing a large amount. Because of the extenuating circumstances that I have outlined above and the fact that the operator is in a very difficult financial position I am going to assess a much smaller penalty than I would otherwise.

Nevertheless, there were certain things that could have been done by management on September 28 that were not done. For example, it is a fact that the section foreman was operating the scoop, and in doing so, he was the primary person who was keeping production going at the mine. He conceded that he had not made his methane checks every 20 minutes as he was required to do, and he conceded that he was obligated to do more things than he could comfortably and efficiently perform on September 28, 1979. Also the operator was personally running the cutting machine and working underground because the cutting-machine operator had quit with only the previous day's advance notice and another person had had to go home because of illness. Those circumstances made it necessary for the section foreman to do work which kept him from doing his supervisory function as efficiently as he might otherwise have performed his supervisory responsibilities.

In view of the above-described aspects of management and the fact that there might have been some things done here that were not done, I believe that a penalty should be assessed which may be a hardship for the operator, but which I think is the very minimum that should be assessed in the circumstances. Therefore, a penalty of \$500.00 will be assessed for this violation of section 75.200.

WHEREFORE, for the reasons given above, it is ordered:

Respondent, within 30 days after the date of this decision, shall pay a civil penalty of \$500.00 for the violation of section 75.200 alleged in Order No. 708133 dated October 2, 1979.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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23 APR 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-104
Petitioner : A/O No. 33-01070-03050
v. :
: Allison Mine
THE YOUGHIOGHENY & OHIO COAL COMPANY, :
Respondent :

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Robert C. Kota, Esq., The Youghioghenny & Ohio Coal
Company, Martins Ferry, Ohio, for Respondent.

Before: Judge Cook

I. Procedural Background

On December 26, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). On January 21, 1980, the Youghioghenny & Ohio Coal Company (Respondent) filed an answer.

On April 21, 1980, the Petitioner filed a motion to approve settlement. On April 29, 1980, an order for production of additional information was issued requiring the Petitioner to submit more detailed justifications, if any existed, in support of the proposed settlement. On May 21, 1980, the Petitioner filed a response to the order for production of additional information stating that it could not submit additional justifications in support of the proposed settlement, and requesting that the matter be set for hearing.

On August 13, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on September 18, 1980, in Washington, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating.

Prior to the presentation of the evidence, the Petitioner moved to amend the proposal for a penalty to charge a violation of mandatory safety standard 30 C.F.R. § 75.1725(c) instead of mandatory safety standard 30 C.F.R. § 75.511. The Respondent had no objection to the motion, and, accordingly, the motion was granted (Tr. 8-9). The Respondent made an oral motion to dismiss at the close of the Petitioner's case-in-chief, arguing that the Petitioner had failed to establish a prima facie case for a violation of mandatory safety standard 30 C.F.R. § 75.1725(c). The motion was denied (Tr. 50-53).

Toward the conclusion of the hearing, Exhibit M-2 was reserved for the posthearing filing by the Petitioner of a computer printout setting forth detailed information as relates to the Respondent's history of previous violations. Exhibit O-1 was reserved for the posthearing filing by the Respondent of any documents it wished to file in response to Exhibit M-2. Also, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law.

Exhibit M-2 was filed on October 14, 1980, and was received in evidence by an order dated October 31, 1980. The Respondent did not file any documents in response to Exhibit M-2.

The Petitioner filed proposed findings of fact and conclusions of law on January 26, 1981. The Respondent did not file a posthearing brief or proposed findings of fact and conclusions of law.

II. Violation Charged

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>
779722	June 25, 1979	75.1725(c)

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called as its witness Federal coal mine inspector (electrical) Victor H. Patterson.

The Respondent called as its witness Mr. John Yarnell.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Directorate of Assessments summarizing by standard the Respondent's history of previous violations at the Allison Mine for which assessments have been paid, from June 26, 1977, to June 25, 1979.

M-2 is a computer printout compiled by the Directorate of Assessments setting forth a detailed listing of the Respondent's history of previous

violations at the Allison Mine for which assessments have been paid, beginning June 26, 1977, and ending June 25, 1979.

2. The Respondent did not introduce any exhibits in evidence.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations, (2) appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the proceeding (Tr. 10-11).

2. The Respondent's Allison Mine constitutes a mine within the meaning of the 1977 Mine Act (Tr. 10-11).

3. The Respondent produced approximately 1,356,816 tons of coal in 1979. The Allison Mine produced approximately 527,843 tons of coal in 1979 (Tr. 10-11).

B. Occurrence of Violation

Federal mine inspector Victor H. Patterson issued Citation No. 779722 during the course of his June 25, 1979, inspection at the Respondent's Allison Mine. The citation alleges that work was being performed on the Jeffrey continuous miner (Serial No. 34397), located in the No. 3 entry of the Main West section, in that a drive shaft was being installed by the gathering head. It is further alleged that the machine was energized, but that it was not being used for positioning or troubleshooting. The proposal for a penalty, as amended, alleges that the cited condition violates mandatory safety standard 30 C.F.R. § 75.1725(c), which provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

The evidence presented reveals that a three- or four-man repair crew was installing a drive shaft between the cutting motor and the gathering head on the righthand side of the electrically powered Jeffrey continuous miner,

Serial No. 34397. The evidence presented also reveals that machinery motion was not necessary to make adjustments during such operation.

The inspector concluded that the continuous miner had not been deenergized because the trailing cable had not been deenergized. The inspector testified as an expert that the trailing cable, and hence the continuous miner, must be deenergized at the power center through the following two-step operation: Trip the circuit breaker at the power center and then disconnect the trailing cable from the power center. The inspector did not check the circuit breaker on the machine because he felt it was unnecessary to do so. According to the inspector, it was unnecessary to check that particular circuit breaker because the machine is energized whenever the trailing cable is energized.

Mr. John Yarnell testified on behalf of the Respondent that turning the power off on the continuous miner simply required one to trip the circuit breaker on the machine. He did not interpret this to require disconnecting the trailing cable.

Essentially, this case presents two questions for resolution. The initial question presented is whether the term "power is off," as used in mandatory safety standard 30 C.F.R. § 75.1725(c) with reference to electrically powered equipment, means "deenergized." The second question presented is what is necessary to have the power off on a continuous miner during repairs or maintenance?

The resolution of these issues has turned, in large measure, on the expert testimony of Inspector Patterson and Mr. Yarnell. I find the inspector's testimony more probative because his credentials in electrical matters are more substantial than those of Mr. Yarnell.

The initial question presented is whether the term "power is off," as used in mandatory safety standard 30 C.F.R. § 75.1725 with reference to electrically powered equipment, means "deenergized." I conclude that it does for two reasons. First, Inspector Patterson, an electrical inspector, indicated that the term "power is off" means "deenergized." It is, therefore, logical to conclude that experts in electrical matters consider the power to be off a given piece of electrically powered equipment for purposes of repair and maintenance only when it has been deenergized.

Second, a comparison of 30 C.F.R. § 75.509 and 30 C.F.R. § 75.1725 indicates that the term "power is off" means "deenergized" when used in reference to electrically powered equipment. The scope of mandatory safety standard 30 C.F.R. § 75.509 is confined to electric power circuits and electric equipment. The standard provides that: "All power circuits and electrical equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing." (Emphasis added.) The wording of the regulation indicates that power is removed from electric circuits and electric equipment for purposes of repair and maintenance only when such circuits and equipment have been "deenergized."

Mandatory safety standard 30 C.F.R. § 75.1725 is a miscellaneous provision setting forth requirements for the operation and maintenance of machinery and equipment. It is generally applicable to the maintenance and operation of all machinery and equipment. Its reach is not expressly confined solely to electric machinery and electric equipment. Therefore, the term "power is off," as used in 30 C.F.R. § 75.1725(c), must be interpreted in light of the expansive reach of the standard so as to encompass power applications including, but not limited to, electrical power. 30 C.F.R. § 75.509 and 30 C.F.R. § 75.1725(c), when read together, indicate that the "power is off" electrically powered equipment only when such equipment has been "deenergized."

The second question presented is what type of action is necessary to deenergize a continuous miner? Is it sufficient to turn off the motor and to move the circuit breaker on the machine from the "on" to the "off" position; or is it also necessary to trip the circuit breaker at the power center and disconnect the trailing cable from the power center? For the reasons set forth below, I conclude that in order to deenergize a continuous miner within the meaning of mandatory safety standard 30 C.F.R. § 75.1725(c), it is necessary to trip the circuit breaker at the power center and then disconnect the trailing cable from the power center.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland on Statutory Construction, § 31.06, p. 362 (1972). According to 2 Am.Jur.2d, Administrative Law, § 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe work places must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974). "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972).

Inspector Patterson's testimony indicates that merely tripping the circuit breaker on the continuous miner is insufficient to deenergize the machine because, under the proper circumstances, power can accidentally be restored to the machine (Tr. 23-24, 26, 28-29, 34). A malfunction in the circuit breaker can cause it to be "on," notwithstanding the fact that it has been switched to the "off" position. The motor could have started under a single-phase condition, notwithstanding the fact that the circuit breaker was in the "off" position. The inspector was personally familiar with several such occurrences. The testimony of Mr. Yarnell tends to confirm that, no matter how remote, the possibility of such occurrences does exist. Tripping the circuit breaker at the power center and disconnecting the trailing cable from the power center eliminates the problem.

Additionally, according to Paul W. Thrush (ed.), A Dictionary of Mining, Mineral and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 306, the term "deenergize" means "to disconnect any circuit or device from the source of power." (Emphasis added.)

In view of the expert testimony of Inspector Patterson and the foregoing definition of the term "deenergize," I conclude that a continuous miner is deenergized within the meaning of 30 C.F.R. § 75.1725(c) only when the circuit breaker has been tripped at the power center and the trailing cable has been disconnected from the power center. Accord, Consolidation Coal Company, 2 FMSHRC 965 (1980) (Lasher, J.)

A violation of mandatory safety standard 30 C.F.R. § 75.1725(c) has been established by a preponderance of the evidence.

C. Negligence of the Operator

The inspector testified that, based upon the amount of work performed, the men probably had been working on the machine for approximately 1 hour. There is no probative evidence tending to show that supervisory personnel knew or should have known of the condition. Accordingly, I conclude that the Petitioner has failed to prove operator negligence.

D. Gravity of the Violation

The occurrence of the event against which the cited standard is directed was improbable. The repair crew consisted of three or four men. In the event of an occurrence, it is more probable than not that one person would have sustained serious or fatal injuries as a result of achieving contact with rotating machine parts.

Accordingly, it is found that the violation was accompanied by moderate gravity (see Tr. 23).

E. Good Faith in Attempting Rapid Abatement

The violation was abated in a prompt fashion. The repair crew immediately disconnected the trailing cable and locked it out (Tr. 19, 24).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. Size of the Operator's Business

The parties stipulated that the Respondent produced approximately 1,356,816 tons of coal in 1979. The parties further stipulated that the Allison Mine produced approximately 527,843 tons of coal in 1979 (Tr. 10-11).

G. History of Previous Violations

The history of previous violations at the Allison Mine for which the Respondent had paid assessments, beginning June 26, 1977, and ending June 25, 1979, is summarized as follows:

<u>30 C.F.R. Standard</u>	<u>Year 1 6/26/77 - 6/25/78</u>	<u>Year 2 6/26/78 - 6/25/79</u>	<u>Total</u>
All sections	246	467	713
75.1725(c)	0	1	1

(Exh. M-2). (All figures are approximations.)

H. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of a civil penalty in this case will adversely affect the Respondent's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. I find, therefore, that a penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to continue in business.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. The Youghiogeny & Ohio Coal Company and its Allison Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

3. Federal mine inspector Victor H. Patterson was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The condition cited in Citation No. 779722 existed in the Respondent's Allison Mine on June 25, 1979, and constituted a violation of mandatory safety standard 30 C.F.R. § 75.1725(c).

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Petitioner's proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

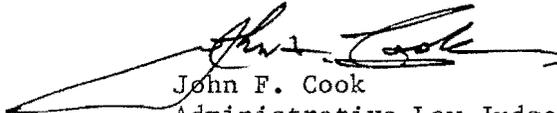
Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
779722	June 25, 1979	75.1725(c)	\$175

ORDER

IT IS ORDERED that the oral determination made during the hearing denying the Respondent's motion to dismiss be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the Respondent pay a civil penalty in the amount of \$175 within the next 30 days.


John F. Cook
Administrative Law Judge

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S.
Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

23 APR 1981

DELMONT RESOURCES, INC., : Notice of Contest
Contestant :
v. : Docket No. PENN 80-268-R
: :
SECRETARY OF LABOR, : Citation No. 624406
MINE SAFETY AND HEALTH : January 15, 1980, modified to
ADMINISTRATION (MSHA), : to May 14, 1980
Respondent :
: Delmont Mine

DECISION

Appearances: Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley,
Whyte & Hardesty, Pittsburgh, Pennsylvania, and Raymond J.
Hoehler, Esq., Greensburg, Pennsylvania, for the Contestant;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department
of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Cook

I. Procedural Background

On June 13, 1980, Delmont Resources, Inc. (Delmont), filed a notice of
contest in the above-captioned proceeding pursuant to section 105(d) 1/ of

1/ Section 105(d) of the 1977 Mine Act provides as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other
mine notifies the Secretary that he intends to contest the issuance or modifi-
cation of an order issued under section 104, or citation or a notification of
proposed assessment of a penalty issued under subsection (a) or (b) of this
section, or the reasonableness of the length of abatement time fixed in a
citation or modification thereof issued under section 104, or any miner or
representative of miners notifies the Secretary of an intention to contest
the issuance, modification, or termination of any order issued under section
104, or the reasonableness of the length of time set for abatement by a cita-
tion or modification thereof issued under section 104, the Secretary shall
immediately advise the Commission of such notification, and the Commission
shall afford an opportunity for a hearing (in accordance with section 554 of
title 5, United States Code, but without regard to subsection (a)(3) of such
section), and thereafter shall issue an order, based on findings of fact,

the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act) to contest Citation No. 624406, as modified on May 14, 1980. The citation was issued at the Delmont Mine on January 15, 1980, 2/ pursuant to section 104(d)(1) of the 1977 Mine Act. 3/ The notice of contest states, in part, as follows:

1. At approximately 0900 hours on Tuesday, January 15, 1980, Federal Mine Inspector Anthony J. Russo issued Citation No. 0624406 (hereinafter sometimes "Citation"), pursuant to the provisions of Section 104(d)(1) of the [1977 Mine] Act, for a condition he allegedly observed in the 4 Left Section I.D. No. 003 of Delmont Resources' Delmont Mine.

2. The aforesaid Citation which was issued on January 15, 1980 and alleged a violation of 30 C.F.R. § 75.200 further alleged that Republic Steel Corporation was the operator of the Delmont Mine.

3. Under the heading and caption "Condition or Practice" the aforesaid Citation also alleged that:

"The approved roof control plan was not being complied with in the entries of the working section of 4 Left I.D. No. 003. All three entries from the faces outby approximately 200 feet including cross cuts between the three entries and all the

footnote 1 (continued)

affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

2/ The citation erroneously designated Republic Steel Corporation as the operator of the Delmont Mine. The citation was modified on May 14, 1980, to show the operator's name as Delmont Resources, Inc., not Republic Steel Corporation (see Exhs. M-1 and M-8).

3/ Section 104(d)(1) of the 1977 Mine Act provides, in part, as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

way down the No. 1 entry to the belt conveyor were driven in excess of 18 feet wide. The measurements were from 19 to 21 feet wide."

The aforesaid Citation directed that the condition be abated by Friday, January 18, 1980, but by no specific time.

4. Despite the abatement period set forth in the aforesaid Citation, it is averred upon information and belief, that Inspector Russo told the Delmont Mine foreman, in the presence of others, that all of the entries would have to be timbered by 9 a.m. Wednesday, the following day, January 16, 1980 or that a withdrawal order pursuant to Section 104(d)(1) of the Act would be written.

5. At 0800 hours on Friday, January 18, 1980, Inspector Russo issued modified Citation No. 0624406-1 (hereinafter "Modification No. 1") pursuant to the provisions of Section 104(d)(1) of the Act. Modification No. 1 did not specify the area of the mine to which it applied.

6. Modification No. 1, which was issued on January 18, 1980, alleged under the heading and caption "Justification for Action Checked Below" that:

"The Citation \$0624406 is hereby modified to change part and section to 75-1704-1-A instead of 75.0200 and to include in the Citation that until the area is supported with posts on (5) five foot centers the required width of six feet could not be maintained in the designated return escapeway."

7. Modification No. 1, by necessity, appeared to revoke the violation alleged in the aforesaid Citation. However, while Modification No. 1 changed the part and section of 30 C.F.R. cited from 30 C.F.R. § 75.200 (Roof Support) to 30 C.F.R. § [75.]1704-1-A (Escapeway), the language of the aforesaid Citation which alleged a violation of the approved roof control plan was not deleted.

8. At 1030 hours on Friday, January 18, 1980, Inspector Russo terminated the aforesaid Citation.

9. At 0710 hours on Wednesday, January 23, 1980, Inspector Russo modified Citation No. 0624406 a second time (hereinafter "Modification No. 2") to specify 800 hours as the time for abatement on the date which had already been specified in Citation No. 0624406.

10. At 0700 hours on Wednesday, May 14, 1980, Inspector Russo modified Citation No. 0624406 for a third time (hereinafter "Modification No. 3") to change the name of the operator from Republic Steel Corporation to Delmont Resources, Inc.

11. Delmont Resources avers that Citation No. 0624406, as modified, is invalid and void and should be vacated and set aside for the following reasons:

(a) The Citation, as modified, failed to cite a condition or practice which constitutes a violation of a mandatory health or safety standard under 30 C.F.R. § 75.200;

(b) The Citation, as modified, failed to cite a condition or practice caused by an unwarrantable failure of Delmont Resources to comply with a mandatory health or safety standard;

(c) The Citation, as modified, failed to cite a condition or practice of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard;

(d) The Citation, as modified, failed to particularize the provisions of the Act or regulations which were allegedly violated, and was inadequately specific;

(e) The Citation, as modified, did not particularize the exact locations which were allegedly in violation of the approved roof control plan and was inadequately specific;

(f) The Citation, as modified, failed to give Delmont Resources an adequate and reasonable time for abatement of the alleged violation;

(g) In issuing and in modifying the Citation, the Inspector failed to give due consideration to the fact that the roof in the entries and cross cuts of the 4 Left I.D. No. 003 Section of the Delmont Mine consisted of sand rock with no cracks or slips and that the cross cuts were posted off;

(g) In issuing and modifying the Citation, the Inspector failed to give due consideration to the fact that the alleged violation presented a

non-immediate and non-serious threat to the safety of miners;

(h) In issuing and modifying the Citation, the Inspector acted arbitrarily, unreasonably, capriciously and in total disregard of the prevailing standards for the issuance of Section 104(d)(1) citations.

12. Subsequently, on dates specified below, Inspector Russo, pursuant to Section 104(d)(1) of the Act, issued the following Orders which reference the aforesaid Citation:

(a) Order No. 0624408 issued on January 16, 1980;

(b) Order No. 0624410 issued on January 24, 1980;

(c) Order No. 0624412 issued on February 2, 1980; and

(d) Order No. 0624414 issued on February 14, 1980.

(Footnote omitted). 4/

Delmont prayed for the entry of an order vacating the citation, as modified, and declaring all actions taken, or to be taken, with respect thereto or in consequence thereof null, void and of no effect.

On July 3, 1980, the Mine Safety and Health Administration (MSHA) filed an answer and motion for continuance. In its answer, MSHA (1) admitted the issuance of Citation No. 624406, as modified, and alleged that it was properly issued; (2) erroneously alleged that the citation was issued pursuant to section 104(a) of the 1977 Mine Act; and (3) alleged that a violation of a mandatory safety standard occurred. MSHA's motion for continuance requested that the case be continued pending the filing of a civil penalty proceeding addressing the subject citation. On July 11, 1980, Delmont filed a reply to MSHA's motion for continuance setting forth Delmont's opposition to a continuance. The motion for continuance was denied on July 28, 1980.

On August 8, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on September 16, 1980, in Washington, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating. Following the presentation of evidence, a schedule was set

4/ Copies of the referenced citation, termination and modifications were attached to the notice of contest as Exhibits A through E.

for the filing of posthearing briefs and proposed findings of fact and conclusions of law. MSHA and Delmont filed posthearing briefs on November 17, 1980, and November 20, 1980, respectively. Neither party filed a reply brief.

II. Witnesses and Exhibits

A. Witnesses

MSHA called as its witnesses Anthony J. Russo, a Federal mine inspector; James C. DeForrest, a belt repairman at the Delmont Mine; and Roger Uhazie, a Federal coal mine inspection supervisor.

Delmont called as its witnesses John J. Cunnard, Jr., a section foreman at the Delmont Mine; and Homer Miller, the mine foreman at the Delmont Mine.

B. Exhibits

1. MSHA introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 624406, January 15, 1980, 30 C.F.R. § 75.200.

M-2 is a copy of the Delmont Mine's approved roof-control plan, dated July 9, 1979.

M-3 is a copy of a map showing the section of the Delmont Mine encompassed by the citation.

M-4 is a copy of the termination of M-1.

M-5 is a copy of modification 624406-1, dated January 18, 1980.

M-6 is a copy of modification 624407-3, dated January 24, 1980.

M-7 is a copy of modification 624406-2, dated January 23, 1980.

M-8 is a copy of modification 624406-3, dated May 14, 1980.

2. Delmont introduced the following exhibits in evidence:

O-1 is a map of the 4 Left Section of the Delmont Mine.

O-2 is a drawing, based upon drawing No. 1-A of the approved roof-control plan, illustrating the first step of the mining cycle in a typical working place.

O-3 is a drawing, based upon drawing No. 1-A of the approved roof-control plan, illustrating the second step of the mining cycle in a typical working place.

O-4 is a drawing, based upon drawing No. 1-A of the approved roof-control plan, illustrating the third step of the mining cycle in a typical working place.

O-5 is a copy of a memorandum dated July 27, 1977, from the Assistant Administrator for Coal Mine Health and Safety, Mining Enforcement and Safety Administration, United States Department of the Interior, to Coal Mine Health and Safety District Managers, addressing the subject of unwarrantable failure violations under section 104(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970).

3. X-1 is a drawing prepared by James C. DeForrest during the course of his testimony.

III. Issues

The general question presented is whether Citation No. 624406, as modified on May 14, 1980, was properly issued to Delmont pursuant to section 104(d)(1) of the 1977 Mine Act. The specific issues are as follows:

A. Whether Citation No. 624406, as modified by the various modifications, complied with the specificity requirement set forth in section 104(a) of the 1977 Mine Act.

B. Whether the condition or practice cited in Citation No. 624406 on January 15, 1980, constituted a violation of mandatory safety standard 30 C.F.R. § 75.200.

C. If the condition or practice cited in Citation No. 624406 on January 15, 1980, constituted a violation of mandatory safety standard 30 C.F.R. § 75.200, then whether such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard, and whether such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

IV. Opinion and Findings of Fact

A. Stipulations

1. The Delmont Mine is owned and operated by the Contestant, Delmont Resources, Inc. (Tr. 8-9).

2. The Delmont Mine is subject to the jurisdiction of the 1977 Mine Act (Tr. 8-9).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 8-9).

4. The subject citation, modifications and termination thereof were properly served by a duly authorized representative of the Secretary of Labor

upon an agent of Delmont Resources, Inc., at the dates, times and places stated therein (Tr. 8-9).

5. The alleged violation was abated in a timely fashion (Tr. 9).

6. Delmont Resources, Inc., produced approximately 65,655 tons of coal in 1979, and has approximately 50 employees (Tr. 9).

B. Specificity of Citation No. 624406

Delmont's initial challenge asserts that Citation No. 624406, when viewed in light of the subsequent modifications, fails to satisfy the specificity requirement set forth in that portion of section 104(a) of the 1977 Mine Act which provides that "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the [1977 Mine] Act, standard, rule, regulation, or order alleged to have been violated." The record contains the following facts material to the issue of whether the specificity requirement has been satisfied:

Federal mine inspector Anthony J. Russo visited the Delmont Mine on January 15, 1980, to continue a regular inspection. At approximately 9 a.m., he issued Citation No. 624406 charging a violation of mandatory safety standard 30 C.F.R. § 75.200 in that "[t]he approved roof control plan was not being complied with in three entries of the working section of 4 Left, I.D. No. 003. All three entries from the faces outby approximately 200 feet including the crosscuts between the three entries, and all the way down the No. 1 entry to the belt conveyor were driven in excess of 18 feet wide. The measurements were from 19 to 21 feet wide." The citation was served to John J. Cunnard, Jr., a section foreman, and designated Republic Steel Corporation as the mine operator. The operator's agents were told that abatement was due by 8 a.m. on January 18, 1980. The termination due date appears on the face of the citation, but the time does not. The operator's agents were notified orally that 8 a.m. was the precise hour by which abatement was due.

The testimony of Inspector Russo and the testimony of Mr. Homer Miller, the mine foreman, reflects agreement that abatement procedures were discussed on January 15, 1980. However, they demonstrated some disagreement as to precisely what was said and as to where it was said. Inspector Russo testified that when he returned to the surface he instructed mine management to install wooden posts in those areas exceeding 19 feet in width. He denied requiring them to install posts all the way down the No. 1 entry. Mr. Miller testified that he discussed the matter underground with Inspector Russo, at which time the inspector stated that he had found some wide places and set forth his requirements to abate the citation. According to Mr. Miller, Inspector Russo told him to install posts on 4-foot centers from the face all the way to the mouth of the entry, and did not limit it to those areas greater than 18 feet wide. Regardless of which account is the most accurate, both witnesses agree that mine management was informed of the actions necessary to abate the citation.

Delmont commenced its abatement activities on January 15, 1980, and completed them on January 16, 1980. Abatement was accomplished through the installation of 365 posts on 4-foot centers.

Inspector Russo returned to the mine on January 18, 1980. At approximately 8 a.m., he issued modification 624406-1 which states that "Citation No. 624406 is hereby modified to change the part and section to 75.1704-1(a) instead of 75.200 and to include in the citation that until the area is supported with posts on 5-foot centers, the required width of 6 feet could not be maintained in the designated return escapeway" (Exh. M-5). Inspector Russo's testimony clarified this modification. His intention was to modify Citation No. 624407, which was also issued on January 15, 1980. ^{5/} He corrected his error on January 24, 1980, by issuing modification 624407-3 to show that modification 624406-1 was modified to 624407-1 (Exh. M-6).

When modification 624406-1 was issued, the inspector did not tell the operator that the abatement procedures discussed on January 15, 1980, were changed in any way. More significantly, modification 624406-1 was served on Mr. Miller. His testimony makes clear that he knew at the time that Inspector Russo had committed an error in writing the modification.

At 10:30 a.m. on January 18, 1980, Inspector Russo terminated Citation No. 624406. The citation was terminated because "[w]ooden posts were installed to bring the width of all entries and crosscuts down to 18 feet wide as required by the roof control plan" (Exh. M-4). The termination was served on Mr. Miller.

At 7:10 a.m. on January 23, 1980, the citation was modified to fill an omission on the face of the original citation by designating 8 a.m. as the time by which termination was due (Exh. M-7).

At 7 a.m. on May 14, 1980, the citation was modified "to show the operator name as 'Delmont Resources, Inc.' not Republic Steel Corporation" (Exh. M-8).

Exhibits M-4, M-5, M-6, M-7 and M-8 were served on Homer Miller and designate Delmont Resources, Inc., as the mine operator.

5/ The following description appears under the "condition or practice" heading on Citation No. 624407:

"An area 14 feet long and 11 feet wide in the designated return escape-way approximately 100 feet outby survey point 284 was not supported according to the approved roof control plan, bolting, full bolting or crossbarring. The area was supported solely by wooden posts which is not according to the plan. This condition was allowed to exist in the 4 Left section, I.D. No. 003, survey point 284 in the No. 3 entry" (Tr. 99).

Delmont argues that the citation, as modified, does not satisfy the requirement set forth in section 104(a) of the 1977 Mine Act that the citation contain a reference to the regulation allegedly violated. Delmont points out that the citation as written on January 15, 1980, alleges a violation of mandatory safety standard 30 C.F.R. § 75.200, and argues that modification 624406-1 of January 18, 1980, changed the cited regulation to 30 C.F.R. § 75.1704-1(a). The latter regulation pertains to the requirements for designated escapeways. According to Delmont, the statute requires the citation to specify with precision the regulation alleged to have been violated so that the mine operator will have notice as to the type of abatement action required. Delmont further argues that a modification changing the cited regulation creates ambiguity or confusion as to what the precise violation is and as to whether the work performed has abated the initial citation (Delmont's Posthearing Brief, pp. 2-4).

The applicable law can be stated concisely. Adequate notice is necessary to enable the mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." Old Ben Coal Company, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 CCH OSHD par. 19,723 (1975). In a civil penalty proceeding, notice is adequate, even though it does not specify the particular section of the 1977 Mine Act or mandatory safety standard violated, if the alleged violation is described with sufficient specificity to permit abatement. At the stage where the operator is charged with a violation of law in a civil penalty proceeding, it is entitled to adequate and timely notice of the section of the 1977 Mine Act or mandatory safety standard involved so as to permit preparation of a timely and adequate defense. Old Ben Coal Company, *supra*; Eastern Associated Coal Corporation, 1 IBMA 233, 79 I.D. 723, 1971-1973 CCH OSHD par. 15,388 (1972). In determining whether adequate notice has been given, the inquiry need not be confined to the four corners of the citation or order. It is appropriate to consider other oral and written communications given to the operator. Citations and orders will not be invalidated for failure to comply with the specificity requirement absent a showing that prejudice has resulted to the mine operator. Jim Walters Resources, Inc., 1 FMSHRC 1827, 1 BNA MSHC 2233, 1979 CCH OSHD par. 24,046 (1979) declining to follow Armco Steel Corporation, 8 IBMA 88, 84 I.D. 454, 1977-1978 CCH OSHD par. 22,089 (1977), aff'd. on reconsideration, 8 IBMA 245, 1978 CCH OSHD par. 22,550 (1978).

Delmont failed to introduce any probative evidence to prove that any or all of the modifications created ambiguity or confusion as to the precise violation charged, or created ambiguity or confusion as to whether the work performed was adequate to abate the initial citation. In fact, the evidence makes it clear beyond a shadow of a doubt that any irregularities appearing on the face of the citation or on the face of any of the modifications created absolutely no ambiguity or confusion as to either point mentioned by Delmont.

Inspector Russo informed Delmont's agent on January 15, 1980, that abatement was due by 8 a.m. on January 18, 1980. In fact, the abatement work was completed the following day, and the citation was terminated at 10:30 a.m. on January 18, 1980.

Modification 624406-1, issued at 8 a.m. on January 18, 1980, created no confusion or ambiguity because Mr. Miller knew at the time that the modification was issued in error. If Mr. Miller had any doubts on this point, they should have been resolved when the inspector terminated the citation 2-1/2 hours later without requiring additional abatement work.

Additionally, Delmont has not shown that any irregularities appearing on the face of the citation, or on the face of any of the modifications, in any way prejudiced its ability to prepare for the instant hearing. Delmont defended on the merits by presenting evidence on the issues of whether the cited condition or practice violated 30 C.F.R. § 75.200, whether the violation was caused by the operator's unwarrantable failure to comply with such mandatory safety standard, and whether the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

In view of the foregoing, I conclude that any irregularities appearing on the face of either the citation or the various modifications did not result in any prejudice to Delmont's abatement efforts or trial preparation. Delmont's challenge to Citation No. 624406 on the grounds that it fails to comply with the specificity requirement set forth in section 104(a) of the 1977 Mine Act is not well founded. Such basis for challenge is rejected because it is unsupported by the evidence.

C. Occurrence of Violation

As noted above, Citation No. 624406 charges that a violation of mandatory safety standard 30 C.F.R. § 75.200 existed at the Delmont Mine on January 15, 1980, in that "[t]he approved roof control plan was not being complied with in three entries of the working section of 4 Left, I.D. No. 003. All three entries from the faces outby approximately 200 feet including the crosscuts between the three entries, and all the way down the No. 1 entry to the belt conveyor were driven in excess of 18 feet wide. The measurements were from 19 to 21 feet wide" (Exh. M-1). The Delmont Mine's approved roof-control plan, in effect on January 15, 1980, prescribed 18 feet as the maximum width for entries, crosscuts, rooms and room crosscuts. The approved roof-control plan does not allow for any type of deviation from the 18-foot width requirement.

Mandatory safety standard 30 C.F.R. § 75.200 provides that:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted

and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The mine operator violates mandatory safety standard 30 C.F.R. § 75.200 by failing to comply with the provisions of the approved roof-control plan. Pontiki Coal Corporation, 1 FMSHRC 1476, 1 BNA MSHC 2208, 1979 CCH OSHD par. 23,979 (1979); Peabody Coal Company, 8 IBMA 121, 84 I.D. 469, 1977-1978 CCH OSHD par. 22,111 (1977); Zeigler Coal Company, 5 IBMA 132, 82 I.D. 441, 1975-1976 CCH OSHD par. 19,998 (1975).

The citation encompasses a rather extensive portion of the Delmont Mine's 4 Left Section. It appears to allege that the condition or practice existed in the No. 1 entry from the face to the belt conveyor drive; in the Nos. 2 and 3 entries from the faces outby approximately 200 feet; in the last open crosscut, the second open crosscut, and the third open crosscut between Nos. 1 and 2 entries; and the last open crosscut, the second open crosscut, and the third open crosscut between Nos. 2 and 3 entries (Exh. M-1, M-3). The citation, on its face, further appears to allege that all such areas were uniformly driven in excess of 18 feet wide, with the width measurements ranging from 19 to 21 feet. However, the evidence is insufficient to sustain such a sweeping allegation.

MSHA now appears to concede that all areas encompassed by the citation were not uniformly driven in excess of 18 feet wide. MSHA argues that Inspector Russo took approximately 16 measurements in the entries and crosscuts and obtained readings of 19 to 21 feet. MSHA further argues that the excessive width condition existed for a distance of approximately 10 to 21 feet in the areas where the measurements were taken (MSHA's Posthearing Brief, pp. 3-4).

It appears that measurements were taken only in locations that appeared wide. The evidence shows that the No. 1 entry was approximately 700 to 800 feet long, and that measurements were taken at three to five locations in the No. 1 entry. At least three of these locations were outby the power box. It appears that the power box was located two crosscuts outby the face. Measurements were taken at two locations in the No. 2 entry. One of these locations was in the vicinity of spad No. 269, and the other location was in the vicinity of spad No. 281. Measurements were taken at two locations in the No. 3 entry from spad No. 268 to spad No. 284. Measurements were taken

in the last open crosscut between No. 1 entry and No. 2 entry, in the last open crosscut between No. 2 entry and No. 3 entry, and in the second open crosscut between the No. 2 entry and the No. 3 entry. The measurements at each such location revealed the width to be between 19 and 21 feet, and there were no additional supports in the area.

The evidence is sufficient to establish the length of the affected areas at only three locations where measurements were taken. The condition existed for a distance of 2 to 3 feet at the following locations: (1) the second open crosscut between the No. 2 entry and the No. 3 entry; (2) the last open crosscut between the No. 1 entry and the No. 2 entry; and (3) a spot in the No. 1 entry approximately 60 feet outby the face.

In view of the foregoing, I find the evidence sufficient to establish a practice at the Delmont Mine in violation of the roof-control plan's 18-foot width requirement for entries and crosscuts. The evidence is sufficient to establish the existence of the individual conditions comprising the practice only at those locations where measurements were actually taken. A practice in violation of mandatory safety standard 30 C.F.R. § 75.200 has been established by a preponderance of the evidence.

D. Unwarrantable Failure

A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1977-1978 CCH OSHD par. 21,676 (1977).

The evidence presented in this case indicates that the violation of January 15, 1980, was caused by the operator's unwarrantable failure to comply with the 18-foot width requirement for entries and crosscuts as set forth in the approved roof-control plan. The practice resulted from a combination of poor mining practices, a pitch from left to right in the floor of the entries, and the unevenness of the sandrock roof. None of the excessive widths were caused by spalling or sloughing.

The evidence presented indicates that some of the wide places existed for a very substantial period of time, and that the individual conditions comprising the practice should have been detected during the course of the required examinations. The evidence further indicates that the excessive width conditions should have been detected by the individuals in charge of roof bolting on the section. Considering the roof-bolting pattern, the conditions could have been easily and promptly detected by simply measuring the distance between the last roof bolt installed and the rib. However, as a general rule, such measurements were not taken. Additionally, simply gazing at the roof-bolting pattern from the proper angle would have been sufficient to detect the wide areas.

Of even greater significance is the testimony of Mr. John J. Cunnard, Jr., the section foreman. His testimony indicates that he was aware that some excessively wide areas existed in the cited portion of the Delmont Mine.

In view of the foregoing, I conclude that Delmont failed to abate a practice that it knew or should have known existed, and that Delmont failed to abate the practice because of a lack of reasonable care or because of an absence of due diligence. The violation was caused by an unwarrantable failure to comply with the width requirements of the approved roof-control plan.

E. Significant and Substantial Criterion

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In Secretary of Labor, MSHA v. Cement Division, National Gypsum Company, Docket No. VINC 79-154-PM (FMSHRC, filed April 7, 1981), the Federal Mine Safety and Health Review Commission (Commission) held "that a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Slip op. at 4. Additionally, the Commission stated that "[a]lthough the [1977 Mine Act] does not define the key terms 'hazard' or 'significantly and substantially', in this context we understand the word 'hazard' to denote a measure of danger to safety or health, and that a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." Slip op. at 6 (footnote omitted.)

As noted previously in this decision, the evidence establishes only that the 18-foot width requirement was exceeded at those locations where measurements were made. The measurements at such locations showed them to be 19 to 21 feet wide. The evidence establishes the length of the violation at only three locations within the cited area. In those three areas, the excessive width condition existed for a distance of 2 to 3 feet.

The evidence reveals that the roof in the No. 1 entry was composed of sand rock almost all the way to the face where it changed to shale (Tr. 163, 182). The roof was in good condition to within approximately 100 feet of the face (Tr. 37, 63-64, 115-116). The roof in such area was not cracked and no pieces were falling from it (Tr. 115-116). However, the roof was loose and cracked in the face area of the entry (Tr. 63-64).

A fault existed in the No. 2 and No. 3 entries. It appears that the fault ran diagonally from the lower right hand side of the section to the upper left hand side of the section (Tr. 126). The face area of the No. 2 entry and the face area of the No. 3 entry were cracked and deteriorated due to the fact that they were going through the fault area (Tr. 37).

It appears that good roof conditions existed in the last open crosscut (Tr. 109-111).

The inspector did not take a sound and vibration test because he did not have the necessary equipment (Tr. 60). However, it appears that the roof was in a safe condition. The approved roof-control plan required the installation of roof bolts at least 36 inches in length (Tr. 154, Exh. M-2, p. 2). The mine operator had installed roof bolts measuring 4 feet in length (Tr. 154, 182), and none of the roof bolts in the cited area were bearing excessive weight (Tr. 64, 164). There were no additional supports in the cited area (Tr. 36). Additionally, there was little or no spalling or sloughing of the roof or ribs (Tr. 34-35, 84, 164).

For the reasons set forth below, I find the evidence insufficient to sustain the allegation that the practice in violation of mandatory safety standard 30 C.F.R. § 75.200 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

MSHA argues that Inspector Russo took approximately 16 measurements of the entries and crosscuts, and that the measurements revealed widths from 19 to 21 feet in areas approximately 10 to 21 feet in length. (MSHA's Posthearing Brief, pp. 3-4). It thus appears that MSHA maintains that the practice consisted of approximately 16 separate instances of excessive widths, measuring from 19 to 21 feet, each extending for distances of approximately 10 to 21 feet. MSHA argues that the practice met the significant and substantial criterion because "a roof fall was probable. Excessive widths without additional supports put stress on a roof. The inspector also noted that in certain areas the roof was cracked and deteriorated" (MSHA's Posthearing Brief, p. 10).

The evidence fails to support MSHA's position that the violation was significant and substantial. First, the evidence does not support the contention that the practice consisted of approximately 16 separate instances of excessive widths, each of which extended for approximately 10 to 21 feet in length. The evidence shows less than 16 instances of excessive widths, and in only three instances is there probative evidence as relates to length. In those three instances, the excessive width condition existed for a distance of 2 to 3 feet. The absence of more precise evidence as to length in the other locations is deemed of particular significance to the conclusion that MSHA has failed to prove that the violation was significant and substantial.

Second, there is no evidence that a roof fall was probable or that the roof was under stress. There was little or no spalling or sloughing. Four-foot roof bolts had been installed and the roof bolts were not bearing excessive weight.

Additionally, MSHA permitted Delmont to exceed the 18-foot width requirement by up to 12 inches at intermittent locations. This 12-inch deviation was apportioned with 6 inches on either side of the entry as

measured from the roof bolt closest to the rib (Tr. 87-88, 186, Exh. M-2). In this regard, it should also be noted that Inspector Russo intended to require posting only in those areas exceeding 19 feet in width (Tr. 87). The fact that MSHA permitted 19-foot widths under certain circumstances, and intended to permit them in the abatement of the cited practice, indicates that a 19-foot width measurement was not significant and substantial given the roof conditions in existence at the time. It appears that in at least some of the areas cited, the inspector obtained width measurements of approximately 19 feet prior to the issuance of the citation.

In view of the foregoing, I find the evidence insufficient to sustain a conclusion that the violation could have been a major cause of a danger to safety or health. The evidence is insufficient to sustain a conclusion that a reasonable likelihood existed that the hazard contributed to would have resulted in an injury. Accordingly, I conclude that MSHA has failed to prove that the violation described was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

V. Conclusions of Law

1. Delmont Resources, Inc. and its Delmont Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Anthony J. Russo was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance and modifications of Citation No. 624406.

4. Citation No. 624406, as modified, complied with the specificity requirement set forth in section 104(a) of the 1977 Mine Act.

5. Citation No. 624406 sets forth a practice in violation of mandatory safety standard 30 C.F.R. § 75.200, and in existence at the Delmont Mine on January 15, 1980, only to the extent found in Part IV(C), supra.

6. The subject violation of mandatory safety standard 30 C.F.R. § 75.200 was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard.

7. The subject violation of mandatory safety standard 30 C.F.R. § 75.200 was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

8. Citation No. 624406, as modified, was improperly issued under section 104(d)(1) of the 1977 Mine Act.

9. All of the conclusions of law set forth in Part IV, supra, are reaffirmed and incorporated herein.

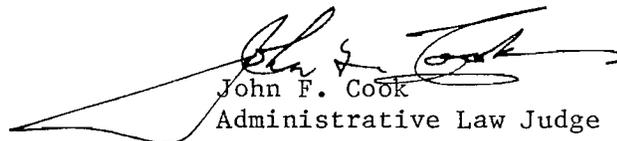
VI. Proposed Findings of Fact and Conclusions of Law

MSHA and Delmont filed posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, IT IS ORDERED that the notice of contest of 104(d)(1) Citation No. 624406 is GRANTED IN PART and DENIED IN PART. IT IS THEREFORE ORDERED that Citation No. 624406 be, and hereby is, MODIFIED from a 104(d)(1) citation to a 104(a) citation containing findings: (1) that on January 15, 1980, a practice in violation of mandatory safety standard 30 C.F.R. § 75.200, as set forth in Part IV(C), supra, existed in the 4 Left Section of the Delmont Mine; 6/ and (2) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard.

IT IS FURTHER ORDERED that Citation No. 624406, as so modified, be, and hereby is, AFFIRMED.


John F. Cook
Administrative Law Judge

6/ The "condition or practice" section of Citation No. 624406 is modified to read as follows:

"The approved roof control plan was not being complied with at certain locations in the working section of 4 Left, I.D. No. 003, in that the crosscuts and entries were driven in excess of 18 feet wide at such locations. There were three to five places in the No. 1 entry. At least three of these places were outby the power box, which was located two crosscuts outby the face. There were two places in the No. 2 entry, one in the vicinity of spad No. 269, and the other in the vicinity of spad No. 281. There were two places in the No. 3 entry from spad No. 268 to spad No. 284. Places existed in the last open crosscut between No. 1 entry and No. 2 entry, in the last open crosscut between No. 2 entry and No. 3 entry, and in the second open crosscut between the No. 2 entry and the No. 3 entry. The measurements at each such location revealed the width to be between 19 and 21 feet.

"The condition existed for a distance of 2 to 3 feet at the following locations: (1) the second open crosscut between the No. 2 entry and the No. 3 entry; (2) the last open crosscut between the No. 1 entry and the No. 2 entry; and (3) a spot in the No. 1 entry approximately 60 feet outby the face."

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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27 APR 1981

REPUBLIC STEEL CORPORATION,	:	Contest of Order
Contestant	:	
v.	:	Docket No. PENN 80-56-R
	:	
SECRETARY OF LABOR,	:	Clyde Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
LOCAL UNION NO. 688,	:	Complaint for Compensation
DISTRICT 5, UNITED MINE	:	
WORKERS OF AMERICA,	:	Docket No. PENN 80-112-C
Complainant,	:	
v.	:	Clyde Mine
	:	
REPUBLIC STEEL CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 81-29
Petitioner	:	A.C. No. 36-00967-03059
v.	:	
	:	Clyde Mine
REPUBLIC STEEL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: B. K. Taoras, Esq., Republic Steel Corporation, Coal Mining Division, Meadow Lands, Pennsylvania for Republic Steel Corporation;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor;
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.c. for Local Union 688, District 5, United Mine Workers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by Republic Steel Corporation (hereinafter Republic) on November 13, 1979, to contest an order of withdrawal issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(b) (hereinafter the Act). On January 3, 1980, the Contest of Order was dismissed without prejudice by Administrative Law Judge Joseph B. Kennedy. On October 9, 1980, the Federal Mine Safety and Health Review Commission (hereinafter Commission) vacated the order of dismissal and remanded the matter for further proceedings. Thereafter, the Contest of Order proceeding was consolidated with the Complaint of Compensation brought by Local Union 688, District 5, United Mine Workers of America (hereinafter UMWA) against Republic arising out of the order in controversy. At the time of the hearing and over Republic's objection, the civil penalty proceeding involving the underlying citation was also consolidated with the other two cases.

A hearing was held on these cases in Pittsburgh, Pennsylvania, on January 20-21, 1981. The following witnesses were called to testify on behalf of MSHA: Lawrence Merella, Robert Swarrow, William Thistlewaithe, and Robert Semancik. The UMWA called Gary Mylan as a witness. Republic called no witnesses.

ISSUES

1. Whether the order and citation were properly issued.
2. Whether Republic violated the Act or regulations as alleged by MSHA and, if so, the amount of the civil penalty which should be assessed.
3. Whether employees at the mine were idled by the order in question entitling them to receive compensation and, if so, the amount of compensation to which they are entitled.

APPLICABLE LAW

Section 104(b) of the Act, 30 U.S.C. § 814(b) provides as follows:

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.

Section 111 of the Act, 30 U.S.C. § 821, provides as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order is issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift,, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations,

the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. Republic operates the Clyde Mine.
2. The products or operations of Republic's Clyde Mine affect interstate commerce.
3. Republic is an operator for purposes of section 111 of the Act.
4. Inspectors Robert Swarrow, Lawrence Merella, and William Thistlewaithe were duly authorized representatives of the Secretary of Labor at all times relevant to this proceeding.
5. At 1:45 p.m., on September 24, 1979, Inspector Lawrence Merella issued to Republic at its Clyde Mine Citation No. 624247 pursuant to section 104(a) of the Act.
6. Citation No. 624247 alleged a violation of 30 C.F.R. § 75.200 as follows:

There was a violation of the roof control plans as hanging bolts, legs knocked out from cross bars and the roof above cross bars that had fallen away was not lagged to support broken roof on the main track haulage from 2 West to 2 Flat switch at the following locations: (1) from pump no. 22 -- 75 feet outby there were 23 hanging bolts; (2) two hanging bolts on the wire side just inby shelter hole no. 156; (3) 50 feet outby shelter hole no. 151 -- needs lagging over the cross bar on the wire side; (4) 300 feet inby the Jacuzzi pump -- the loose rock on the cross bars taken down and roof bolted; (5) 300 feet outby 3 East switch -- the area needs to be bolted or lagged above the cross bars; (6) 25 feet outby shelter hole no. 150 (near telephone) -- two bolts need to be installed; (7) just outby shelter hole no. 149 -- the left side above the cross bars needs lagging; (8) 20 feet outby shelter hole no. 148 -- a cracked cross bar needs replaced; (9) 300 inby 2-1/2 West switch -- two legs need be replaced two under cross bars and needs bolted; (10) 50 feet outby the bottom of 3 East switch -- two bars need replaced under cross bars and one leg replaced just outby 3 East switch; (11) inby no. 136 shelter hole -- 20 feet of coal rib

and broken rock on the wire side taken down; (12) replace broken cross bar -- 75 outby 3 East wreck latch; (13) replace four legs under cross bars -- outby shelter hole no. 1; (14) at shelter hole no. 129 -- replace three legs under cross bars; (15) 20 feet outby shelter hole no. 122 -- replace four hanging bolts; and (16) replace four hanging bolts outby shelter hole no. 126.

7. The parties stipulated and I find that the inspector was mistaken when he alleged a "violation of the roof control plans" because the area in question was driven prior to the enactment of the Federal Coal Mine Health and Safety Act of 1969.

8. The condition of the roof and rib in the Clyde Mine on September 24, 1979, was as stated in Citation No. 624247.

9. Citation No. 624247 establishes a termination due date of October 9, 1979, at 8 a.m.

10. During the period of time between the issuance of Citation No. 624247 and October 10, 1979, Republic took no action to abate the citation.

11. At noon on October 10, 1979, Inspector Robert E. Swarrow issued to Republic, at its Clyde Mine, withdrawal Order No. 624051 pursuant to the provisions of section 104(b) of the Act. The withdrawal order stated that it was issued because "no apparent effort was made by the operator to correct the roof conditions" in the 16 areas along the main track haulage listed in Citation No. 624247.

12. Republic presented no evidence concerning its inability to abate the citation within the time allowed by the citation.

13. On September 18 and 19, 1979, MSHA inspector, William Thistlewaithe, issued other citations for conditions along the haulage at Republic's Clyde Mine. These citations had not been abated prior to Inspector Merella's issuing Citation No. 624247. Inspector Thistlewaithe and the management of Clyde Mine had a discussion regarding the sequence or order of abatement of the citations. Prior to the issuance of Citation No. 624247, Inspector Thistlewaithe told Republic that if good faith was shown and an honest effort was performed toward getting the most hazardous conditions abated first, the time for abatement of other citations would be extended. On October 9, 1979, Inspector Thistlewaithe terminated one citation and extended the time for abatement of two others.

14. During all periods of time relevant to this proceeding, Republic regularly operated three daily shifts at its Clyde Mine. The shifts are commonly referred to as the midnight shift, the day shift, and the afternoon shift.

15. As a direct result of Order No. 624051, certain miners scheduled to work from 4 p.m. to midnight were idled for the entire afternoon shift of October 10, 1979.

16. Such miners, except for Mr. Bundy, have been compensated for 4 hours of such afternoon shift as indicated on Joint Exhibit No. 1.

17. As a direct result of Order No. 624051, certain miners scheduled from midnight to 8 a.m., on October 11, 1979, were idled for their entire 8 hour shift.

18. Joint Exhibit No. 2 identifies those miners who were idled during the midnight to 8 a.m. shift on October 11, 1979.

19. As a direct result of Order No. 624051, certain miners scheduled to work the day shift on October 11, 1979, were idled for their entire 8 hour shift.

20. Joint Exhibit No. 3 identifies those miners who were idled during the day shift of October 11, 1979.

21. The parties stipulated that if Order No. 624051 was affirmed, miners listed in Joint Exhibit Nos. 1, 2, and 3 are entitled to compensation for the period of time set forth in paragraphs 15 through 20 of the Findings of Fact herein.

22. In the 2 years prior to the issuance of Citation No. 624247, Republic was assessed 429 violations in 952 inspection days.

23. Republic's Clyde Mine is a large underground coal mine.

24. Republic is a large operator.

25. Order No. 624051 was modified on October 11, 1979, at 2 p.m., to allow use of the main track haulage because of the abatement efforts made by Republic up to that time.

DISCUSSION

I. Citation No. 624247

It appears that the area of the mine in controversy was driven in the late 1940's or early 1950's when there was no requirement of an approved roof control plan. Indeed, MSHA has now stipulated that the roof control plan does not apply to this citation. Republic contends that the citation is defective in that it alleges violations of the inapplicable plan. Republic goes on to assert that the inspector's "mere recital of the facts stated in the notice of violation without some recollection of the details of the pertinent facts are not sufficient to sustain MSHA's burden of proof." No authority is cited in support of Republic's arguments.

MSHA asserts that the inspector's reference to the roof control plan is of no consequence since the citation specifically alleges a violation of 30 C.F.R. § 75.200 which applies to all active mines. This regulation requires that "the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." MSHA asserts that Republic has not claimed any prejudice resulting from the inspector's error and that even where a condition does not violate the approved roof control plan, an operator may be liable for a violation of 30 C.F.R. § 75.200. MSHA cites the decision of Judge John F. Cook in Peabody Coal Company, 1 FMSHRC 1121, 1 BNA MSHC 2218 (August 29, 1979). In Peabody Coal Company, Judge Cook held as follows:

It is unnecessary to address the ambiguities in the roof control plan, if it is indeed ambiguous, because the plan is not the basis for the violation presented herein. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), the Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of the mandatory safety standard of [30 CFR 75.200]." 2 IBMA at 222.

Accordingly, where the evidence presented is sufficient to establish that the mine's roof was not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of 30 C.F.R. § 75.200.

Id. at 1150.

I agree with MSHA's contention that the inspector's error in charging a violation of the roof control plan is of no consequence in this proceeding. The citation specifically alleged a violation of 30 C.F.R. § 75.200. Republic does not claim that it was misled or prejudiced in any way by the error. The unrefuted testimony of the three MSHA inspectors fully establishes numerous areas of inadequately supported roof and one area of inadequately controlled rib along the main haulage track of the Clyde Mine. The uncontroverted evidence of record also establishes that miners traveled in these areas and were exposed to injuries from falling material.

I also agree with Judge Cook's decision in Peabody Coal Company, supra, that where the evidence establishes that the mine's roof was inadequately supported to protect persons from falls, it is unnecessary to prove a violation of the approved roof control plan in order to establish a violation of 30 C.F.R. § 75.200. This is particularly true in the instant case where the area in question was driven prior to the time approved roof control plans were required by law.

Republic's arguments, that the citation is defective because it alleged a violation of the roof control plan and that MSHA did not establish the

violation of 30 C.F.R. § 75.200 by a preponderance of the evidence, are rejected. Republic violated 30 C.F.R. § 75.200 as charged by MSHA and Citation No. 624247 is affirmed.

II. Order No. 624051

On September 24, 1979, MSHA issued the citation to Republic for inadequately supported roof and rib. That citation allowed a period of 15 days, until October 9, 1979, for Republic to abate the violation alleged. On October 10, 1979, Inspector Swarrow went to the Clyde Mine to determine whether the violation had been abated or the time for abatement should be extended. Inspector Swarrow determined that Republic had performed no work to abate the citation. Thereupon, he issued Order of Withdrawal No. 624051 pursuant to section 104(b) of the Act.

Since Republic's challenge to the underlying citation has been rejected herein, Republic's sole remaining argument is that the order is invalid "because the citation should have been extended." Republic asserts that Inspector Swarrow acted unreasonably in refusing to extend the period for abatement and in issuing the order of withdrawal. Republic also claims that the time for abatement of this citation should have been extended because it was abating another more hazardous condition along the haulage and that MSHA Inspector Thistlewaithe had previously stated that if Republic showed good faith and an honest effort to abate the most hazardous conditions first, other times for abatement would be extended.

The testimony of the MSHA inspectors establishes that the termination due date or abatement date for the citation was reasonable. Since Republic presented no evidence to the contrary, the testimony of the inspectors is accepted. Likewise, Republic did not controvert the testimony of Inspector Swarrow that on October 10, 1979, 16 days after the citation was issued, no work had been performed by Republic to abate the 16 conditions listed in the citation. Accordingly, MSHA has established that the violation cited was not abated on October 10, 1979.

In its brief, Republic argues that the order of withdrawal pursuant to section 104(b) of the Act should be vacated because of the "inflexible and adamant position" of Inspector Swarrow. Republic cites Peter White Coal Mining Corporation, April, 1979, FMSHRC 255 (April 24, 1979), where Judge William Fauver vacated an order of withdrawal issued under section 104(b) of the Act because of the inspector's failure to consider the operator's explanation for failure to abate. In that case, an electrician mistakenly repaired a different splice at another location in the mine and there was confusion regarding the location of the violation. Peter White Coal Mining Corp., *supra*, is clearly distinguishable from the instant case because the evidence of record establishes that there was no confusion regarding the locations of the alleged violations in the citation and Republic failed to show that it took any action, mistaken or otherwise, to correct the violation. Republic failed to establish that Inspector Swarrow acted improperly because of his alleged "inflexible and adamant position."

The primary thrust of Republic's assertion that the time for abatement of the citation should have been extended, is its contention that it was utilizing its resources to abate more hazardous conditions in the area which required "more immediate attention." In this regard, Republic relies upon a statement made by Inspector Thistlewaithe prior to the time the instant citation was issued, that if Republic demonstrated good faith and an honest effort to correct the more hazardous conditions, the time for abatement of citations issued by Inspector Thistlewaithe would be extended. Inspector Thistlewaithe testified that, in his opinion, Republic did not demonstrate good faith or an honest effort to correct the previously cited violations but that his supervisor ordered him to extend the earlier citations. Although not articulated as such, Republic appears to raise estoppel as a defense against MSHA. Suffice it to say that the Government cannot be estopped by the statements of an MSHA inspector. However, if Republic can establish that it committed maximum resources to abate violations, beginning with the most hazardous, this would be considered in deciding whether the time for abatement should be extended. Unfortunately for Republic, it has failed to establish anything beyond a token effort towards abatement of the outstanding citations prior to the issuance of the order in question. The mine employed more than 300 miners. On the day this order was issued, Inspector Swarrow saw three miners working to abate the citations issued on September 18 and September 19. As noted earlier, Republic elected to present no testimony at the hearing.

In the instant case, the citation was issued for 16 areas of inadequately supported roof and rib. These conditions presented a safety hazard to all miners traveling in the area. During the 16 days from the time the citation was issued until the day the order of withdrawal was issued, Republic took no action to abate any of the cited conditions. Republic failed to establish any justification for its refusal to abate the violation. The evidence clearly shows a lack of diligence by Republic in its response to this citation. I find that Republic failed to establish that the time for abatement of Citation No. 624247 should have been extended. MSHA has established that Order No. 624051 was properly issued. Order No. 624051 is affirmed.

III. Miner's Claim for Compensation

A. Lost Wages

Section 111 of the Act provides that where a coal mine is closed by a valid order issued under section 104 for a failure of the operator to comply with a mandatory health or safety standard, "all miners who are idled due to such order shall be fully compensated . . . for lost time at their regular rates of pay for such time as the miners are idled by such closing. . . ." In this case, the order under section 104(b) was issued at noon on October 10, 1979. The order was modified at 2 p.m., on October 11, 1979, and no working shifts thereafter were idled. The parties stipulated the identities, rates of pay, and lost wages of the miners who were idled by the order in question. Joint Exhibit Nos. 1, 2, and 3 are incorporated herein and attached as an Appendix to this Decision and Order. Republic failed to comply with mandatory safety standard 30 C.F.R. § 75.200. The section 104(b) order was issued

because of this failure. The miners who were idled as a result of the order are entitled to that rate of pay which they would have received on the days in question had the withdrawal order not been issued. Therefore, Republic is ordered to pay each miner listed in the Appendix attached hereto the amount of compensation owed including, where applicable, shift differential and the rate of pay for the grade at which the miner was scheduled to work on the days in question.

B. Interest

The UMWA contends that the miners are entitled to 12 percent interest on the compensation owed. It urges that the Commission should follow the lead of the National Labor Relations Board in Florida Steel Corp., 231 N.L.R.B. 651 (1977). The UMWA presented the same argument to me in Local Union 9690 v. Itmann Coal Company, 2 FMSHRC 1986 (1980). In that decision, I stated:

I am aware that other judges of the Commission have awarded interest in excess of 6 percent per annum. Although the UMWA presents a persuasive argument in support of its position in favor of higher interest, I am constrained to follow the decision of the Commission in Peabody Coal Company, Docket No. VINC 77-50, November 14, 1979, where it modified a judge's decision on interest to a rate of 6 percent per annum from the date compensation was due up to the date on which payment is made. If this policy is to be changed, it is for the Commission to make the change.

Id. at 2011.

Although the Commission's decision in Peabody Coal Company, *supra*, involved an order of withdrawal under the 1969 Act, the UMWA is unable to cite any legislative history of the 1977 Act which would support a higher rate of interest for the award herein. At the UMWA request, I have reconsidered my prior ruling on the amount of interest to be awarded in compensation cases brought under the 1977 Act. However, I continue to believe that the Commission's decision in Peabody Coal Company, *supra*, is controlling on this issue. Therefore the amount of interest payable on the compensation award herein shall be at 6 percent per annum from the date the compensation was due until the date payment is made.

IV. Civil Penalty

MSHA initially proposed a civil penalty of \$500 for the violation herein. However, the Solicitor's posthearing brief states that "MSHA recommends a penalty of \$5,000 in the instant proceeding."

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. The parties stipulated that Republic was assessed 429 violations and 952 inspection days at this mine and the

Solicitor characterizes this as a "moderate" history of violations. Republic is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

Republic is chargeable with ordinary negligence in its failure to discover and correct the numerous areas of inadequately supported roof and rib in its main track haulage. The uncontradicted testimony of the MSHA inspectors established a void, which required lagging between cracked roof and the crossbar below; loose material resting on a crossbar; loose rib; and hanging roof bolts. The evidence established that more than 300 miners traveled through this area every day. Those miners were exposed to possible injury from a roof fall. I conclude that the gravity of this violation was serious.

As noted above, Republic failed to exercise good faith in abating the cited conditions. During the 16 days from the time the citation was issued until the order of withdrawal was issued, Republic took no action to correct the conditions. Republic failed to establish any reason for its lack of good faith compliance.

Based upon all of the evidence of record and on the criteria as set forth in section 110(i) of the Act, I conclude that a penalty of \$1,000 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. Republic and its Clyde Mine are subject to the Act.
3. Citation No. 624247 issued on September 24, 1979, charging a violation of mandatory safety standard 30 C.F.R. § 75.200, is affirmed.
4. Republic failed to establish that the time to abate Citation No. 624247 should have been extended.
5. Order No. 624051 issued on October 10, 1979, for failure to abate Citation No. 624247 pursuant to section 104(b) of the Act, is affirmed.
6. Order No. 624051 was issued pursuant to section 104(b) of the Act because Republic failed to comply with a mandatory health or safety standard.
7. The miners listed in Joint Exhibit Nos. 1, 2, and 3, attached hereto and incorporated herein, were idled for the times specified due to Order No. 624051.
8. Those miners described in the foregoing conclusion of law are entitled to the compensation listed in the above documents at the rate of pay which they would have received had the order not been issued including,

where applicable, shift differential and the rate of pay for the grade at which the miner was scheduled to work on the days in question.

9. Interest on the amount of compensation awarded herein shall be payable at 6 percent per annum from the date such compensation was due to the date payment is made.

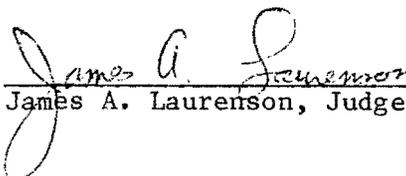
10. Considering the criteria specified in section 110(i) of the Act, Republic is assessed a civil penalty in the amount of \$1,000 for the violation of 30 C.F.R. § 75.200.

ORDER

WHEREFORE IT IS ORDERED that Republic's contest of Order No. 624051 is DENIED and Order No. 624051 is AFFIRMED.

IT IS FURTHER ORDERED that the miners listed in Joint Exhibit Nos. 1, 2, and 3, attached hereto and incorporated herein, are entitled to the compensation listed therein, with interest at 6 percent per annum from the dates such compensation was due to the dates such compensation is paid, and where applicable, shift differential and the rate of pay for the grade at which the miner was scheduled to work on the days in question.

IT IS FURTHER ORDERED that Republic pay the sum of \$1,000 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.200.


James A. Laurenson, Judge

Distribution by Certified Mail:

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Local Union 688, District 5, v. Republic Steel Corp., PENN 80-112-C
 (Clyde Mine -- 4:00 p.m. to midnight shift -- 10/10/79)

<u>Employee</u>	<u>Number</u>	<u>Hourly Rate</u>	<u>Hourly Rate</u>	<u>4 Hrs. Compensation Owed</u>	
		(with SD)	(without SD)	(with SD)	(without SD)
*Bundy	23118	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
*R. Keller	23096	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Molk	23043	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Lucostic	23139	9.07 (8.9975)	8.87 (8.7975)	36.28 (35.99)	35.48 (35.19)
Rohfer	23126	8.9975	8.7975	35.99	35.19
M. Angelo	23064	9.07	8.87	36.28	35.48
*Cutwright	23146	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Stickles	23117	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Stickovich	20527	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Sutton	20484	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*P. Mahoney	20530	10.065 (9.66)	9.865 (9.46)	40.26 (38.64)	39.46 (37.84)
*D. Mahoney	20493	10.065 (9.66)	9.865 (9.46)	40.26 (38.64)	39.46 (37.84)
*T. Mahoney	23091	10.065 (9.07)	9.865 (8.87)	40.26 (36.28)	39.46 (35.48)
*Bishop	20329	9.2925 (9.07)	9.0925 (8.87)	37.17 (36.28)	36.37 (35.48)
*Davis	20474	9.2925 (9.07)	9.0925 (8.87)	37.17 (36.28)	36.37 (35.48)
*Bailey	20389	9.2925 (9.07)	9.0925 (8.87)	37.17 (36.28)	36.37 (35.48)
*St. Fancin	20534	9.2925 (9.07)	9.0925 (8.87)	37.17 (36.28)	36.37 (35.48)
*Meese	23108	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
Dennis	23040	9.2925	9.0925	37.17	36.37
Greenwood	23080	9.2925	9.0925	37.17	36.37
Lesouski	20377	10.065	9.865	40.26	39.46
Bucher	23087	10.065	9.865	40.26	39.46
*Meadows	23111	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)

Appendix - Joint Exhibit 1

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APPENDIX

<u>Employee</u>	<u>Number</u>	<u>Hourly Rate</u> <u>(with SD)</u>	<u>Hourly Rate</u> <u>(without SD)</u>	<u>4 Hrs. Compensation Owed</u>	
				<u>(with SD)</u>	<u>(without SD)</u>
*K. Lockett	23129	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
Adamson	20498	10.065	9.865	40.26	39.46
Hess	23048	9.2925	9.0925	37.17	36.37
*Devlin	23071	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
Revi	20515	10.065	9.865	40.26	39.46
Gleason	23019	10.065	9.865	40.26	39.46
*McMaster	23106	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Lanzi	23149	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
Kern	23027	10.065	9.865	40.26	39.46
Crawford	20502	10.065	9.865	40.26	39.46
*Jackson	23136	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
*Sweany	23120	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
Lesko	20382	10.065	9.865	40.26	39.46
*Dunseath	23068	10.065 (9.2925)	9.865 (9.0925)	40.26 (37.17)	39.46 (36.37)
*Christopher	23030	10.065 (8.9975)	9.865 (8.7975)	40.26 (35.99)	39.46 (35.19)
*Lawson	23069	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
*Fairfax	23132	9.2925 (8.7975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
*Green	23148	9.2925 (8.9975)	9.0925 (8.7975)	37.17 (35.99)	36.37 (35.19)
Nicholson	23151	9.2925	9.0925	37.17	36.37
Neyman	20512	8.9975	8.7975	35.99	35.19
Anderson	20439	10.065	9.865	40.26	39.46
Hammon	20543	10.065	9.865	40.26	39.46
Smigovsky	20476	10.065	9.865	40.26	39.46
Emericko	23057	9.66	9.46	38.64	37.84
Rumble	23026	9.66	9.46	38.64	37.84
Bates	23066	9.07	8.87	36.28	35.48
Dirda	23067	9.07	8.87	36.28	35.48

SD = Shift differential.

* = Employee scheduled to work in a pay grade higher than his normal job classification.

() = Employee's regular job grade.

MIDNIGHT SHIFT (Midnight to 8:00 am shift) - 10/11/79

<u>Job Grade</u>	<u>Hourly Rate (with SD)</u>	<u>Daily Rate (with SD)</u>	<u>Hourly Rate (without SD)</u>	<u>Daily Rate (without SD)</u>
5	10.165	81.32	9.865	78.92
4	9.76	78.08	9.46	75.68
3	9.3925	75.14	9.0925	72.74
2	9.37	74.96	8.87	70.96
1	9.0975	72.78	8.7975	70.38

SD = shift differential

\$4,771.58 -- rate of higher pay with shift differential.

Appendix - Joint Exhibit 2

Joint exhibit 2

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APPENDIX

LOCAL UNION 688, DISTRICT 5 v. REPUBLIC STEEL CORP., PENN 80-112-C
 (CLYDE MINE -- Midnight to 8:00 am shift -- 10/11/79)

<u>EMPLOYEE</u>	<u>NUMBER</u>	<u>HOURLY RATE</u> (with SD)	<u>HOURLY RATE</u> (without SD)	<u>8 HRS. COMPENSATION OWED</u> (with SD)	<u>(without SD)</u>
B. King	23127	9.0975	8.7975	72.78	70.38
Makel	23092	9.0975	8.7975	72.78	70.38
Kontor	20521	10.165	9.865	81.32	78.92
Ashford	23037	9.37	8.87	74.96	70.96
White	23060	9.37	8.87	74.96	70.96
Carter	23144	9.0975	8.7975	72.78	70.38
Workman	23098	9.37	8.87	74.96	70.96
*Pascara	23134	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Zaksek	23115	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Orawiec	23052	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Strathers	23105	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
McLaughlin	23140	9.0975	8.7975	72.78	70.38
*Katpuska	20466	10.165 (9.76)	9.865 (9.46)	81.32 (78.08)	78.92 (75.68)
*Strathers	20462	10.165 (9.76)	9.865 (9.46)	81.32 (78.08)	78.92 (75.68)
*Sasko	23058	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Vargo	23054	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Mahoney	20508	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Parks	23135	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
*Hancak	23032	9.3925 (9.37)	9.0925 (8.87)	75.14 (74.96)	72.74 (70.96)
*O.Dillinger	20481	9.3925 (9.37)	9.0925 (8.87)	75.14 (74.96)	72.74 (70.96)
Vilcoss	23072	9.0975	8.7975	72.78	70.38
*Hoover	23128	9.37 (9.0975)	8.87 (8.7975)	74.96 (72.78)	70.96 (70.38)
Lorence	20496	10.165	9.865	81.32	78.92
Stickle	20517	10.165	9.865	81.32	78.92
*Tedrow	20471	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
Sweany	20450	10.165	9.865	81.32	78.92

<u>EMPLOYEE</u>	<u>NUMBER</u>	<u>HOURLY RATE</u> <u>(with SD)</u>	<u>HOURLY RATE</u> <u>(without SD)</u>	<u>8 HRS. COMPENSATION OWED</u> <u>(with SD)</u>	<u>(without SD)</u>
*Fisher	23113	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
*Kingan	23107	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
Nyswaner	20449	10.165	9.865	81.32	78.92
Martin	20485	10.165	9.865	81.32	78.92
*Ferrari	23021	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Klamers	23074	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Bungard	23076	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
*Stotka	23109	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
Vavreck	20535	9.37	8.87	74.96	70.96
Kruper	20566	10.165	9.865	81.32	78.92
Glebes	20536	10.165	9.865	81.32	78.92
J. Swaney	20468	10.165	9.865	81.32	78.92
*Ferarri	23075	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
*Stuck	23133	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
Corrazi	23020	10.165	9.865	81.32	78.92
*Dice	23124	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
Brewer	20480	10.165	9.865	81.32	78.92
*Tchiniski	23078	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
Wise	23143	9.3925	9.0925	75.14	72.74
Callahan	20554	10.165	9.865	81.32	78.92
Bricker	23041	10.165	9.865	81.32	78.92
*Elentri	20561	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
*Peters	23044	10.165 (9.0975)	9.865 (8.7975)	81.32 (72.78)	78.92 (70.38)
Vegoda	23023	10.165	9.865	81.32	78.92
*Shrontz	23114	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)
*Burrie	23142	9.3925 (9.0975)	9.0925 (8.7975)	75.14 (72.78)	72.74 (70.38)

<u>EMPLOYEE</u>	<u>NUMBER</u>	<u>HOURLY RATE</u> <u>(with SD)</u>	<u>HOURLY RATE</u> <u>(without SD)</u>	<u>8 HRS. COMPENSATION OWED</u> <u>(with SD)</u>	<u>(without SD)</u>
Fieldson	20477	9.0975	8.7975	72.78	70.38
Turner	20415	10.165	9.865	81.32	78.92
Branstettler	20292	10.165	9.865	81.32	78.92
Stagon	23022	9.76	9.46	78.08	75.68
Retucci	23065	9.76	9.46	78.08	75.68
Toth	23094	9.37	8.87	74.96	70.96
Boyer	23056	9.37	8.87	74.96	70.96
*Bowman	20495	9.37 (9.0975)	8.87 (8.7975)	74.96 (72.78)	70.96 (70.38)
Meadows	20571	10.165	9.865	81.32	78.92

SD = shift differential

*Employees scheduled to work in a pay grade higher than their normal job classification.

() Employees regular job grade.

DAY SHIFT (8:00 am to 4:00 pm) - 10/11/79

<u>JOB GRADE</u>	<u>HOURLY RATE</u>	<u>DAILY RATE</u>
5	9.865	\$78.92
4	9.46	\$75.68
3	9.0925	\$72.74
2	8.87	\$70.96
1	8.7975	\$70.38

\$4,434.92 -- rate of higher job grade.

Joint exhibit 3

Appendix - Joint Exhibit 3

LOCAL UNION 688, DISTRICT 5 v. REPUBLIC STEEL CORP., PENN 80-112-C

(CLYDE MINE -- 8:00 am to 4:00 pm shift -- 10/11/79)

<u>EMPLOYEE</u>	<u>NUMBER</u>	<u>HOURLY RATE</u>	<u>8 HRS. COMPENSATION OWED</u>
Levo	23145	8.7975	\$70.38
Ferarri	23119	8.7975	70.38
Hajari	23083	9.0925	72.74
Miller	20531	8.87	70.96
Smoggie	23015	8.87	70.96
McCarty	23077	8.87	70.96
*DeFrancisco	23123	8.87 (8.7975)	70.96 (70.38)
Doman	23130	8.7975	70.38
Galek	23090	9.0925	72.74
Dubovich	23095	8.7975	70.38
Bohna	23121	8.7975	70.38
*Colbert	20559	9.865 (8.87)	78.92 (70.96)
*Vigoda	20333	9.865 (9.46)	78.92 (75.68)
*Celaschi	20551	9.865 (9.46)	78.92 (75.68)
*Mutucci	20342	9.0925 (8.87)	72.74 (70.96)
*Rossell	20322	9.0925 (8.87)	72.74 (70.96)
*Rossell	20325	9.0925 (8.87)	72.74 (70.96)
Frey	23063	8.7975	70.38
Grooms	23131	8.7975	70.38
Lynch	20313	9.865	78.92
Manches	20557	9.865	78.92
*Scuccia	23125	9.0925 (8.7975)	72.74 (70.38)
Valentic	20568	9.865	78.92
Hritz	20544	9.865	78.92
Petrovich	20569	9.865	78.92
*Elko	20482	9.865 (9.0925)	78.92 (72.74)
Piper	20344	9.865	78.92

<u>EMPLOYEE</u>	<u>NUMBER</u>	<u>HOURLY RATE</u>	<u>8 HRS. COMPENSATION OWED</u>
King	23042	9.865	78.92
*Junk	23053	9.0925 (8.7975)	72.74 (70.38)
Steinmiller	20501	9.865	78.92
Grooms	20413	9.865	78.92
Gallagher	20553	9.865	78.92
*Galand	23089	9.865 (8.7975)	78.92 (70.38)
*O'Hern	23101	9.865 (8.7975)	78.92 (70.38)
Taft	23070	9.0925	72.74
*Chuska	23110	9.0925 (8.7975)	72.74 (70.38)
McEven	20550	9.865	78.92
Johnson	20472	9.865	78.92
E. Grooms	20562	9.865	78.92
*J. Lawrence	20360	9.865 (8.7975)	78.92 (70.38)
Thompson	23029	9.865	78.92
Adamson	23025	9.865	78.92
*L. Smith	23112	9.0925 (8.7975)	72.74 (70.38)
*A. Bonamo	23059	9.0925 (8.7975)	72.74 (70.38)
Guthrie	20549	9.865	78.92
Lacinak	20323	9.865	78.92
*Smith	23016	9.865 (8.87)	78.92 (70.96)
Workman	23024	9.0925	72.74
*Schubert	23062	9.0925 (8.7975)	72.74 (70.38)
*Jenko	23122	9.0925 (8.7975)	72.74 (70.38)
Kennison	23103	8.7975	70.38
Ropejko	20510	8.7975	70.38
Rankin	20548	9.865	78.92
Wilson	20334	9.865	78.92
Wilson	23047	9.46	75.68

<u>EMPLOYEE</u>	<u>NUMBER</u>	<u>HOURLY RATE</u>	<u>8 HRS. COMPENSATION OWED</u>
Tuomi	23033	9.46	75.68
Ropach	20990	9.46	75.68
Keffer	23045	8.87	70.96
Kolek	23097	8.87	70.96

*Employees scheduled to work in a pay grade higher than their normal job classification.

() Employees regular job grade.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

28 APR 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 79-96-M
Petitioner : A/O No. 03-01140-05003F
v. :
: Searcy Quarry and Mill
BEN M. HOGAN COMPANY, INC., :
Respondent :

DECISION

Appearances: Gail M. Dickenson, Esq., and Eloise V. Vellucci, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Dallas, Texas, for Petitioner;
Gus Albright, Safety Director, Ben M. Hogan Company,
Inc., Little Rock, Arkansas, for Respondent.

Before: Judge Cook

I. Procedural Background

On June 25, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Ben M. Hogan Company, Inc. (Respondent), in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (Supp. III 1979) (1977 Mine Act), and alleges a violation of one provision of the Code of Federal Regulations. An answer was filed on July 5, 1979.

The case was assigned to the undersigned Administrative Law Judge on October 16, 1979, and a prehearing order was issued on October 19, 1979, which, among other things, ordered the parties to confer as to the possibility of settlement of the case. Settlement negotiations continued for several months without fruition. A notice of hearing was issued scheduling the case for August 27, 1980, in Little Rock, Arkansas. This was continued until December 2, 1980, pursuant to request by the Respondent's representative that eye surgery would prevent him from activity for at least 2 months. The case was then again continued as a result of a request by both parties to submit the case on stipulations. Time for filing stipulations and briefs was set, however, pursuant to a motion by the Petitioner, the time limit was extended.

A stipulation of facts was filed as well as the Petitioner's motion for summary judgment. 1/ A memorandum in support of the Petitioner's motion was filed as well as a letter from the Respondent's representative in rebuttal to the Petitioner's memorandum.

II. Violation Charged

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>
162921	6/23/78	56.9-37

III. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred. In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

IV. Opinion and Findings of Fact

A. Stipulation and Findings of Fact

The stipulation provided, in part, as follows:

The parties stipulate and agree that the following documents and statements constitute all factual evidence in this case.

1. Copy of Citation No. 162921.
2. Copy of Penalty Assessment.
3. Accident report.
4. Conference worksheet which reflects violation, size of mine and previous history.

1/ The Petitioner's motion for summary judgment stated, in part, as follows:

"Comes now the Secretary and moves the court for summary judgment in favor of petitioner and against respondent affirming citation #16 2921 and proposed penalty of \$1,000.00.

"In support of said motion complainant would show the court that no genuine issue exists as to any material fact, and that complainant is entitled to judgment as a matter of law."

5. Letter to MSHA from Gus Albright dated July 2, 1979.

The order and citation as originally issued provided, in part, as follows:

Order No. 162921 (date - 06/23/78; time - 0700; type - 107a, 104a) [part and section: 56.9-37]

William O. Wilcox, the operator of the 980-B Caterpillar front-end loader, Serial No. 89P5256, was fatally injured on June 21, 1978, at approximately 11:30 a.m. Ed Tomlinson, a witness, stated that he observed the victim squatting on top of the front-end loader left rear wheel, facing the engine while the engine was operating at a fast idle. The front-end loader, parked on a grade, the bucket in a raised position and the wheels not blocked or turned toward the bank, started moving and the victim was pulled between the wheel and the fuel tank and subsequently run over by the left rear wheel.

The termination of such order and citation was issued on June 23, 1978, at 0800 and stated, in part, as follows: "The front-end loader operators were instructed on the proper procedure for parking and dismounting the front-end loaders."

On February 2, 1979, a modification of the original order and citation was issued which stated, in part, as follows: "Delete the 107 A order and modify to read 104 A citation only."

Pertinent parts of the accident report provide as follows:

INTRODUCTION

This report is based on an investigation made pursuant to Section 103(a) of the Federal Mine Safety and Health Act of 1977, Public Law 91-173 (83 STAT. 742) as amended by Public Law 95-164 (91 STAT. 1290).

William O. Wilcox, SSN 431-48-0037, front-end loader operator, age 62, married, with no dependents, was fatally injured at 11:30 a.m., June 21, 1978, when the parked front-end loader he was operating started a sudden forward movement, throwing the victim from a squatting position on the left rear tire, pulling him between the wheel and mudguard and ran over him. The victim had 3 years experience operating a front-end loader at this operation, and 25 years experience in related heavy equipment operations.

The Little Rock field office was notified by a telephone call from Gus Albright, safety director for Ben M.

Hogan Company, Inc. at 4:16 p.m. June 21, 1978. This accident was investigated on June 22, 1978.

Information for this report was obtained by visiting the accident site and interviewing employees and officials of the Ben M. Hogan Company, Inc. The accident site had been left undisturbed. Investigations of the accident had been conducted by the company officials in conjunction with local law enforcement officers and J. A. Riggs Tractor Company.

GENERAL INFORMATION

The Ben M. Hogan Company, Inc., Searcy Quarry and Mill is a crushed stone mining and sizing operation 3 miles north of Searcy, Arkansas. Sandstone is drilled, shot and loaded into haulage trucks, hauled to the crushing and screening plant, where crushed material is stockpiled, loaded and hauled to various areas for the construction industry.

* * * * *

PHYSICAL FACTORS INVOLVED

The rubber-tired articulated front-end loader was a Caterpillar Model 980-B, Serial No. 89P5256, equipped with a 5-1/2-cubic yard capacity bucket, 260 horsepower at 220 RPM, operating weight of 47,000 pounds, single lever planetary power shift, iron counterweight of 3,190 pounds, wheelbase of 122 inches, overall length of 24 feet 10 inches, height to top of exhaust stack 11 feet 7 inches, and a maximum hinge pin height of 13 feet 7 inches.

On the day of the accident the victim had complained to Ed Tomlinson, haulage truck operator, that it felt like a tire was low. After an investigation by the two it was decided the tires were ok.

Mobile equipment operators change oil, lubricate, and inspect their vehicles weekly. Deficiencies found at any time were reported verbally to the foreman or the superintendent and the J. A. Riggs Tractor Company sends a mechanic to repair equipment.

The west top of quarry bench was cap rock and clay that was removed by loading with a front-end loader into haulage trucks and hauled off to dump. There was a grade of about 5 percent south after the overburden was removed.

DESCRIPTION OF ACCIDENT

On Wednesday, June 21, 1978, William O. Wilcox (victim) reported for work at 7 a.m., his normal starting time. The victim performed his duties of loading the Euclid haulage trucks with stripped sail, from the west end of the quarry site, with a 980-B Caterpillar front-end loader, until about 11:30 a.m.

At this time, he parked his loader on a grade with the bucket in a raised position and the wheels not blocked or turned toward the bank.

Ed Tomlinson, a witness, stated that he observed the victim squatting on top of the front-end loader left rear wheel, facing the engine, while the engine was running at a fast idle. (See sketch.)

The victim had motioned Tomlinson to come toward him and when Tomlinson got to within 6 feet of the victim, the front-end loader suddenly moved forward and the victim was pulled between the wheel and the fuel tank and subsequently run over by the left rear wheel. The front-end loader continued down the 5 percent grade for approximately 100 feet at which point the left front wheel climbed the side of a sloped dirt bank causing the loader to turn over on its side.

After he determined that there wasn't anything he could do for the victim, Tomlinson drove his haulage truck to the mine office and notified Dwain Mason, the superintendent, about the accident. Mason immediately called the White County emergency ambulance service out of Searcy, Arkansas.

Boyce Moser, a haulage truck operator, stated that he drove up to the overturned loader, and thinking that Wilcox might be pinned under the loader, started looking for him. Moser, unable to locate Wilcox, turned the engine off since it was still running.

Allen Foster, the White County coroner, pronounced Wilcox dead at the scene of the accident. The body was taken to the Powell Funeral Home in Bald Knob, Arkansas.

After the investigation was completed, it was determined that the victim had set the emergency parking brake and left the transmission in first forward gear before getting out of the loader cab. The transmission safety lever was not in the horizontal position which would have locked the transmission in neutral.

In trying to determine why the victim was on top of the rear wheel and apparently working on the engine while it was running, Jim Evans, a mechanic for J. A. Riggs Tractor Company, checked the following:

1. The operation of the transmission.
2. Transmission shift linkage.
3. Throttle control linkage.
4. Throttle control--low and high idle.
5. Brakes on all four wheels.

Results:

1. He found that the transmission link assembly was out of adjustment. The rod had been welded to the link assembly. The link assembly was replaced.
2. The link return spring on the throttle linkage was broken. The spring being broken would not return the governor to idle RPM. The spring was replaced.

CAUSE OF THE ACCIDENT

The direct cause of the accident was the victim attempting to work on the engine with the transmission in gear, the bucket in a raised position, and the loader was not blocked or turned into a bank.

The penalty assessment form states that the Respondent's company size is 320,508 man-hours per year, and that the mine size (Searcy Quarry and Mill) is 42,571 man-hours per year.

The conference worksheet states that the 1978 production of the subject company was 320,508 man-hours, and that the 1978 production of the subject mine was 42,571 man-hours.

The conference worksheet states that there were 11 assessed violations issued by MSHA at the subject mine during 1978 and that there were 11 inspection days during 1978 at the subject mine.

B. Occurrence of Violation

The Respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.9-37 in that one of its front-end loader operators parked the front-end loader on a grade with the bucket in a raised position and the wheels not blocked or turned toward the bank. The stipulation signed by both parties clearly states that this in fact did occur as charged.

Mandatory safety standard 30 C.F.R. § 56.9-37 provides that: "Mobile equipment shall not be left unattended unless the brakes are set. Mobile

equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."

It is clear that mandatory safety standard 30 C.F.R. § 56.9-37 was violated at the time and place charged.

The Respondent, however, raises the argument that under the facts of this case the violation was caused by the equipment operator himself who then was the unfortunate victim of the fatal accident that followed. The Respondent states that its supervisor had no knowledge of the actions of the victim. The Respondent argues that it should not be held responsible for the violation.

In this regard, the letter of Gus Albright, safety director of the Respondent, dated July 2, 1979, to the Petitioner was made a part of the record by the stipulation. That letter states, in part, as follows:

Per instructions of Attorney Gail M. Dickenson, Office of the Solicitor, 555 Griffin Square Building, Dallas, Texas 75202, the Ben M. Hogan Co., Inc. submits the following reason for requesting a Hearing.

"The accidental death of William O. Wilcox was caused solely by the victim's own negligence and violation of at least four safety rules, all of which were well known by Mr. Wilcox, an operator with many years of experience. This fact was established by the only witness present and by MSHA Inspectors.

"The accident was in no way due to unsafe equipment. Mr. Wilcox had been operating the particular piece of equipment for many months and was well acquainted with it.

"Mr. Wilcox was operating the piece of equipment approximately one-quarter mile from the primary job site and his immediate supervisor. This is normal procedure around a quarry and crusher operation - no way a supervisor can be with every employee at all times."

The Ben M. Hogan Company understands that penalties and assessments are mandatory under MSHA. We understand our training and supervisory responsibilities; however, in cases as the one in question, where unquestioned evidence dictates that the cause of the accident was due to the employee's own chance-taking action, we question the fairness and advisability of assessing a civil penalty against the employer. It should at least be the very minimum.

In this regard, also, the Respondent in its letter filed in response to the Petitioner's memorandum in support of the motion for summary judgment

takes issue with certain factual statements made by the Petitioner. In that letter, the Respondent states in part:

Enclosed are the copies of the Stipulation which I have signed. We do not agree, however, with two references under "FACTS" submitted in your Memorandum. They are:

1. Page 1, line 4 which states: "Evidently, due to a malfunction of the transmission, the loader would not shift into neutral." We propose that there is no such statement in the Accident Investigation Report. Jim Evans, J. A. Riggs Tractor Company mechanic, found the "transmission link assembly was out of adjustment" and the "link return spring on the throttle linkage was broken." There is no evidence or testimony that the front end loader would not shift into neutral.

2. Page 2, line 6 which states, "Mr. Wilcox informed his supervisor." The Accident Investigation Report does not bear this out. At no time did Mr. Wilcox report to a "supervisor" any malfunction of the front end loader. He talked with a haul truck operator [concerning] the possibility of a low tire (concluded by both that there was not a low tire). The haul truck operator was Ed Tomlinson. Our supervisors, Foreman and Superintendent, were approximately one-half mile away, site of the quarry, crusher and office.

As relates to the Respondent's position in the above-quoted paragraph No. 1, it appears that there is nothing in the record as stipulated which clearly states that the loader would not shift into neutral. The findings by MSHA in the accident report were:

1. He found that the transmission link assembly was out of adjustment. The rod had been welded to the link assembly. The link assembly was replaced.

2. The link return spring on the throttle linkage was broken. The spring being broken would not return the governor to idle RPM. The spring was replaced.

MSHA went on to state the cause of the accident as follows: "The direct cause of the accident was the victim attempting to work on the engine with the transmission in gear, the bucket in a raised position, and the loader was not blocked or turned into a bank."

Therefore, I must reject the findings of fact proposed by the Petitioner that "the loader would not shift into neutral."

As relates to the Respondent's argument in paragraph No. 2 of its letter quoted above, the record does not sustain the finding proposed by the Petitioner that: "Mr. Wilcox had informed his supervisor earlier of what he

thought to be a low tire * * *." The facts show that Mr. Wilcox discussed the tire with Mr. Tomlinson, a haulage truck operator.

In view of the fact that there has been no proof that the Respondent's supervisors had knowledge of the actions of the unfortunate victim of the accident, and in view of the findings by MSHA that the direct cause of the accident was the action of the victim attempting to work on the engine with the transmission in gear, the bucket in a raised position, and the loader not blocked or turned into the bank, the Respondent has demonstrated no negligence in this case.

However, the fact that the Respondent has demonstrated no negligence does not result in its lack of liability for the violation of mandatory safety standard 30 C.F.R. § 56.9-37. It has been held that a mine operator may be held liable for a violation of a mandatory safety standard regardless of fault. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 2 BNA MSHC 1132, 1981 CCH OSHD par. 25,154 (1981); United States Steel Corporation, 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD par. 23,863 (1979); see also, Heldenfels Brothers, Inc. v. Marshall, No. 80-1607, 2 BNA MSHC 1107 (5th Cir., filed January 15, 1981).

Accordingly, the Respondent is found to be liable for the violation of mandatory safety standard 30 C.F.R. § 56.9-37 as charged.

C. Negligence

As stated above, I find that the Respondent demonstrated no negligence.

D. Gravity of the Violation

In view of the fatal accident which resulted here, it is found that the violation is extremely serious.

E. History of Previous Violations

The record shows that 11 inspections were conducted at the subject mine during 1978, resulting in assessment by MSHA for 11 violations of the regulations. This is a moderate history.

F. Good Faith in Attempting Rapid Abatement

The record shows that the violation was terminated within 1 hour after the citation was issued by instructing the front-end loader operators in the proper procedures for parking and dismounting the front-end loaders. Good faith in attempting rapid abatement of the violation has been established on the part of the operator.

G. Appropriateness of Penalty to Operator's Size

The record establishes that the Respondent's size was 320,508 man-hours per year at the time of the violation, while the size of the mine was 42,571 man-hours per year. The Respondent is small in size.

H. Effect on Operator's Ability to Continue in Business

The Federal Mine Safety and Health Review Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

V. Conclusions of Law

1. Ben M. Hogan Company, Inc., and its Searcy Quarry and Mill have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. The violation charged in Citation No. 162921, June 23, 1978, 30 C.F.R. § 56.9-37, is found to have occurred as alleged.

4. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

The Petitioner and the Respondent submitted a memorandum and letter, respectively. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

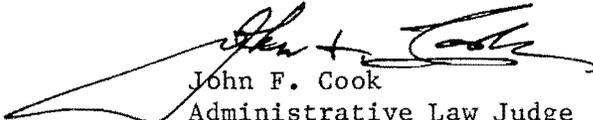
<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
162921	6/23/78	56.9-37	\$300

ORDER

Based upon the stipulations of fact and the conclusions set forth above, the Petitioner's motion is GRANTED to the extent that it is determined that the

Respondent is liable for a June 21, 1978, violation of mandatory safety standard 30 C.F.R. § 56.9-37. As relates to any other matters contained therein, the motion is DENIED.

The Respondent is ORDERED to pay a civil penalty in the amount of \$300 within 30 days of the date of this decision.


John F. Cook
Administrative Law Judge

Distribution:

Gail M. Dickenson, Esq., and Eloise V. Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

Gus Albright, Safety Director, Ben M. Hogan, Company, Inc., P.O. Box 2860, Little Rock, AR 72203 (Certified Mail)

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

29 APR 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY ACTION
)	
Petitioner,	)	DOCKET NO. CENT 80-52-M
	)	A.C. NO. 14-00546-05001
v.)	
	)	DOCKET NO. CENT 80-119-M
TOPEKA SAND COMPANY,	)	A.C. NO. 14-00546-05002 R
)	
Respondent.	)	DOCKET NO. CENT 80-373-M
	)	A.C. NO. 14-00546-05003
)	
	)	TOPEKA SAND & GRAVEL PIT & PLANT

DECISION

Appearances:

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106
for the Petitioner

Helen Winter
Topeka Sand Company
Route 4, Topeka, Kansas 66605, pro se

Before: Judge Jon D. Boltz

The above cases, involving petitions proposing assessment of civil penalties pursuant to provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act"), 30 U.S.C. § 801 et seq., were consolidated and a hearing on the merits was held in Kansas City, Missouri, on March 17, 1981. Respondent was not represented by counsel, however, Helen Winter, who jointly owns the sand and gravel business with her husband, appeared and testified on behalf of the respondent.

At the conclusion of all of the evidence, the parties agreed to waive the filing of briefs and agreed to have a decision rendered from the bench. Accordingly, the decision was made from the bench disposing of all issues in the consolidated cases.

The question of jurisdiction had been raised by the respondent in correspondence contained in the hearing file. I included this correspondence as pleadings in the case since the respondent had not filed any formal pleadings.

BENCH DECISION

The Bench Decision is as follows:

Jurisdiction

The business activities of the respondent in the mining and sale of sand or gravel constitute "commerce" within the meaning of the Act. Section 3 of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States," et cetera. The word commerce is extremely broad and covers any transaction involving trade or anything similar to traffic. I conclude that the activities conducted by the respondent in the sale of sand or gravel and in the loading of the material onto trucks on respondent's property constitutes "commerce" within the meaning of the Act.

CENT 80-119-M
Citation No. 183375

The petitioner alleges a violation of section 103 (a) of the Act. The petitioner alleges in Citation No. 183375 that the owner of Topeka Sand Company refused to allow an authorized representative of the Secretary entry into the sand and gravel pit and plant for the purpose of conducting an inspection pursuant to section 103 (a) of the Act.

The wording in section 103 (a) which would be pertinent to the evidence in this case is that "authorized representatives of the Secretary . . . shall make frequent inspections and investigations . . . in mines . . ." Then, going on to subparagraph 2 of that section, it states, "gathering information with respect to mandatory health or safety standards," which, of course, can mean gathering any information in regard to the enforcement of these regulations. It also states in the same section, "in carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . ."

In this case, I find that the inspector was an authorized representative of the Secretary and that he did go to respondent's mine and was refused entry. This refusal was temporary, but nevertheless it constituted a violation of section 103 (a) of the Act.

In regard to any penalty, I find that the respondent is a small operator, has no outside employees, and is a family business that has been operated by the respondent for approximately 20 years. The respondent also operated a junkyard in connection with this sand and gravel business. Although the inspector testified that he considered that there was a lack of good faith on the part of Mr. Winter, and I gather this may have been because of a comment from Mr. Winter to the inspector stating that the inspector could inspect the mine if he knew the difference between a junk yard and a gravel and sand operation, I do not find that there was bad faith on the part of Mr. Winter. I must take into consideration in this case that this is a small operator who may or may not have been totally aware of the implications of the Act. I realize that the mine inspector explained the Act's requirements to him, but I have concluded that this was a technical violation. I am affirming the citation involved and assessing a penalty of \$10.00.

CENT 80-52-M
Citation No. 183378.

This citation alleges a violation of 30 C.F.R. 56.14-1. The cited regulation states in pertinent part, "Mandatory . . . head, tail, and takeup pulleys . . . which may be contacted by persons, and which may cause injury to persons, shall be guarded." It is alleged in the citation that the tail pulley on the south stacker belt was not guarded. The exposed pinch point was about 4 feet from the ground.

I find there was no guard on the take-up pulley.

However, the testimony that I find most persuasive in this case is that of Mrs. Winter. She testified that the takeup pulley is located in an area in which it would not be contacted by any person and thus a person would not be subject to getting caught in the takeup pulley. The equipment was never energized unless Mr. Winter turned it on, and, as owner of the sand company, he was the only one in the area who could have been exposed to the takeup pulley. I find under these circumstances that evidence is lacking which would show that the takeup pulley might be contacted by persons and that they might be injured thereby. Therefore, Citation No. 183378 is vacated.

Citations No. 183379 and 183380.

These two citations allege a violation of 30 C.F.R. 56.12-8. The regulation mandates that "power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the hole shall be substantially bushed with insulated bushings."

The evidence is uncontradicted that the power cables or wires did not have bushings. The cables themselves had deteriorated and the outer jackets were not intact, but were hanging in pieces. In such an instance, the metal frame could become energized, even if Mr. Winter was operating it from a distant location. He might have come into contact with it himself at some time or other and it did present a hazard.

I find that these violations were abated in good faith by Mr. Winter and that the gravity was not great under the circumstances of this particular case, this being an operation not involving any employees other than the owner. There are no previous violations in the record. I affirm Citations 183379 and 183380 and the penalty assessment is set at \$20.00 for each of those violations.

Citation No. 183382:

This citation alleges a violation of 30 C.F.R. 56.12-2, which states as follows:

"Mandatory. Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed."

I conclude that the particular switch referred to by the mine inspector did allow one area to still be energized even though the switch had been turned off. However, the cited regulation uses the words "switches or other controls." The testimony is undisputed that Mr. Winter uses the controls at the generator for controlling the power and not the switch referred to by the mine inspector. As a matter of fact, the testimony was that the switches were always open. Mr. Winter controlled the electricity directly from the power source itself. He followed this method invariably and was the only person involved in the operation of the equipment. Under the circumstances, I find that the electric equipment and circuits were provided with controls in conformity with the cited regulation. Consequently, Citation No. 183382 is vacated.

CENT 80-373-M

Citation No. 183377.

This citation alleges a violation of 30 C.F.R. 56.12-8. I will not reread the regulation since it has already been stated in this decision in regard to the violation alleged in Citations No. 183379 and 183380.

I find the testimony of the inspector persuasive since the wiring which entered the motor was not in conformity with accepted standards in that there were no proper fittings as required, it being a power wire or cable. Although this motor was taken out of service at a later date, nevertheless, at the time it was inspected there was a violation of the regulation. The inspector testified that a junction box, or some other method, could have been used which would have satisfactorily accomplished the purpose of bringing the equipment into conformity with the cited regulation. There was also testimony in regard to the fact that this violation was not abated for some time after the citation was issued and that extensions were given in order to allow the owner to abate the violation. As a matter of fact, the evidence is that the inspector used considerable restraint in extending the time and it wasn't until several months after the violation that the citation was abated. Mrs. Winter testified that when the motor, which was subsequently taken out of service, was purchased it did not have a junction box connected to it.

I find there was a violation of the cited regulation and affirm Citation No. 183377 and assess a penalty of \$72.00.

Prior to this hearing, there were two motions pending, one by the respondent requesting a continuance and the other motion was by the petitioner requesting an order allowing him to amend his petition. The motion to amend the petition is granted and the motion for continuance is denied.

ORDER

The foregoing Bench Decision is hereby AFFIRMED. The respondent is ordered to pay, within 30 days of the date of this decision, penalty assessments as follows:

CENT 80-119-M, Citation No. 183375	- - - - -	\$ 10.00
CENT 80-52-M, Citation No. 183379	- - - - -	\$ 20.00
Citation No. 183380	- - - - -	\$ 20.00
CENT 80-373-M, Citation No. 183377	- - - - -	\$ 72.00
		<hr/>
		\$122.00

Further, in regard to CENT 80-52-M, Citations No. 183378 and 183382 are vacated.



Jon D. Bolz
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor
Room 2106, 911 Walnut Street
Kansas City, Missouri 64106

Mrs. Helen Winter
Topeka Sand Company
Route 4
Topeka, Kansas 66605

STIPULATION

The parties stipulated as follows:

1. The operator, Lyman-Richey Sand and Gravel Corporation, is owner and operator of the subject mine, Plant Number 10 Waterloo.
2. The operator and the mine are subject to the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge, Virgil E. Vail, of the Federal Mine Safety and Health Review Commission has jurisdiction of this case.
4. The inspector, Marino M. Solano, Jr., who issued the subject citation, was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. A copy of the subject citation is authentic and may be admitted into evidence for the purpose of establishing its issuance but not for its truthfulness or relevancy.
7. The Lyman-Richey Sand and Gravel Company is a member of the National Sand and Gravel Association. During 1979 Plant Site 10 at Valley, Nebraska was classified by that Association as a class C plant site, which is a plant site which extracts between 225,000 and 549,999 metric tons of sand and gravel during a year's operation and is considered to be moderate in size.
8. The record shows the respondent had no violations prior to the inspection on September 12, 1979.

ISSUES

Although respondent apparently advances three arguments, there are actually only two issues to be decided in this case.

1. Whether a violation of mandatory safety standard 30 C.F.R. § 56.12-13 occurred at the time of the inspection on September 12, 1979 at the Waterloo Plant, and
2. Whether the standard cited in this instance applies to temporary splices in a power cable.

DISCUSSION

The evidence shows that on September 12, 1979 Inspector Kenneth McCleary conducted two inspections, one during the daylight and a second "illumination" inspection at night, at the respondent's Waterloo Plant No. 10 near Valley, Nebraska.

The plant involved herein is a sand and gravel extraction process involving a dredge. The dredge is powered by electricity supplied by three power cables which run through a reel rack to a transformer located on shore. In this particular dredging operation, the dredge starts removing or dredging materials from the property near the shore and as the material is mined from the property it is replaced by water creating a lake. As the dredge moves further away from the transformer on shore, power cable is spliced in at a point in front of the reel rack located between the transformer and the dredge.

During the daytime inspection, Inspector McCleary performed his duties alone issuing citations involving areas not involved in this citation. He testified that he did point out to Pete Reeves, the plant superintendent, several places on the power cable south of the reel rack near the transformer where the cable was "starting to get a little bit ratty" and stated that he would like to have that fixed. This was not the part of the power line involved in Citation no. 184644.

During the "illumination" inspection on the night of September 12, 1979, Inspector McCleary was accompanied by Inspector Solano who issued Citation no. 184644 for the violations involved in this case. Inspector McCleary testified that the citation was issued covering several splices in the power cable between the reel rack and the dredge (Tr. 33). The section of cable where the splices were observed was approximately 60 feet in length from the reel rack to the water's edge (Tr. 25). There was a path or walkway 3 to 4 feet from where the cable lay on the ground. The path was used by employees going to and from the dredge. A handrail constructed of a wire cable separated the path or walkway from where the power cable was located.

The petitioner argues that the inspectors observed and photographed several splices in the power cable to the dredge which were in violation of 56.12-13 which states as follows:

Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Solano was not available to testify at the hearing, but Inspector McCleary testified that he observed the splices with inner tube wrapped around them and the splicing wrapped with electrical tape (Tr. 21). Regarding one splice, he observed one bare wire showing which was photographed and appeared in exhibits 7 and 9 (Tr. 28). He stated that he observed one splice smoking which was located approximately 25 feet from the shore line over the water (Tr. 32). The evidence in the record shows that the "Y" splice shown in exhibits 7 and 9 and described by the inspectors as showing a bare wire is a "temporary splice" next to the reel rack which is made in the power line as the cable is extended to allow the dredge to proceed out onto the lake. As the power cable is extended, new sections of cable are added and the temporary splice is made into a permanent splice (Tr. 54). The petitioner further argues in his brief that the cable lay in an area which exposed workers to a potential shock hazard.

The respondent argues in his brief that the citation does not involve a permanent splice or repair made to a power cable and therefore 30 C.F.R. § 56.12-13 does not apply, that no employee would be exposed to risk of injury and that the evidence does not show a violation occurred due to the method by which the splices in the power cable were made.

I find that the petitioner has failed to prove that a violation of 30 C.F.R. § 56.12-13 occurred in this case. The testimony of Inspector McCleary was that the splices he observed and that appear in the photographs admitted in evidence had inner tubes around the splices with electrical tape around the inner tubes, which he believed to be improper (Tr. 20). However, no evidence was presented to show that the splice under the inner tube was defective. The inspectors did not remove the covering on any of the splices to examine their exact condition. The respondent's general superintendent testified that the common practice in the company in splicing cables was to clear the insulation from the end of the cable, apply a clamp to the two cable ends, and wrap the splice with two layers of scotch tape number 22.10 and then at least two wraps of scotch tape number 88 for a permanent splice (Tr. 51-52). The procedure for wrapping the temporary splice was to remove part of the insulation from the wire, place it in a "Kearny clamp" and wrap it with either paper, inner tube or friction tape, and then generally put on two layers of scotch tape number 2210. After this is done, inner tube is wrapped around the tape and friction tape applied to the inner tube to hold it in place (Tr. 52-53).

I find that 56.12-13 does not cover the requirements for making "temporary splices" in power cables. It speaks only of permanent splices and repairs. The particular splice described as near the reel rack and shown in exhibits 7 and 9 is of a temporary nature. No interpretation is possible that this can be described otherwise. Webster's New Collegiate Dictionary, 1973 edition, gives the following primary definition for the word "permanent": "Continuing or enduring without fundamental or marked change." The standard provides for the repair of power cable. However, the splice or joint involved here is not a repair of a power cable according to the definition of "repair" in the same dictionary which

states as follows: "repair-to restore by replacing a part or putting together what is torn or broken: fix; to restore to a sound or healthy state". Although this definition more nearly describes the action taken in the "temporary splice" involved herein, it cannot be construed to have given the respondent sufficient notice that said standard would apply. Judge Fauver in his decision Secretary of Labor, (MSHA), v. Evansville Materials, Inc. Docket No. Lake 80-82-M (March 1981) stated as follows: "A mandatory safety standard must be clearly worded and fairly administered so that a reasonable prudent operator can understand and follow it. The operator should not be subjected to varying and inconsistent interpretations based on the subjective understanding of different inspectors. Clear wording and consistent application of the standard are required to avoid unfairness to the mine operator." I concur with his reasoning here.

In Connally v. General Construction Company, 269 U.S. 385, (1925), the Supreme Court said, "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

I conclude that the wording of the cited standard does not give the respondent sufficient notice that the "temporary splice" involved here was to be treated the same as "permanent" splices and "repairs" in power cables.

The evidence shows also that the inspectors failed to examine the permanent splices sufficiently to prove that said splices were not "(a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket." I find that the testimony shows that the concern of Inspector McCleary was over the splice that was smoking not being adequately wrapped and that this might be the inner tube burning (Tr. 24). This type of statement lacks proof and appears to be pure conjecture. Other splices were also found by the inspectors to be in violation of the cited standard based upon being wrapped in inner tube (Tr. 38). Here, again, no examination of the splice was performed to determine what it consisted of. I find no basis upon which to conclude that wrapping inner tube around a splice will make a proper splice become a safety hazard. The record does not support such a finding in this case.

The final argument of the respondent, that the location of the power cable does not expose employees to a risk of injury, is moot by reason of my findings that no violations of the cited standard was proven. However, I cannot agree with the respondent's argument as to this situation.

The location of those power cables within 3 to 4 feet of a walkway used by the respondents' employees presents a potential hazard of an injury which would be most likely fatal. Such an exposure requires a high degree of care, which is not satisfied by the construction of a single cable along the walkway.

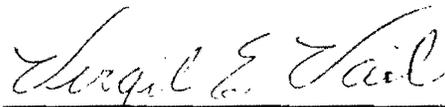
CONCLUSIONS OF LAW

1. The Commission and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter of these proceedings.

2. The petitioner did not meet his burden of proving a violation of 30 C.F.R. § 56.12-13 as alleged in Citation no. 184644.

ORDER

Citation no. 184644 and the penalty therefor is hereby VACATED.



Virgil E. Vail
Administrative Law Judge

Distribution:

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John D. Hartigan, Esq., Kennedy, Holland, Delacy and Svoboda, Suite 1900, One First National Center, Omaha, Nebraska 68102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

8 9 APR 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
)	
Petitioner,	)	DOCKET NO. WEST 79-376-M
)	
v.	)	A/O NO. 1-00094-05002
)	
J. R. SIMPLOT COMPANY,	)	MINE: Conda Mine & Mill
)	
Respondent.)	

DECISION

APPEARANCES:

Ernest Scott, Jr., Esq., Office of the Solicitor, United States
Department of Labor, 8003 Federal Office Building, Seattle,
Washington 98174

for the Petitioner,

Blair D. Jaynes, Esq., Assistant General Counsel, J.R. Simplot
Company, One Capital Center, 999 Main St., Suite 1300, P.O. Box
27, Boise, Idaho 83707

for the Respondent.

Before: Judge Virgil E. Vail

I. PROCEDURAL BACKGROUND

The above-captioned civil penalty proceeding was brought pursuant to
Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
§ 820(a). The proposals for penalties allege fifteen violations of safety
standards.

Pursuant to notice, a hearing on the merits was held in Boise, Idaho,
on March 25 and 26, 1980. John M. Moore and Frank W. Clary, Jr., Federal
Mine Inspectors, testified on behalf of the petitioner. Lloyd Phelps,
Gayland Archibald and Paul Hooper testified on behalf of the respondent.
The parties waived filing post hearing briefs.

II. STIPULATIONS

During the course of the hearing, the parties entered into the
following stipulations:

1. That respondent operated a mine and mill, the products of which
affect Commerce.

2. That the Mine Safety and Health Review Commission has jurisdiction of the proceedings identified as Docket No. WEST 79-376-M.

3. That between June 19th and 27th Mine Safety and Health Administration inspectors, John M. Moore and Frank W. Clary, Jr., conducted a series of inspections at respondent's mine and mill located at Conda, Idaho. The inspectors had jurisdiction to conduct the inspections.

4. Respondent does not have any previous violations.

5. Respondent has approximately 218 employees working in its mine and mill operations.

6. The imposition or assessment of the proposed penalties will not effect the respondent's ability to continue in business.

7. The size of respondent's company is 791,399 production tons or man hours per year.

8. The size of Conda Mine and Mill is 39,190 production tons or man hours per year.

9. Respondent, J.R. Simplot, is a corporation with its principal office located at Boise, Idaho.

10. Copies of the 15 citations issued in this case were received by respondent, and respondent filed a timely notice of contest as to each of the citations and proposed penalties.

11. The citations were abated in good faith.

III. Counsel for the petitioner moved that Citation no. 351414 be dismissed on the grounds that there is not sufficient evidence to establish the violation charged by the citation. Said motion was unopposed by the respondent and Citation no. 351414 was vacated. This left fourteen citations remaining to be litigated.

IV. The issues in this case are (1) whether the respondent was "operating" a mine at Condo, Idaho between June 19th and 27, 1979, when the inspection was conducted by representatives of the Mine Safety and Health Administration, and (2) did violations of safety standards occur and, if so, what is the appropriate civil penalty for each violation.

The Legality of the Inspection

Respondent conceded that it "operates" a mine and mill at Condo, Idaho, as defined by the Act. However, respondent argues that for three (3) weeks prior to and during the inspection of this mine and mill, the operation had been shut down for extensive maintenance and repairs and that operations had not yet commenced when the subject citations were issued.

Further, respondent contends that it was engaged in testing, adjusting and modifying the equipment related to its operation of the mine and did not attain full operation until one (1) day after the inspection was conducted.

The evidence supports the respondent's contention that prior to the inspection the Condo mine and mill had been shut down for maintenance and repairs and that during the inspection, it was in the process of starting up. Section 103(a) of the Act provides in part:

"Authorized representatives of the Secretary * * * shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided * * *."

After a careful review of the pertinent parts of the Act relating to inspections, I find no provisions which would prevent an inspection of a mine during periods when it was shut down or in the process of starting up. It must be recognized that such a situation does present special problems for both the operator and the inspectors and those problems should be considered in contemplating the issuance of a citation. A review of the testimony presented at the trial indicates that the inspectors in this case were aware of the situation and considered it when issuing their citations (Tr. 111). However, the fact that the mine and mill were not in full operation does not support Respondent's position that the citations should be vacated. Rather, if the alleged violations occurred, the fact that the mine and mill was in the process of starting up may be taken into account in considering the gravity, negligence and good faith of abatement efforts in assessing appropriate penalties under section 110(i) of the Act. Secretary of Labor v. Van Mulvehill Coal Company, Inc., FMSHRC Docket No. SE 79-127 (February 25, 1980).

Citation No. 350132

This citation involved an alleged violation of 30 C.F.R. § 55.9-7.^{1/}

^{1/} 55.9-7 Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

The inspector issued the citation because a walkway alongside a conveyor belt was unguarded on the portion outside the mill building. The conveyor belt involved in this part of the operation was a reject conveyor belt which carried oversized material from inside the grinding mill to the outside. It was the portion of the conveyor belt outside the building which was allegedly unguarded. There was a walkway adjacent to the conveyor belt which was constructed from the framework of the conveyor.

The respondent contended that the conveyor belt had been out of service for a period longer than a year as the process of handling the material had changed and this belt was no longer used. The respondent abated the citation by placing a lockout device on the power switch to the belt.

This citation should be vacated. The uncontradicted evidence shows that the conveyor belts involved herein had been out of service for over a year due to a change in the process of handling the material (Tr. 207-208). Further, the evidence shows that the area of the conveyor that was unguarded was a part of the belt outside the building approximately 20 feet in length. The sole purpose of the walkway was for maintenance work, involving the pulley at the end of the belt. I find that there was no safety hazard here by reason of the conveyor belt having been out of service for over a year. Further, the location of the unguarded walkway was not a regularly travelled walkway but had been used only for servicing the pulley by employees for maintenance purposes and therefore afforded no risk of injury to employees in the area of this building should the conveyor belt have become activated again. The standard violated in this case requires that unguarded conveyors with walkways be guarded. It is not that the walkway involved herein was used infrequently, which causes me to vacate this citation, but rather that the equipment had been out of service for such a long period of time so as to make it unlikely that the belt would be started up without considering the safety factors.

Citation No. 350133

This citation involved an alleged violation of 30 C.F.R. § 55.12-8.^{2/} The inspector issued the citation alleging that the flexible conduit containing electrical wires to a motor was broken. The conduit involved herein was located on top of storage silos at the respondent's mine. The electric motor, served by the wiring in the conduit, operated a shuttle conveyor that travelled back and forth to direct the discharge of materials to the proper silo.

^{2/} 55.12-8 Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The mine inspector testified that he observed that the conduit containing the wiring to the motor was broken by being separated at a point where it entered the junction box on the motor (Tr. 53). He further testified that there was considerable vibration and stress involved here and that the electrical wire contained in the conduit could sustain damage to the insulation covering the wire and cause an electrical shock. The inspector admitted that not many people go into this area where the conveyor was located but that maintenance people do go to the area.

The respondent's safety coordinator, Mr. Archibald, testified that he observed that the conduit was separated approximately three fourths to a half an inch (Tr. 214). The respondent argued that the electrical wiring in the conduit was covered with insulation and that the insulation was not damaged.

I find that there was a violation of the standard involved herein. The standard, 55.12-8, requires that power wires be adequately insulated where they pass into or out of electrical compartments. I find that the broken conduit presented a potential hazard of an electrical short occurring due to the movement occasioned by the operation of the shuttle conveyor. The fact that the area was not frequented often by employees does not diminish the potential for a serious injury should a short occur to those employees who are required to visit this area from time to time. This citation is affirmed.

Citation No. 350134

This citation involved an alleged violation of 30 C.F.R. §55.14-1.^{3/} The inspector issued the citation because the head pulley on the shuttle conveyor belt located on top of the storage silos was unguarded. This is the same area referred to in Citation no. 350133 and to which the testimony of the inspector was to the effect that it is an isolated area where only maintenance and clean up employees would go (Tr. 28).

The respondent's witness, Mr. Archibald, testified that he did not know why the guard was off the head pulley but that no one was to go to this area while the mill was operating due to dust exposure.

I find that the evidence is uncontroverted that the pulley was not guarded and a violation of the mandatory safety standard occurred. However, the gravity of the violation is not great in that it would be unlikely an employee would be in the area while the belt is running. There is a risk here, even though remote, in that maintenance people could be in the area when the equipment is being operated or tested. This citation is affirmed.

^{3/} 55.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

Citation No. 350135

This citation also involved an alleged violation of 30 C.F.R. § 55.14-1. The citation was issued because the calcinder feed head pulley adjacent to a travelway was not provided with a guard. The inspector testified that this is an induced belt near a walkway where a person could be injured in a pinch point between the head pulley and the belt (Tr. 33). He stated that there was framework around the belt, but that a gap existed where a person could be injured if drawn into the pulley. The inspector stated that the walkway along the belt was also induced and that a dusty condition existed in the area. That condition could contribute to a fall or injury due to a person walking by slipping and falling into the belt and being drawn into the pinch point. The inspector conceded that the company had considered the framework of the conveyor around the area of the pulley as an adequate guard, but stated that he disagreed with this and believed someone could be drawn into the pinch point (Tr. 35). The evidence, particularly a photograph admitted as Exhibit 17, showed that the actual pinch point on the head pulley is located behind a plate which would protect this area from direct contact by a person. However, the inspector indicates that he issued a citation on this alleged violation believing that someone could fall, trip, or slip and place his hand on the belt and be drawn into the pulley (Tr. 68).

I find that the inspector's observations and concerns regarding this pulley are persuasive and that his decision that a person might have suffered an injury in this area meets the description of what is intended by the standard involved herein and that a violation occurred. The gravity was slight as there was some protection and all the inspector required was for additional protection to be applied in the form of a screen. This citation is affirmed.

Citation No. 350136

This citation involved an alleged violation of 30 C.F.R. § 55.11-1. ^{4/} The inspector issued the citation because a safe access was not provided to the valve on the slurring line located approximately 10 feet above the floor. This was abated by removal of the slurry line valve. The evidence established that this was part of a new installation and that none of the respondent's employees accompanying the inspector on his inspection knew how often the valve would be used and how a person would get to the valve to turn it off or on. It was subsequently learned that the valve would be used to remove the rod mill from the system which could be once every three or four months. (Tr. 223). The testimony of the respondent's safety coordinator was that the valve had been operated from a step ladder, which in his opinion was adequate for the number of times the valve was operated.

I find that this citation should be vacated. It is apparent from the evidence that the valve was not operated on a regular basis and that a ladder would constitute a safe access to the valve on occasions when it was used.

^{4/} 55.11-1 Mandatory. Safe means of access shall be provided and maintained to all working places.

Citation 351404

This citation also involved an alleged violation of 30 C.F.R. 55.14-1. The citation was issued because there was approximately one-half inch clearance between the skirting and conveyor belt on a continuous conveyor belt from the rod mill which needed guarding. The inspector testified that he found no negligence on the part of the respondent. Additionally, he stated that he did not believe a serious accident would occur, but that someone could get their finger in the pinch point during clean up (Tr. 84).

The respondent's safety coordinator did not view the pinch point as a safety hazard. He felt anyone catching a hand in this area would not be pinched, but rather the belt would go up and over the pulley due to the flexibility of the belt (Tr. 232-233).

The evidence indicates that the reason for possible injury here is due to the stiffness of the belt. In viewing the photographs (Exhibits 8, 9, 10 and 11) and other evidence relating to this violation, I find a danger existed in this area but that if an injury would occur it would be minor as testified to by the inspector. The citation is affirmed.

Citation 351405

This citation also involved an alleged violation of 30 C.F.R. § 55.14-1. The citation was issued because the return troughing idler for the rod mill feed belt was not guarded. This return idler was approximately 5 feet high and in an area not usually travelled, but where clean up and maintenance people would be. The inspector testified that there was no negligence involved on the part of the respondent, but if someone was caught in this belt the injury could be serious.

The respondent's witness did not refute the fact that it would be possible to get caught in the return idler involved herein, but wasn't sure the guard applied would prevent such an occurrence. Further, it was felt that this was not a travelway or area used by persons, as a crossover existed here to cross the belt (Tr. 240).

I find that a violation of the standard occurred. There was little or no negligence but that an injury, if it occurred, could be serious. The citation is affirmed.

Citation 351406

This citation involved an alleged violation of 30 C.F.R. § 55.14-6. ^{5/} The inspector stated the citation was issued because the head pulley guard for the number 275 conveyor belt was removed to replace a bearing and was not replaced. The inspector testified that the pulley

^{5/} 55.14-6 Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated.

was approximately 4 to 5 feet above the floor near a walkway and that when the belt was observed it was moving, but there was no material being carried on it (Tr. 89-90). The inspector stated that he knew the plant was in the process of being "started-up" after repairs had been made, but that in his opinion the guard should have been on this pulley to protect anyone coming into the area and contacting the pulley.

The respondent's safety coordinator testified that the guard was off this pulley and standing against the wall while the newly replaced bearing was being tested. The standard provides that guards shall be in place except during testing. The inspector confirmed that he had been told that the guard had been removed to replace a bearing by the maintenance superintendent and that this was part of the start up of the plant (Tr. 131-132).

I believe the evidence here supports the respondent's contention that the guard was removed for testing the new bearing, and falls within the exception in the standard that guards shall be in place on moving machinery except when testing. The preponderance of the evidence shows that the plant had been down for repairs and was being put back into operation when the inspection was conducted. For the reasons stated above, I vacate this citation.

Citation 351407

This citation involved an alleged violation of 30 C.F.R. § 55.14-1. The inspector testified he issued the citation because the pinch point on the head pulley for the calcinator mill feed conveyor belt was not fully guarded. The pulley was guarded by a 6 inch piece of metal with approximately an 18 inch gap exposing a switch gear assembly. The inspector stated that there were steps near this location where a person going by could trip and fall, putting his arm in the pinch point of the pulley. The guarding of the pulley in this location was similar to the pulley in Citation no. 350135 and respondent argued that the guard utilized in this location was adequate.

I find the evidence supports the inspector's position that additional guarding was needed at this conveyor as it was near a walkway with steps near the pulley. A possibility of a fall created a condition that warranted a further guarding of the area where a person's arms or clothing might come in contact with the belt. There was little negligence here as the pulley was guarded to some extent and the respondent apparently thought this was adequate. However, the inspector's observations and views in this case persuade this writer that the pulley was not fully guarded and the citation is affirmed.

Citation 351408

This citation involved an alleged violation of 30 C.F.R. §55.12-20.^{6/} The inspector issued the citation because dry wooden platforms, insulated mats, or other non-conductive materials were not provided for the power control switch gear located in the pump house. The inspector testified that upon entering the pump house containing electrical equipment switches he observed one to two inches of water standing on the floor (Tr. 96).

The respondent's safety coordinator testified that when the pumps controlled by these switches are operating the area is normally dry (Tr. 267).

I find a violation of the mandatory safety standard occurred. Although it may not be normal for the area to be wet, the possibility of such an occurrence is always present and anyone who is required to go into this area to operate the switches is exposed to a danger of an electrical shock. The citation is affirmed.

Citation 351409

This citation involved an alleged violation of 30 C.F.R. § 55.11-1. The inspector issued the citation because a safe means of access was not provided to the number ten (10) calcinder fresh water valve located in the pump house. The testimony was that this was in the same pump house as described in the prior citation and that the valve was approximately nine feet above the pump floor. From foot prints on an electrical motor below the valve, the inspector concluded that someone had stood or had been standing on the electrical motor to operate the valve (Tr. 99). The inspector testified that there was water on the floor in this area and that an electrical hazard existed to anyone standing on the motor, besides a possible slip and fall condition in reaching to operate the valve (Tr. 100). The respondent argues again, as he did in the situation involving the overhead valve in the slurry line, that it was not frequently used and that safe access was provided with portable ladders.

I find that the same condition does not exist here as in citation 330136, as the access is apparently more difficult, as displayed in a photograph of the area (Exhibit 21). Citation no. 351409 is affirmed.

Citation 351412

This citation involved an alleged violation of 30 C.F.R. § 55.4-33.^{7/} The inspector stated he issued the citation because there was a compressed gas cylinder on a portable truck located on the third

^{6/} 55.12-20 Mandatory. Dry wooden platforms insulating mats, or other electrically non-conductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, noncurrent-carrying parts of the power switches to be operated may be used.

^{7/} 55.4-33 Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used.

floor landing in the mill that had the valves opened on the cylinder while not in use. He stated the hoses were strung down the stairs to the second floor landing with the torch assembly hung on a hand rail. It was explained that the valves in question control the passing of oxygen and acetylene through two separate hoses which terminate at the torch to become mixed into a highly volatile and explosive gas (Tr. 103-104).

The respondent's safety coordinator testified that this is one of the areas which the respondent has stressed in their safety training. However, he stated that it is difficult to achieve compliance even though the employees are warned that continued violations could jeopardize their jobs (Tr. 259).

It is apparently a common violation often found in safety inspections throughout the industry in spite of the efforts on the part of safety trainers to have employees comply with the standard. However, the Act imposes a duty upon the operators to see that the employees comply with all mandatory safety and health standards and the citation is affirmed.

Citation No. 351413

The citation also involved an alleged violation of 30 C.F.R. § 55.14-6, which is similar to citation 351406. The citation was issued because the guard for the dryer trunnion roller had been left off after starting the dryer up. The inspector testified that he realized that periodic adjustments had to be made to the dryer. However, during the two hours he was on the property, prior to the start up, no adjustments had been made. He felt that the guard should be replaced between the times when adjustments had to be made (Tr. 106). He testified that there was an elevated work platform around the dryer trunnion roller and with the guard off a person's arm could get caught in the pinch point located there (Tr. 108).

Again, the respondent's safety coordinator testified, as in the case of the prior violation described in Citation no. 351406, that the plant was in the process of "starting up" after a complete shut down, that it was necessary to remove the guard here in order to make periodic adjustments on the bearing; that the platform around this area is only used by maintenance employees, and for the purpose of working on this specific equipment (Tr. 263-264). The inspection involved herein occurred during the night shift and that there was not a maintenance or mill superintendent on that shift.

Again, the question presents itself as to whether there was a violation of the safety standard when the guard was left off or was this within the exception providing that guards shall be securely in place except when testing. The evidence does not support the respondent's position in this instance as there were no present "testing" such as "adjusting" the roller being done here. Further, apparently the guard had been off for sometime and it cannot be argued with any degree of logic that safety guards can be removed and left off for extended periods of time while the plant is being started up. The negligence here is not great, nor is the gravity, as the area is not frequented by employees other than maintenance personnel. However, good safety practice would dictate that the guard be on while this potentially dangerous equipment is running, except when actual work is being performed on it. The citation is affirmed.

Citation No. 351415

This citation also involved 30 C.F.R. § 55.14-6. The citation was issued because half of the guard was left off of the classifier screw located on the upper floor of the mill. The inspector testified that this involved an auger type screw approximately 20 feet long and located 3 to 3 1/2 inches off a walkway. The upper half of the guard covering this screw was off (Tr. 109-110).

The respondent's safety coordinator testified that he was in the inspection party and observed the guard off in this location and that he didn't know exactly why it was off. However, he again stated that the plant was in the process of starting up after being shut down and he assumed that the guard was off for some "valid reason" relating to the start up (Tr. 265-266).

Although guards may be removed under the safety standard for purposes of testing, there is no evidence here that this is what was occurring when the inspection was made at this location. The inspector stated that there was a man described as the upper floor operator on the inclined walkway adjacent to the screw looking into the exposed area. The inspector testified that he realized it was start up time and asked questions if any adjustments were being made. Apparently he was not given a satisfactory answer (Tr. 109). With this uncontradicted testimony the only conclusion is that the guard was removed and allowed to remain off in violation of the standard. The inspector further testified that there was reason to believe a persons clothing could be caught in the moving screw drawing a person in and could cause an injury (Tr. 110). The citation is affirmed.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of the proceeding. At all times relevant, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The inspection of Respondent's mine and mill was a proper and legal inspection under section 103(a) of the Act.

3. The Respondent did not violate the regulations cited in Citations nos. 351414, 350132, 350136 and 351406.

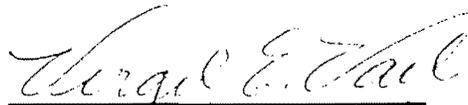
4. The Respondent violated the regulations cited in Citation nos. 350133, 350134, 350135, 351404, 351405, 351407, 351408, 351409, 351412, 351413, and 351415.

ORDER

Citation nos. 351414, 350132, 350136 and 351406 are hereby VACATED. Based upon the criteria set forth in section 110(i) of the Act, the penalties determined proven are as follows:

<u>CITATION NUMBER</u>	<u>AMOUNT</u>
350133	\$ 34.00
350134	40.00
350135	40.00
351404	40.00
351405	40.00
351407	40.00
351408	90.00
351409	40.00
351412	44.00
351413	40.00
351415	90.00
	<u> </u>
	\$538.00

It is further ordered that the respondent pay the above penalties in the total amount of \$538.00 within 30 days from the date of the decision.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

3 0 APR 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 80-145
Petitioner : A.O. No. 44-00294-03039
: :
v. : No. 1 Mine
: :
EASTOVER MINING CO., :
Respondent :

DECISION AND ORDER

This matter is before me on the parties' motion to approve settlement or, in the alternative, on the operator's motion for summary decision. For the reasons set forth below, the motion to approve settlement is denied. 1/ The motion for summary decision is granted.

The undisputed facts show that the "coalbed" or height of the coal seam at the lowest point on the section of the mine in question was 38 inches. I find this measurement rather than that of the actually extracted height, 53 inches, was the controlling height for determining the requirement for canopies under Section 317(j) of the Act, 30 C.F.R. 75.1710, 1710-1, and therefore no violation existed at the time the instant citation was written. 2/

1/ In Co-Op Mining Company, 2 FMSHRC 3475 (1980), the Commission held that as a matter of policy a settlement should not be approved where no violation has been shown.

2/ Effective July 1, 1977, MSHA determined that in coalbed heights below 42 inches the use of canopies diminished the safety of the miners and were not technologically or anthropometrically feasible. 42 F.R. 34876. The Secretary's Annual Report to Congress for FY 1978 noted that "Progress in installing cabs and canopies has been substantial for equipment used in coalbed heights of 42 inches or more; however, based on research as well as experience gained in the course of MSHA enforcement, certain human engineering problems had not been solved, particularly in coalbed heights below 42 inches Because of these unsolved engineering problems the Secretary suspended indefinitely the time period for operators to design and install cabs and canopies on self-propelled electric face equipment used in underground coal mines where coalbed heights are less than 42 inches." Report pp. 11-12. While counsel for MSHA contends that (footnote 2 continued on page 2)

MSHA, of course, denies the correctness of this conclusion. MSHA argues that when the initial administrative implementation of the statutory standard 3/ was published in 1972 4/ MSHA legislatively added the term "mining height" to the standard and perhaps inadvertently but nevertheless authoritatively changed the plain meaning of the statutory term "coalbed height" to that of "actual height" or "actually extracted height". 5/

The difficulty with this is that there is nothing in the record of the legislative rulemaking proceeding of 1972, at least as reported in the Federal Register, 37 F.R. 20689, to show that the industry was apprised or put on notice of the fact that the plain meaning of the statutory term "coalbed height" was being revised and amended. Adequate notice of the issues to be resolved is an essential of a substantive rulemaking proceeding. Wagner Electric Co. v. Volpe, 466 F.2d 1013 (3d Cir. 1972).

(footnote 2 continued)

a requirement exists for canopies where the coalbed or mining height after adjustment for roof support is 36 inches, this is clearly erroneous. The elusiveness of MSHA's position is shown by a January 1981 Report of the U.S. Regulatory Council which states that "While local MSHA officials have agreed that canopied equipment in coal seams under 50 inches is 'impractical' MSHA officials in Washington require continued experimentation" at seam heights as low as 36 inches.

3/ Section 317(j) of the Act, 30 C.F.R. 75.1710.

4/ 30 C.F.R. 75.1710-1.

5/ The plain meaning of the statutory term is "a bed or stratum of coal". BuMines, Dictionary of Mineral Terms (1968). In response to the pretrial order of January 8, 1981, counsel for MSHA assured the trial judge that the term "mining height" as used in 30 C.F.R. 75.1710-1 was the equivalent of the term "coalbed height" as used in the mandatory standard. It was not until the significance of the difference in the two meanings was disclosed at the prehearing conference that counsel claimed that Congress always intended what MSHA later invented. The crux of the matter is whether MSHA's invention, if such it is, has the force and effect of law and can be the basis for applying civil and criminal sanctions. In its response to the show cause order MSHA argues that "'Mining height' as it is used in 30 CFR 75.1710-1 . . . was intended by the Secretary to have the same meaning as that Congress intended by 'where the height of the coalbed permits.'" (Response, p.5). The legislative history shows Congress intended the phrase to mean "where the height of the coal permits the installation of" canopies. H. Rpt. 91-563, 91st Cong., 1st Sess. 57 (1969).

To the contrary, as counsel admits, in September 1973, MSHA for the first time disclosed that its concept of the term "mining height" included the "thickness of the roof rock taken". This instruction to enforcement personnel was not the subject of either a formal or an informal rulemaking proceeding, however, and was not promulgated as either a substantive or interpretative rule in accordance with the provisions of either section 101, 30 U.S.C. § 811, of the Mine Safety Law of section 553 of Title 5, section 4 of the APA.

For these reasons, I conclude the plain meaning of the statutory term "coalbed" height" was not revised or amended in accordance with the substantive or procedural requirements of the law at the time the improved standard, 30 C.F.R. 75.1710-1 was promulgated in 1972. 6/ I further find that neither the bulletin to enforcement personnel of September 20, 1973, nor the suspension action of July 7, 1977, 42 F.R. 34876, were promulgated in accordance with section 101 of the Act or section 4 of the APA, 5 U.S.C. §§ 553(b), (c). Consequently, none of these actions effected a legally binding change in the statutory limitation on MSHA's authority to require canopies in the section of the coal mine involved in this proceeding. 7/

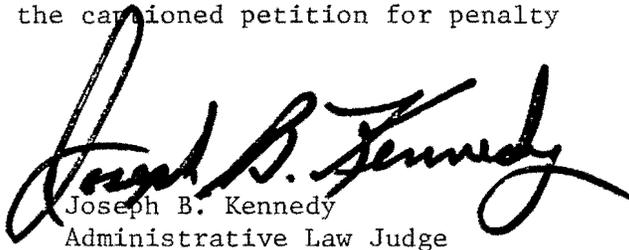
6/ When MSHA published the statutory standard together with its administrative implementation in 1972 simultaneously and without further explanation it must be taken to have ascribed the same meaning to the term "mining height" as Congress had ascribed to the term "coalbed height". This is underscored by the fact that MSHA is without authority to require operators to take top or bottom rock so as to provide space for the installation of canopies where the coalbed height alone does not permit their use. As the record shows, MSHA recognizes that taking top and bottom results in contamination of the coal with noncombustible material that reduces the b.t.u. content and the value of the product. It also creates added health hazards in the form of silica or quartz dust that increases air pollution contaminates in the form of respirable dust. Another consideration that militates against MSHA's claim that by necessary implication the term "coalbed height" includes the thickness of top and bottom rock taken is the fact that operators calculate their capital needs for equipment on the basis of what the core borings show with respect to the thickness of the coal seam. Thus, where, as here, the core samples indicated a thick seam and the operator invested in high profile production equipment the imposition of a requirement to buy low profile equipment to meet a transient condition is seen not only as unfair and unreasonable but as arbitrary and capricious. As Cardozo noted, "Law as a guide to conduct is reduced to the level of futility if it is unknown and unknowable."

7/ The distinction between legislative and interpretative rules is basic. Chrysler Corp. v. Brown, 441 U.S. 208, 301-304, 313-316 (1979); General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Batterton v. Francis, 432 U.S. 416 (1977); Skidmore v. Swift & Co., 323 U.S. 124. When Congress (footnote 7 continued on page 4)

In enacting the Mine Safety Law Congress made a conscious judgment that notions of fairness require that informed legislative rulemaking be made only after affording interested persons notice and an opportunity to participate. It is obvious that the interpretation contended for by MSHA was not the product of procedures prescribed by Congress as a necessary prerequisite to give it the binding effect of law. See cases cited in Parts I, II, and III of the Show Cause Order issued March 17, 1981, attached as an appendix hereto.

The premises considered, therefore, I find that (1) there is no genuine issue as to any material fact, and (2) that the operator is entitled to summary decision as a matter of law.

Accordingly, it is ORDERED that the captioned petition for penalty be, and hereby is, DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

(footnote 7 continued)

has delegated to an agency the authority to make rules having the force of law and the agency acts reasonably and within its delegated legislative power, a reviewing tribunal has no more power to substitute its judgment for that of the agency than it has to substitute its judgment for that of Congress. But to be legislative in character a rule must not only be rooted in a grant of such power by Congress but must be promulgated in conformity with the procedural requirements imposed by Congress. Morton v. Ruiz, 415 U.S. 199, 232 (1974). Rules that are not the product of legislative rulemaking are interpretative. As the Supreme Court observed in Batterton v. Francis, supra, 432 U.S. 425, n. 5 "A court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as timing and consistency of the agency's position and the nature of its expertise." It is not necessary to decide whether the instructional bulletin of September 20, 1973 and the suspension action of July 7, 1977 are properly characterized as "interpretative rules", because these regulations were not properly promulgated as substantive or legislative revisions of the definition of "coalbed height" and therefore do not have the force and effect of law. Chrysler Corp. v. Brown, supra, 441 U.S. at 315-316. Compare, VW v. Federal Maritime Commission, 390 U.S. 261 (1968), in which Justice Stewart delivered the opinion of the Court: "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law'." (footnote 7 continued on page 5)

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(footnote 7 continued)

. . . But the courts are the final authorities on issues of statutory construction . . . and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' . . . 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.'" See also Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 17, 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA-80-145
	Petitioner :	A.C. No. 44-00294-03039
v.	:	
	:	Mine: No. 1
EASTOVER MINING CO.,	:	
	Respondent :	

ORDER TO SHOW CAUSE 1/

A review of the record in this proceeding shows:

1. Section 317(j) of the Mine Safety Law, 30 C.F.R. § 75.1710, provides that wherever "the height of the coalbed permits" MSHA may require an operator to install "substantially constructed canopies" on electric face equipment. The legislative history shows Congress intended this authority to be exercised where "the height of the coal permits the installation of such" canopies. H. Rpt. 91-563, 91st Cong., 1st Sess. 57 (1969); Legislative History, Mine Safety Law, Senate Committee on Labor, 94th Cong., 1st Sess. Part 1, 1087 (1975).

2. After consultation with the industry, MSHA issued an "improved" safety standard in October 1972, that established a timetable, based on mining

1/ This order was in preparation at the time of receipt of the operator's parallel motion for a summary decision. MSHA's response to this order may include its response to the operator's motion.

heights, for installation of canopies. 30 C.F.R. § 75.1710-1(a). The term "mining height" as used in the improved standard was intended to mean "coalbed height" as used in the statutory standard.

3. Difficulties in meeting the original timetable necessitated a postponement in the times for compliance. To accomplish this without republishing the schedule, a bulletin issued on September 20, 1973. In this bulletin, MSHA undertook to make a special definition of the term "mining height" as used in the schedule for compliance set forth in 30 C.F.R. § 75.1710-1(a). Thus, it was provided that:

The mining height as used in Section 75.1710-1 will be interpreted as being the distance from the floor to the finished roof less 12 inches. In those areas where the roof is taken in the normal mining cycle, the mining height shall include the thickness of the roof rock taken * * *.

For example, if the distance from the floor to the finished roof is 72 inches less 12 inches, then the effective date for that mine to install cabs or canopies is the one for mining heights 60 to 72 inches which would be July 1, 1974 and not January 1, 1974.

The interpretive bulletin made clear that the special definition was to be used only to determine the effective date for compliance in any particular section of a mine and "not if [canopies] are required." With the exception of this bulletin, I can find nothing in the "improved" standard or its subsequent history that warrants a finding that the statutory limitation to "coalbed height" was lawfully revised or amended to require canopies wherever the "extracted height", including the thickness of the roof taken, permits the use of a canopy. Even where the coalbed height permits, the requirement for the use of canopies is dependent on the availability of practical technology,

i.e., canopy designs and hardware that meet the requirements for structural strength and operational safety, including more particularly those design factors affected by human engineering. 2/ 37 F.R. 20689.

4. It is MSHA's policy to determine the requirement for canopies on a section-by-section basis with the controlling vertical measurement being that taken at the lowest point on the section.

5. Between October 1972, and July 1977, progress was made in installing canopies on electric face equipment including continuous miners where such equipment was used in coalbed heights of 42 inches or more. Based on research as well as experience gained in the course of MSHA's enforcement, however, it was found that in coalbed heights below 42 inches certain human engineering problems such as impaired operator vision, operator cramping and operator fatigue had not been solved. For these reasons, the requirement for canopies on sections where the coalbed height was less than 42 inches was first extended and, effective July 1, 1977, entirely suspended. 42 F.R. 34876.

6. In this case, the parties are agreed that on the date the violation in question was written, April 10, 1980, the minimum extracted height on the

2/ As recently as January 1981, the United States Regulatory Council reported coal operators complained that:

"Retrofitting existing equipment [with canopies] has proven impractical. They assert that the requirements to do so have resulted in new problems, including reduced visibility and increased 'out of service' time for repairs and maintenance. The operators assert that the standards were written without sufficient flexibility and do not allow the use of improved equipment which they feel would not pose the same problems." Cooperation and Conflict, Regulating Coal Production, January 1981, 23.

2 Right 001 Section of the mine was 53 inches, which included the thickness of roof and bottom rock taken. They are also agreed that the coalbed thickness was 38 inches.

I.

MSHA points to the determination of July 7, 1977, 42 F.R. 34876, as indicating an intent to require canopies wherever the "actual height from bottom to top" is 42 inches or more as support for the view that regardless of the coalbed height the canopy requirement is triggered wherever a mine section has an actual extracted height of 42 inches. The difficulty with this is that the suggested revision or amendment of the statutory limitation on MSHA's authority to require canopies was not accomplished in accordance with the rulemaking procedures provided under section 101 of the Mine Safety Law, 30 U.S.C. § 811.

In United States v. Finley Coal Company, 493 F.2d 285, 290 (6th Cir. 1974), cert. denied, 419 U.S. 1089 (1974), the court held that a revision, amendment or modification of a statutory standard that has the effect of imposing an additional requirement is invalid and ineffective as an improved standard where the revision, although cast in interpretative or definitional language, was promulgated without compliance with the mandatory consultation procedures set forth in sections 101(a) and (c) of the Act. 30 U.S.C. §§ 811(a) and (c). Here there is little doubt that the requirement for canopies in sections where the extracted height exceeds the coalbed height is substantive in nature and adds significantly to the individual operator's potential civil and criminal liability. Chrysler Corporation v. Brown, 441 U.S. 281, 301-304 (1979).

MSHA's interpretation may not be upheld therefore as a mere administrative implementation of the statutory standard. As the court of appeals noted, in such a case what is at issue is not just the agency's authority to interpret or implement the statutory standard but "the very power of the agency to promulgate" a substantive addition to the conduct mandated by the statutory standard. 493 F.2d 290.

The considerations which underlie this construction of the agency's authority to create administrative crimes was further spelled out in United States v. Consolidation Coal Company, 477 F. Supp. 283, 284 (S.D. Ohio 1979):

If the regulations are so significant that a violation amounts to a crime, then their promulgation would warrant the Section 811(d) formalities. First, common sense dictates that regulations, which if violated, amount to crimes, should be promulgated only after the most serious consideration and an opportunity for those affected for consultation with the rulemakers. It is hard to imagine any rules which are more demanding of pre-promulgation formalities than those which if violated subject persons to criminal sanctions. Moreover, if such a procedure is followed it will have the effect of clearly apprising those concerned of its criminal provisions.

* * * * *

The bothersome aspect of the government's position is that it sounds a retreat from an important and traditional philosophical principle: that criminal statutes must be strictly construed and that if a crime is to be established the statute or regulation must reasonably apprise reasonable persons that a failure to obey will amount to a basis for a conviction. We must be mindful that in this case we are not dealing with regulations which carry merely a civil penalty, but rather a criminal sanction for their violation.

As the Court of Appeals for the District of Columbia has observed, the mandatory standard concept evolved to deal with a dilemma perceived by those

most directly affected by the Mine Safety Law, namely, concern "by representatives of both industry and labor that a freely exercised power of [agency] amendment might result in an unpredictable and capricious administration of the statute, which would redound to the benefit of no one." Zeigler Coal Company v. Kleppe, 536 F.2d 398, 402 (D.C. Cir. 1976). The resolution was the adoption of the elaborate consultative procedures set forth in section 101. Compliance with these procedures is a condition precedent to any substantive revision of a mandatory standard. Finley Coal Company, supra, 493 F.2d 290. They operate as a legislative check on the arbitrary exercise of administrative discretion.

I conclude, therefore, that any reliance on the suspension action of July 7, 1977, as a modification of the substantive coverage of the statutory standard is misplaced and that unless the Secretary can find some other support for the claim that the term "coalbed height" was, by valid administrative action, revised or amended to read "extracted height" I shall be constrained to conclude that the improved standard as applied to the facts of this case is invalid. For this conclusion, I need only rely on the principle that administrative rulemaking in disregard of procedural requirements is ultra vires. Finley Coal Company, supra, 493 F.2d 291.

I need not and do not consider whether the suspension action of July 7, 1977, is properly characterized as an "interpretative rule" because such rules do not have the force and effect of law unless promulgated in accordance with the statutory procedural minimums of notice and opportunity for comment prescribed by section 4 of the APA, 5 U.S.C. §§ 553(b) and (c). Chrysler

Corporation v. Brown, *supra*, at 312-316; Morton v. Ruiz, 415 U.S. 199 (1974); United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 758 (1972). Here that did not occur. See, 42 F.R. 34877.

II.

A subsidiary question is whether assuming the legal efficacy of the claimed definitional change the operator had fair warning of MSHA's intention to abandon the 12-inch tolerance from the actually extracted height as the basis for determining when compliance was due. The record shows that since the minimum extracted height was only 53 inches the operative "mining height" under the September 23, 1973, bulletin was 41 inches.

The Mine Safety Law is remedial and therefore to be liberally construed. But because it is also penal, the due process clause precludes the imposition of sanctions without fair warning of the acts and conduct prohibited. The vagueness doctrine generally requires that a statute or standard having the force and effect of law be precise enough to give fair warning to actors that contemplated conduct is criminal and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. Impermissible vagueness occurs whenever such a provision states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork. Connally v. General Construction Company, 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Colton v. Kentucky, 407 U.S. 104, 107 (1972).

In the case of purely economic regulation, the Supreme Court has usually insisted that a statute be evaluated not only on its face but in the context of the conduct with which a defendant is charged. Boyce Motor Lines v. United States, 342 U.S. 337 (1952); United States v. National Dairy Products, 372 U.S. 29, 31-33 (1963). Thus, unlike a finding of facial vagueness, which results in a standard being declared unenforceable against all operators, a finding that an interpretation urged renders the standard impermissibly vague as applied to a particular violation results only in a vacation of the citation. Secretary v. Peabody Coal Company, 3 FMSHRC _____, Docket No. CENT 80-298, decided February 5, 1981.

The question presented here is whether the suspension action of July 7, 1977, gave the operator fair warning that henceforth the 12-inch tolerance from the actually extracted height would no longer apply. I find that it did not because the suspension notice is susceptible not only of the meaning ascribed to it by MSHA but also of meaning that canopies are required only where the actually extracted height less 12 inches exceeds 41 inches. Because of the serious consequences not only to the operator but also to miners forced to work with canopies in mining heights insufficient to accommodate them, I conclude that as a matter of law the latent ambiguity in MSHA's rule or policy must be construed against it. A rule or policy "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." Connally v. General Construction Company, *supra*, at 391; A. B. Small Company v. American Sugar Refining Company, 267 U.S. 233 (1925); Jordan v. DeGeorge, 341 U.S. 223 (1951).

For these reasons, I conclude that even if the suspension notice of July 7, 1977, were found to be a valid revision or amendment to the statutory standard (see Part I, supra), it may be impermissibly vague and unenforceable as applied to the violation charged.

III.

Substitution of an "actually extracted height" for the "coalbed height" standard results in remarkably disparate treatment of the requirement for canopies on electric face equipment in sections of coal mines with the same coalbed height. The record shows that in this case no requirement for a canopy would have been imposed if the operator had confined his extraction in the three left entries to the coalbed height of 32 to 38 inches, regardless of the extracted or coalbed height on the three right entries. It was only because the operator had to balance his ventilation system and mine coal from the three high entries on the right, 75 to 80 inches, that he claims he was faced with the necessity of mining through the low coal roll on the left with an oversized, 45-inch machine in order to be in a position to rob the three high seams on the right in a safe and economical manner. It was the taking of top rock and bottom to accommodate the oversized machine that resulted in triggering the requirement for a canopy under the "actually extracted height" rule. At the same time, the parties agree that insufficient top was taken to permit use of a canopy that would provide a safe seat. The obvious answer--take more top--both parties disavow as a solution, MSHA because it disclaims authority to require the taking of top to accommodate canopies and the operator because of the health hazard created by rock dust. Declaring irrelevant

the operator's claim that interchange of the oversized miner with a piece of low profile equipment was impractical as a matter of sound mining practice and business judgment, MSHA argues that the solution was either to effect an equipment interchange or utilize a full floater canopy technology allegedly known to the operator and available from the Clinchfield Coal Company.

Without attempting at this time to resolve these disagreements, the threshold issue is whether application of the "actually extracted height" as the trigger for compliance results in treatment of operators with sections where the coalbed heights are less than 42 inches in a manner so unequal or inequitable as to result in a deprivation of due process.

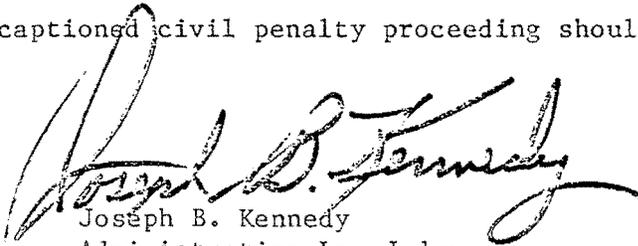
MSHA contends that it does not because while it has no authority to require the use of existing technology to take top or bottom in order to permit use of canopies in sections where the coalbed height is less than 42 inches, it has authority to impose heavy monetary penalties on any operator who fails for any reason to utilize canopy technology available anywhere throughout the industry in sections where the actually extracted height is 42 inches or more. If there is a rational explanation for the disparate treatment of those operators who take top and thereby allegedly trigger application of the canopy requirement and those who do not, the inequality of treatment does not offend due process. See, Secretary v. Kenny Richardson, 3 FMSHRC 8, 18-28 (1980).

MSHA claims that the disparate treatment is rational because it may result in greater safety for miners working in those sections where the actually extracted height exceeds 41 inches. What appears to be questionable if not

irrational is MSHA's refusal to afford this protection to miners who work on sections where the coalbed height is less than 42 inches but where top or bottom could be taken in so as to provide an actually extracted height that would permit the use of canopies.

Thus, what bothers me is not so much the disparate treatment of the operators but the disparate treatment or safety afforded the miners. Consequently, I find that because MSHA's disparate treatment of the operators results in what appears to be a self-imposed and irrational limitation on its authority to enforce the canopy standard, the discriminatory enforcement policy presently in effect is violative of this operator's right to equal treatment under the law.

Accordingly, it is ORDERED that on or before Wednesday, April 15, 1981, the Secretary SHOW CAUSE WHY the captioned civil penalty proceeding should not be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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