April 1982

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

APRIL

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

Patrick J. Mooney v. Sohio Western Mining Company, Docket No. CENT 81-157-DM. (Judge Vail, March 3, 1982)

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 80-318-R, Kent 81-32. (Judge Lasher, March 4, 1982)

Secretary of Labor, MSHA v. Allied Chemical Corporation, Docket No. WEST 79-165-M. (Judge Morris, March 19, 1982)

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

Secretary of Labor, MSHA v. FMC Corporation, Docket No. WEST 80-397-RM, WEST 81-80-M. (Judge Boltz, February 22, 1982)

Secretary of Labor, MSHA on behalf of Isaac A. Burton v. South East Coal Co., Docket No. KENT 81-124-D. (Judge Broderick, March 8, 1982)

Secretary of Labor, MSHA v. FMC Corporation, Docket No. WEST 80-495-RM, WEST 81-259-M. (Judge Broderick, March 10, 1982)

Secretary of Labor, MSHA v. Ace Energy Company, Inc., Docket No. KENT 80-368, etc. (Judge Steffey, March 24, 1982 Order confirming Default Order)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 5, 1982

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 79-221-P
ALEXANDER BROTHERS, INC.	:	

DECISION

This case involves the interpretation of sections 3(h) and 3(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977). The question is whether, at the time of the alleged violations at issue, Alexander Brothers, Inc., was subject to the 1969 Coal Act. We affirm the administrative law judge's finding of coverage. 1/

Alexander Brothers' operation is located near the site of an abandoned underground mine that was operated from the 1930s to 1967, first by Pond Creek Coal Company and later by Island Creek Coal Company. Waste from the underground mine was deposited on the side of a hill and formed a refuse pile. 2/ After Island Creek sealed the mine, Whitco and Recco Coal Corporation leased the property where the refuse pile is located from its owner, Henry Warden, and reclaimed coal from the pile. In late 1972 or early 1973, that corporation sold its equipment to Alexander Brothers, which also acquired rights to the lease between Warden and Whitco and Recco Coal.

Alexander Brothers' reclamation activities are performed by four to seven employees, and take place at two plants about a mile apart. An end-loader removes material from the refuse pile and deposits it into trucks. The trucks bring the material to the screening plant and dump it into a bin. From the bin, the material goes through a roller and screen that removes large rocks. The material passes under a magnet that removes scrap metal. From there it crosses a vibrating screen where fine coal is sifted and workers pick out rock and obvious waste. The material is then sent through a hammer mill and crushed. It is stockpiled until loaded for transportation to the cleaning plant.

1/ The judge's decision is reported at 3 FMSHRC 2085 (1981).

2/ The refuse pile is composed of coarse and fine coal, rock dust, garbage, rock, timber, wood, steel, dirt, tin cans, bottles, metal and general debris. At the time of the hearing in January, 1981, it was estimated that about 20 to 25 percent of the material taken from the refuse pile was coal.

At the cleaning plant the material is loaded into a bin and fed onto a conveyor belt. The belt transports it to a tank where it is mixed with water. The material next passes through a jig which separates coal and coal-bearing material from non-coal. 3/ From the jig, fine and coarse coal are handled separately. The fine material, i.e., 1/8 inch size particles or smaller, goes to a cyclone that removes the remaining non-coal, and then goes to a dryer. 4/ The larger pieces are crushed to one inch size particles and carried to a heavy media washer, which controls the ash content. 5/ (Any fine coal resulting from this crushing also goes to a cyclone.) From the heavy media washer the coarse coal is taken to the dryer. The fine and coarse coal are then remixed and loaded onto railroad cars for shipment. The coal is sold to a broker, and the parties stipulated that it enters interstate commerce.

The administrative law judge examined the procedures undertaken by Alexander Brothers. He noted that Alexander Brothers' facility differs from "traditional preparation facilities" in that the raw material processed at those facilities is run-of-mine coal and thus contains a much higher percentage of coal than the material processed by Alexander Brothers. 3 FMSHRC at 2091. The judge found that, due to this difference in the composition of the materials processed, Alexander Brothers employs some separation techniques not used at traditional facilities. He found, however, that both types of operations involve "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading" of coal. The judge noted that section 3(i) of the Coal Act defined "work of preparing the coal" as including these very processes. He concluded that Alexander Brothers engages in the "work of preparing the coal" as defined in section 3(i). 3 FMSHRC at 2093.

In addition, the judge held that a coal preparation facility need not extract coal or have a direct relationship with the extractor in order to be covered by the Coal Act. 3 FMSHRC at 2092-93. The judge

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3/ A jig is defined as:

> a. A device which separates coal from foreign matter by means of their difference in specific gravity in a water medium.

Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 600 (1968)(hereafter "Dictionary of Mining").

4/ A cyclone cleans coal with the aid of centrifugal force:

> cyclone washer. Cyclone washing of small coal ... is effected with the aid of centrifugal force. The heavier shale particles move to the wall of the cyclone and are eventually discharged at the bottom while the lighter coal particles are swept towards the central vortex and are discharged through an outlet at the top. The washer may be used for cleaning coal up to three-fourths of an inch....

Dictionary of Mining at 297.

5/ A heavy media washer is a machine that cleans coal by means of a sink-float process that separates coal from other minerals through immersion in a magnetite suspension. See "dense-media separation" and "heavy-media separation", Dictionary of Mining at 311, 536.

therefore concluded that Alexander Brothers was subject to the coverage of the Coal Act. He did not resolve the question of whether Alexander Brothers was a "custom coal preparation facility" under section 3(h). 3 FMSHRC at 2097. 6/ Finally, he rejected Alexander Brothers' argument that the definition of "coal mine" contained in section 3(h) of the Coal Act was unconstitutionally vague. Id.

Alexander Brothers argues that it was not subject to the Coal Act because it has no connection with any coal extractor. This argument is premised largely on a memorandum issued March 31, 1972, by the Mining Enforcement and Safety Administration, commonly referred to as the Geisler memorandum. This memorandum was rescinded on October 8, 1976. 7/ The Geisler memorandum indicated that a preparation facility would not be considered a mine under the Coal Act unless it were directly connected to the extractor of the coal it prepared. Alexander Brothers argues that the Geisler memorandum represents "a clear, concise and logical analysis of the intent of Congress with respect to the scope of the definition of a coal mine under the 1969 Coal Act." Alexander Brothers submits that the Commission should reject the rationale of the 1976 memorandum rescinding the Geisler memorandum because it improperly extends the jurisdiction of the Coal Act.

Our resolution of the question before us is governed by the statute, rather than by which of two conflicting interpretations by the Solicitor is correct. Resolution of questions of statutory interpretation is a primary role of the Commission. Helen Mining Co., 1 FMSHRC 1796, 1781, rev'd on other grounds sub nom., UMWA v. FMSHRC, No. 79-2503, etc., (D.C. Cir. Feb. 23, 1982). Thus, we will examine the facts in this case against the relevant statutory provisions.

The term "coal mine" was defined in section 3(h) of the 1969 Coal Act as follows:

> "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from,

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6/ In view of our conclusion that Alexander Brothers was subject to the Coal Act because it engaged in coal preparation, we also do not resolve this issue. In addition, the judge suggested that the Act would cover Alexander Brothers' operation simply because it was performed on an area of land "resulting from" the work of extracting coal from its natural deposits. It is also unnecessary for us to address this alternate basis of coverage.

7/ The Geisler memorandum was an internal Department of Interior memo from the assistant solicitor for regulations and procedures to the director of the Bureau of Mines. The assistant solicitor responded to an inquiry on whether Geisler Coal Sales, and similar independent preparation facilities, were subject to the 1969 Coal Act. The 1976 memorandum was also from the Interior Department's Office of the Solicitor, and was addressed to the administrator for MESA. It reviewed the Geisler memorandum.

> the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1976)(emphasis added). Section 3(i) of the 1969 Coal Act provided:

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

Section 3(h) did not specifically require that those involved in "the work of preparing the coal" be connected with the extractor. 8/ Moreover, to hold that the Coal Act did not apply to preparation facilities that were not connected with the extractor of the coal being prepared would remove from that Act's coverage facilities that would otherwise be regulated, except for their business arrangement, geographic location, or period of operation. We conclude that a connection with the extractor of coal was not required for a facility engaged in "the work of preparing the coal" to have been subject to the Coal Act. 9/

Alexander Brothers also argues that it does not engage in the "work of preparing the coal," but rather processes refuse "which happens to contain a small amount of coal." The company asserts that its equipment would not function if coal mined from its natural deposit were processed by it. Alexander Brothers argues that few, if any, coal preparation operations perform all the functions it does--particularly those functions necessary to remove the foreign debris (wood, tin cans, metal, trash, garbage, etc.) from its "raw" material--and that this makes its facility "fundamentally very different from a coal preparation plant as envisioned by the ... [Coal] Act."

8/ The 1977 Mine Act's definition of "mine" was changed somewhat from that of the 1969 Coal Act. Among the modifications was the substitution in the 1977 Act of the word "or" for "and" before "the work of preparing coal." We do not regard this change to be significant; rather, we believe that Congress intended to clarify, not alter, its original intent with respect to the extent of the statute's coverage of the mining process. See S. Rep. 95-121, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

9/ Courts have held that a connection to extraction is not required under the 1977 Mine Act for coverage of a preparation facility. See, e.g., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980); Marshall v. Tacoma Fuel Co., No. 77-0104-B (W.D. Va. June 29, 1981).

The judge found that Alexander Brothers' processes include "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading" of coal. These are all the processes listed in section 3(i) of the 1969 Coal Act. As we noted in Oliver M. Elam, Jr., 4 FMSHRC 5 (1982), inherent in determining whether a preparation operation is a mine is an inquiry not only into whether the operator performs one or more of the listed work activities, but also into the nature of the operation. 4 FMSHRC at 7. 10/ In this regard, we held that "work of preparing the coal" signifies a process undertaken to make coal suitable for a particular use or to meet market specifications. 4 FMSHRC at 8. Here the processes undertaken by the company are all those specifically enumerated in section 3(i). Moreover, Alexander Brothers does not dispute that it undertakes those processes in order to make coal-bearing refuse marketable as coal. The mere fact that its "raw material" has a greater proportion of non-coal than that of run-of-mine preparation plants does not remove Alexander Brothers from the jurisdiction of the Coal Act.

Finally, we reject Alexander Brothers' argument that section 3(h) of the Coal Act was so vague as to violate constitutional due process requirements. As the judge correctly noted, any perplexity concerning the meaning of the statutory section "is undoubtedly due to the broadness of the Act; not its vagueness." 3 FMSHRC at 2097.

For the foregoing reasons, the decision of the administrative law judge is affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

10/ Although Elam arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), that statute's definition of "work of preparing the coal" is identical to the definition in the 1969 Coal Act.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1982

VALLEY LIMESTONE COMPANY	:	
v.	:	
	:	Docket No. LAKE 81-87-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

ORDER

Valley Limestone Company has filed a petition for reconsideration of the Commission's failure to grant its petition for discretionary review filed on February 25, 1982. Upon review of the petition for reconsideration and further review of the petition for discretionary review, Valley Limestone's request for reconsideration is denied.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

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A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 27, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. CENT 79-281-M, CENT 79-282-M, CENT 80-6-M, CENT 80-124-M
v.	:	
PHILLIPS URANIUM CORPORATION	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 80-208-M
v.	:	
PHILLIPS URANIUM CORPORATION	:	

DECISION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), involve the same parties, and present identical issues. We therefore consolidate and dispose of them in this decision. Docket Nos. CENT 79-281-M, CENT 79-282-M, CENT 80-124-M, and CENT 80-6-M are hereinafter referred to as "Phillips I". Docket No. CENT 80-208-M is referred to as "Phillips II".

The common issue presented is whether the administrative law judge in each case erred in upholding citations and orders issued by the Secretary of Labor to Phillips Uranium for violations of the 1977 Mine Act arising from the work activities of independent contractors engaged by Phillips.

Facts

These cases were submitted to the judges on the basis of stipulations of facts and motions for summary decision. The stipulations in each case established the same material facts. Phillips owned mining rights and was conducting mining activities subject to the Mine Act at a proposed uranium mine. Phillips retained large, independent companies with experience and expertise in shaft sinking and related underground construction. As a matter of law, these

contractors are "operators" under the Mine Act's definition. The citations and orders alleging violations of the Act described activities or omissions of the contractors' employees or conditions of the contractors' equipment or facilities relating to the work the contractors were engaged to perform. Phillips' employees, equipment or activities did not cause or contribute to the alleged violations. Phillips' employees did not perform any work for the contractors, but they did inspect and observe the progress of the work to assure compliance with quality control and contract specifications. The alleged violations were abated by employees of the contractors.

The stipulations also established the following: MSHA's policy at the time the citations and orders were issued was to cite only operators with a "Federal Mine Identification Number." None of the involved contractors possessed such an identification number. The identification number for the subject site was possessed by Phillips. Phillips was proceeded against under an MSHA policy to directly enforce the Act against only owner-operators for contractor violations. This policy was an interim policy pending MSHA's adoption of regulations governing the issuance of identification numbers to contractors and the direct citation of contractors so identified.

Procedural Background

The 1977 Mine Act became effective on March 9, 1978. The Act imposes a duty on mine operators to comply with its provisions and includes in its definition of "operator," "any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). The citations at issue in Phillips I were issued to Phillips between February and August 1979. The citation and order at issue in Phillips II were issued to Phillips in November 1979.

In August 1979 the Secretary published a proposed rule addressing the citation and identification of contractors as operators. 44 Fed. Reg. 44746-47753. On July 1, 1980, the Secretary published the final rule. 45 Fed. Reg. 44494-44498. This rule became effective on July 31, 1980.

Shortly before the Secretary's final rule was published, motions for summary decision were filed in the present cases. Cross-motions for summary decision in Phillips I were submitted in May 1980. A joint motion for summary decision in Phillips II was submitted in June 1980.

On June 5, 1980, before the publication of the final rule, the judge decided Phillips I finding on the basis of the Commission's decision in Old Ben Coal Co., 1 FMSHRC 1480 (1979), aff'd, No. 79-2367, D.C. Cir., January 6, 1981, that the citations were properly issued to Phillips. The Commission granted Phillips' petition for discretionary review of the judge's decision. On August 4, 1980, the Commission remanded Phillips I to the judge for the limited purpose of allowing the Secretary the opportunity to determine, in light of the subsequent adoption of his final rule, whether to continue to proceed against Phillips only, or to proceed against the contractor, or both. On remand the Secretary responded that it was not in his "interest" to

substitute or join the contractor. He stated, however, that he would not oppose a joint motion by Phillips and the contractors to substitute the contractors, or a motion by Phillips to implead the contractor, if such motions were filed. In view of this response the judge returned the record to the Commission. 1/

The judge in Phillips II also issued an order allowing the Secretary an opportunity to redetermine whether, in light of the new regulations, he would continue to proceed against Phillips only. The Secretary again responded that he would proceed solely against Phillips, but would not oppose a motion by Phillips to join the contractor. Following this response, the judge affirmed the citation and order issued to Phillips on the basis of the Old Ben decision. We granted Phillips' petition for discretionary review.

Discussion

In our decision in Old Ben Coal Co., we emphasized that, although an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor, the Secretary's decision to proceed against an owner for such a violation is not insulated from Commission review. 1 FMSHRC at 1483-1484. For the reasons stated in Old Ben we hold that the Commission may review the Secretary's decision in these cases to proceed against Phillips.

The test applied by the Commission in reviewing the Secretary's choice is "whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." 1 FMSHRC at 1485.

1/ Shortly after the judge returned the record in Phillips I to the Commission, Phillips and American Mine Services (AMS) (the contractor that created the violative condition at issue in Docket No. CENT 79-281-M), entered into a contractual agreement in which AMS agreed to be voluntarily substituted as the respondent in Docket No. CENT 79-281-M. AMS also tendered a check to Phillips, endorsed to the MSHA's Office of Assessments, for the full amount of the penalty proposed by MSHA. Phillips indicated to the Secretary that the primary objective of the substitution was to remove the citation from Phillips' history of violations.

In his brief on review, the Secretary states that he would not oppose a remand of Docket No. CENT 79-281-M for the substitution of AMS. Although the Secretary has not initiated the substitution, and in the absence of the efforts made by the operators would be content to continue against Phillips, we will grant a remand in this docket so that AMS can be substituted and Phillips dismissed. In light of the agreement between Phillips and AMS, and in view of our discussion in this decision, we find that the purposes of the Act will be served by allowing the substitution.

Our upholding of the Secretary's choice in Old Ben, albeit with considerable doubts expressed as to the wisdom thereof, was largely based on the particular chronology of events in that case. The citation in Old Ben was issued only thirty-four days after the 1977 Mine Act had taken effect. 1 FMSHRC 1486 n.7. Recognizing that responsibility for enforcement of the nation's mine safety program had only recently been transferred to the Department of Labor from the Department of Interior, we found that the Secretary's decision to cite Old Ben under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early stage, a decision not inconsistent with the purposes and policies of the 1977 Act.

The facts in the present cases place them in a fundamentally different light. The citations and orders here were issued in a period extending from 11 to 17 months after the 1977 Act took effect. Furthermore, more than two years after the Act's effective date, and well after the Commission's decision in Old Ben, the Secretary continued to proceed against Phillips, as owner-operator, by submitting the cases on motions for summary judgment. Finally, the cases were submitted shortly before the Secretary published his final regulations on identifying and proceeding against independent contractors, and even thereafter the Secretary refused to apply the regulations against the very operators who would be held accountable under the regulations.

As we previously have observed, "direct enforcement against contractors is a vital part of the 1977 Act's enforcement scheme." 1 FMSHRC at 1483. "[T]he amendment of the 1977 Act's definition of operator to include independent contractors was intended to accomplish a specific purpose, i.e., to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." 1 FMSHRC at 1486. MSHA itself acknowledges that direct enforcement against contractors best serves the health and safety of miners. In the preamble to its contractor regulations MSHA stated:

> During the course of the rulemaking process, MSHA has been persuaded that the interest of miner safety and health will best be served by placing responsibility for compliance with the Act, standards and regulations upon each independent contractor.
>
> * * *
>
> The commentors' analysis of the concept that independent contractors are generally in the best position to prevent safety and health violations in the course of their own work, and to abate those violations that may occur, has persuaded MSHA that holding all independent contractors responsible for their violations will in the majority of instances improve the overall safety and health of miners.

45. Fed. Reg. 44494, 44495 (emphasis added).

The shortcomings of the Secretary's decision to proceed against Phillips here are made all the more evident by viewing the facts in light of the basic statutory scheme. Large, skilled contractors were retained for their expertise in an important and familiar facet of mine construction, i.e., the sinking of shafts and related underground construction activities. The hiring of contractors to perform the specialized task of shaft construction is common in the mining industry. The contractors, conceded to be "operators" subject to the Act, failed to comply with various safety standards. Yet Phillips, rather than the contractors, was cited; penalties were sought against Phillips, rather than the contractors; the violations would be entered into Phillips' history of violations, rather than the contractors' histories, resulting in increased penalties for Phillips rather than the contractors in later cases; 2/ Phillips, rather than the contractors could be subjected to the stringent section 104(d) sequence of citations and orders; and Phillips rather than the contractors could be subjected to the stringent section 104(e) pattern of violation provisions. Compared to Phillips' burden in bearing the full brunt of the effects of the violations committed by the contractors, the contractors would proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions should the contractors again proceed to engage in unsafe practices.

We previously have observed that "[i]n many circumstances ... it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring." 1 FMSHRC at 1486. This precise situation was evident to the inspector when he issued the citations and orders in these cases, was evident to the Secretary's attorneys in preparing and submitting these cases against Phillips, and most assuredly was evident to the Secretary after adoption of his final regulations on independent contractor violations. The Secretary's insistence on proceeding against Phillips appears to be a litigation decision resting solely on considerations of the Secretary's administrative convenience, rather than on a concern for the health and safety of miners. In choosing the course that is administratively convenient, the Secretary has ignored Congressional intent, the Commission's clear statements in Old Ben, and the intent of his own regulations, and has subjected the wrong party to the continuing sanctions of the Act. The Secretary's decisions to continue against Phillips were not consistent with the purposes of the Act and must fail.

2/ In his motion to dismiss as moot, denied this date, the Secretary asserts that under his penalty assessment regulations violations are not counted in an operator's history after two years. As the Secretary is well aware, in assessing penalties under the Act the Commission and its judges are not bound by the Secretary's penalty assessment regulations. 30 U.S.C. § 110(i); 29 C.F.R. § 2700.29(b). Cf. Co-op Mining Co., 2 FMSHRC 784, 785 (1980). See also, 30 C.F.R. § 100.2. Therefore, the fact that the Secretary, for his purposes, may choose to discount violations that occurred more than two years in the past is not determinative of an operator's history in cases contested before the Commission.

Accordingly, the decisions of the administrative law judges in Docket Nos. CENT 79-282-M, CENT 80-6-M, CENT 80-124-M and CENT 80-208-M are reversed, the citations and orders are vacated and the petitions for assessment of civil penalties are dismissed. Docket No. CENT 79-281-M is remanded so that Phillips can be dismissed and AMS substituted, and for further proceedings consistent with this decision. See n. 1, supra.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

Commissioner Lawson dissenting:

In Old Ben, supra, the Commission agreed with the Secretary's decision to proceed against only the owner-operator. We held that:

> "It was not the intention of Congress to limit the number of persons who are responsible for the health and safety of the miner, nor to dilute or weaken the obligation imposed on those persons, ... we find that, as a matter of law under the 1977 Act, Old Ben, as an owner-operator, can be held responsible without fault for the violation of the Act committed by its contractor. 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. ... 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." (Emphasis added).

Old Ben, supra, at 1483.

The rationale supporting the Commission's conclusion that owner-operators are responsible for contractor-operators' violations under the 1977 Act also has recently been firmly endorsed by two Courts of Appeals. In Harman Mining Corporation v. FMSHRC, No. 81-1189 (4th Cir. December 24, 1981), the court stated:

> "Based upon our analysis of the statute, we held that the owner of a mine is liable "regardless of who violated the Act or created the danger" (citing Bituminous Coal Operators Association v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977)).

In Cyprus Industrial Minerals Company v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981) the court held:

> "In addition, mine owners are strictly liable for the actions of independent contractor violations under the Coal Act and the present (1977 Act)." (Citations omitted). The Secretary presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing, the owner is generally in continuous control of conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the owner the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances.

> A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted" (citing Secretary of Labor v. Republic Steel Corp., 1 FMSHRC 5 (1979)). (Emphasis added).

Less than two months ago, this Commission again found that an owner-operator "was properly cited for the condition created by its independent contractor." U. S. Steel Corporation, 4 FMSHRC 163, 164 (February 25, 1982).

The majority here chooses to ignore precedent and instead asserts that the Secretary must at this late date discontinue the cases it has successfully prosecuted against the owner-operator in these dockets. This is even more anomalous since, in Phillips I, this Commission remanded that case to the Secretary, and offered him the choice of continuing these dockets against the owner-operator, proceeding only against the contractor-operator, or against both. In light of the majority's decision today, that offer was obviously a sham. The Secretary is now ordered to start anew and, on two year old violations, issue new citations against Phillips' contractors in these now stale dockets.

It bears emphasis that in Old Ben (also affirmed by the D.C. Court of Appeals; No. 79-2367 (1981)), (supra at 1486), we criticized the Secretary only if he "unduly prolongs the policy that prohibits direct enforcement of the Act against contractors." (emphasis added), indicating that the Secretary's formerly inflexible policy of proceeding only against owner-operators for contractor-operator's violations would not be permitted to continue indefinitely. 1/

This precedent--the only one cited by the majority--therefore reached a result contrary to that the majority herein now endorses.

1/The length of time taken by the Secretary for the development of a new policy was, in any event, not unduly prolonged. The proposed rule was published in the Federal Register on October 31, 1978 (43 F.R. 50716), and forty-five days allotted for public comment thereon. Comments were received from more than seventy-five organizations and individuals. The comments were analyzed and a new proposed rule published on August 14, 1979 (44 FR 47746-53). Six public hearings were held on the proposal. During this period of public comment the agency received some eighty written comments, and the hearings generated testimony from seventy-three witnesses extending over six hundred and sixty-five transcript pages, in addition to one hundred and fifty-five pages of written statements submitted at the hearings. The time consumed in promulgating a final rule was thus largely due to the extensive public participation throughout the entire rulemaking process, and the Secretary's commendable and sensitive response thereto.

The citations in Phillips I were issued prior to the Commission's decision in Old Ben. To the extent therefore that the majority opinion, as it does, relies on Old Ben in criticizing the Secretary's initiation of the Phillips I action against the owner-operator, it is obviously misdirected.

In Phillips II, the citation and order were issued only thirteen days after the Commission's Old Ben decision, and nothing in the record reveals awareness by any Secretarial personnel of that decision. The majority's contention that issuance of either the Phillips I or II citations and order was in defiance or contravention of this now asserted Old Ben prohibition is therefore unsupported. The judges in both Phillips' I and II decided these cases with full cognizance of and in reliance on the Commission's decision in Old Ben, and neither found any fault in the Secretary's prosecution of Phillips.

More narrowly, of course, the Commission did not--and indeed could not--prohibit the Secretary's direct enforcement of the Act against an owner-operator. As the Senate Committee Report on the 1977 Act noted:

> "In enforcing this Act, the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F2d 240 (C.A. 4, 1977)." (Emphasis added).

S. Rep. 95-181, 95th Cong., 1st Sess. 14 (1977).

The majority here chooses to quote only the preamble to the "contractor regulations" upon which it places such great emphasis. 2/ The regulations themselves, however, fail to support that selective quotation:

2/ Indeed, even the quoted material relied upon by the majority sanctions prosecution of owner-operators; viz..."in the majority of instances" the Secretary may proceed against contractor-operators. Obviously, therefore, he is not bound to do so in other instances (page 4, supra).

"General Enforcement Policy for Independent Contractors.

...

MSHA's general enforcement policy regarding independent contractors does not change the basic compliance responsibilities of production-operators. Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to the work being performed by independent contractors at the mine. As a result, independent contractors and production-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors.

...

Enforcement action against production operators for violations involving independent contractors is ordinarily appropriate in those situations where the production-operator has contributed to the existence of a violation, or the production operators' miners are exposed to the hazard, or the production-operator has control over the existence of the hazard. Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an independent contractor: (1) when the production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement." (Emphasis added).

Here, Phillips I had been decided, and Phillips II had been submitted to the judge below for decision prior to the time the Secretary declined to discontinue these cases, abatement had been completed, and between twelve and eighteen months had expired since the various citations and order in these dockets had been issued. Further, the Secretary had specific authorization so to proceed. The then Assistant Secretary of Labor for Mine Safety and Health had issued a memorandum dated October 31, 1980 which stated:

> "Effect of New MSHA Independent Contractor Policy on Cases Pending at the time of the Policy Change. ...On a case-by-case basis, counsel for the Secretary will either dismiss the case against the operator or move to join the contractor as a party. No action will be taken on fully tried cases or cases submitted on the record." (Emphasis added).

The Secretary's response to the Commission's orders did not therefore represent any abuse of discretion, and no precedent to the contrary is cited by the majority, since none exists.

Nor are the facts herein exculpatory of Phillips, which had not only selected these contractors, but continually inspected their work and reserved the right to terminate their services. The agreements between Phillips and its contractors provide that Phillips' "...representatives shall at all reasonable times have access to the work wherever it is in preparation or progress". (Exhibit 1 to stipulation at page 3). Of Phillips' sixty-five contractually enumerated "job title[s]", as of February 1, 1979, nineteen were specifically authorized access to the contractor's construction areas. Of these, seven were authorized daily entry, ten were permitted entry "occasionally," and two on a semi-weekly basis. Five categories of Phillips' employees were authorized entry into the contractor's area "to maintain Phillips equipment." (Exhibit B to stipulation).

This periodic intermingling of personnel thus resulted in the exposure of Phillips' employees to the hazards here involved on a regular, substantial, and continuous basis. Broad participation by Phillips in its contractors' operations is perhaps most notably memorialized in its agreements with its its contractors, which provide that Phillips "reserves the right of suspending the whole or any part of the work to be done hereunder at any time its best interest appears to be served by so doing." (Exhibit 1 to stipulation, page 11). (Emphasis added).

The Commission acknowledged the importance of these factors in Republic Steel Corporation, supra:

> "It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted." 1 FMSHRC 5, 11 (1979).

The majority's professed concern with the possibility that these violations would become part of Phillips history of violations, rather than its contractors, and possibly result in increased penalties for Phillips for any subsequent violations is equally baseless. It is sufficient to note that these violations are over two years old, and thus cannot, under the Secretary's Regulations, be part of Phillips history of violations. 30 C.F.R. 100.3(c).

While the majority feels that Phillips "could" be subjected to the "stringent" section 104(d) sequence of citations and orders, and 104(e) pattern of violations provisions of the Act, this prediction is to say the least speculative, as well as totally unsupported on the record. The majority's anxiety over possible section 104(e) "pattern" violations, cannot conceal the fact that such actions have never been instituted against Phillips, or any other operator, owner or contractor. Indeed, the Secretary over the four year history of this Act, appears to be totally disinterested in enforcement of section 104(e). Suggestions to the contrary are consequently not only historically unfounded but misleading.

The majority's unsupported conclusion that the Secretary's decision not to discontinue its (successfully tried) actions against Phillips "... were not consistent with the purpose of the Act and must fail." thus fails to stand up to even minimal critical analysis. No owner-operator henceforth need worry about penalty proceedings or enforcement under the Act, nor indeed the safety or health of miners. It need only contract with or establish a separate corporate entity to do shaft sinking, construction, or any other mining activities, and thereby contractually evade its responsibility under the Act for the safety and health of the miners.

To understate the case considerably, this hardly seems in accord with the "purpose of the Act" and the protection of the health and safety of the miners whom the Congress has declared to be "... the first priority and concern of all in the coal or other mining industry..." Section 2(e).

To exonerate or pardon an operator found responsible under the Act, in particular after full hearings and judicial decisions to the contrary, hardly seems designed to improve or insure miner safety and health; indeed, quite the contrary. The Secretary saw no reason post-trial to dismiss these cases against the mine owner-operator, which had been found legally liable, nor do I.

Contrary to the majority's suggestion, the issue here is not whether the Secretary's decisions were "consistent with the purpose of the Act"; it is rather whether the Secretary abused his discretion by continuing to proceed against the owner-operator.

There is no basis for the majority to find that the Secretary's decision was made for any reason in derogation of either the Secretary's, the Commission's, or the courts' mandates. The Secretary's continuing as appellee in these cases was, to the contrary, in full accord and conformity with those commands. This owner-operator should not be permitted to contract away its responsibility for compliance with the Act, particularly in the context of its very substantial involvement with its contractors' operations.

I therefore dissent.

A. E. Lawson

A. E. Lawson, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 24 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 81-136
	:	A.O. No. 15-02008-03036
v.	:	No. 32 Mine
UNITED STATES STEEL CORP., Respondent	:	

SUMMARY DECISION

Appearances: Carole Fernandez, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Louise Q. Symons, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

This case concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on July 6, 1981, seeking a civil penalty in the amount of $170 for an alleged violation of mandatory safety standard 30 CFR 77.1605(k), as detailed in a section 104(a) citation, No. 981185, served on the respondent by MSHA inspector Alex R. Sarke, Jr., on January 23, 1981. The condition or practice described by the inspector on the face of the citation is as follows:

> The berms provided along the elevated roadway leading to the mine were not as high as the axle of the largest piece of equipment using the roadway in that 3 locations along the roadway have berms with less than 22 inches which is the height of the axle of the Pettibone tractor used at the mine. Location No. 1 is directly across from the bathhouse and an area of 29 feet at this location has no berm or guardrail. Guardrails were installed at one time, but they have been dislodged. Location No. 2 is three tenths of a mile from the bathhouse and an area of 22 feet

has a berm of 6 to 8 inches. Location No. 3 is 1.6 miles from the bathhouse and an accident has occurred in this area in that three workmen went over the berm and down under the elevated roadway in a passenger car. The height of the berm provided in this area is 16 inches for a distance of 29 feet. This is where the car went over the berm.

Respondent filed its answer on July 10, 1981, denying the alleged violation, and subsequently, by letter filed August 28, 1981, petitioner's counsel advised that the parties had conferred with each other and believe that the material facts are not in dispute and can be stipulated, and that the case may be decided on motions for summary decision without the necessity for a hearing on the merits. Subsequently, on December 7, 1981, the parties filed a joint stipulation, setting forth the following:

1. Number 32 Mine of United States Steel Corporation's (USS) Lynch District is subject to the jurisdiction of the Mine Safety and Health Administration.

2. The proceedings in Docket No. KENT 81-136 are properly before the administrative law judge.

3. USS is a large operator and payment of a civil penalty will not affect its ability to stay in business.

4. Citation No. 981185 was issued by a duly authorized representative of the Department of Labor.

5. Citation No. 981185 alleges a violation of 30 CFR 77.1605(k).

6. The standard cited states, "Berms or guards shall be provided on the outer bank of elevated roadways."

7. Citation No. 981185 states that there were berms along the roadway except at Location No. 1 where the guardrail was dislodged.

8. USS claims that it was in the process of replacing the guardrail when the citation was issued; the mine inspector saw no evidence of this activity.

9. The MSHA Surface Manual at page III-338 requires that berms must be as high as the axle of the largest piece of equipment using the roadway.

10. An accident in which a car went over the 16-inch berm occurred on January 22, 1981.

11. It has not been determined that a berm of 22 inches would have had any different effect on the fact situation of January 22, 1981, than a berm of 16 inches.

Motions for Summary Decision

By motion and supporting arguments filed December 21, 1981, petitioner moves for summary decision in its favor. In support of its motion, petitioner asserts that with regard to location No. 1 along the elevated roadway which was cited, the parties have stipulated that no berm was at that location and that the guardrail was dislodged and the inspector saw no evidence of the claim that respondent was in the process of replacing the guardrail at the time the citation issued. Respondent maintains that it has established a violation as to that location since no berm or guardrail was present.

With regard to the remaining two locations cited by the inspector, petitioner argues that the inspector found a violation on the basis of the inadequacy of the existing berms. Petitioner asserts that in its interpretation of section 77.1605(k), MSHA applies the definition of an adequate "berm" found in 30 CFR 77.2(d), which defines "berm" to mean "a pile or mound of material capable of restraining a vehicle". Petitioner asserts further that as a minimum standard, MSHA policy requires berms to be "at least as high as the mid-axle height of the largest vehicle using the roadway". That policy is set forth in MSHA's March 9, 1978, Surface Manual, as well as in a June 30, 1972, publication of the Bureau of Mines, Department of the Interior, which contains an interpretative "application" of identical berm standards found in Parts 55, 56, and 57, Title 30, Code of Federal Regulations. The Surface Manual "policy" dealing with section 77.1605(k), provides as follows at pg. III-338:

> "Berm" as used in this requirement means a pile or mound of material at least axle high to the largest piece of equipment using such roadway, and as wide at the base as the normal angle of repose provides. Where guardrails are used in lieu of berms, they shall be of substantial construction.

The "policy" application set forth in the Bureau of Mines publication at pg. 9-5 is as follows:

> Berms shall be at least as high as the mid-axle height of the largest vehicle using the roadway. They need not be continuous where drainage and snow removal may constitute a problem. Guards of posts and railings shall be substantially equivalent as a restraining medium as berms of earth or waste rock.

Petitioner argues that the respondent has not argued that it was unaware of the aforementioned longstanding MSHA policy. Further, while there were mounds or berms of earth, rock, or other materials along the roadway in question (except for location No. 1), in the judgment of the inspector these berms were inadequate to meet the definition of

"berms" in the "regulations". This is because location No. 2 had a 6-to-8-inch berm, location No. 3 had a 16-inch berm, and the height of the axle of the largest piece of equipment using the roadway was 22 inches. In support of its case, petitioner cites the case of Secretary of Labor v. Heldenfels Brothers Inc., 2 MSHC 1143, Docket Nos. CENT 79-280-M and CENT 79-235-M (1980), where the Judge affirmed a violation of the berm requirements of 30 CFR 55.9-22, based on an inspector's opinion that the berms provided were not sufficient to restrain the vehicles using the elevated roadway. Petitioner points out that in Heldenfels, the Judge rejected the operator's argument that there was no violation since the existing berm was approximately 18 inches high. Looking at the definition of "berm" in the applicable regulations, the Judge found that there could be no berm within the meaning of the regulations if the mound of material along the roadway was incapable of restraining the vehicles using the roadway.

Conceding that the referenced MSHA policy and guidelines are not mandatory requirements imposed on a mine operator, petitioner nonetheless argues that in the case at hand, while it would appear from the wording of the citation that the inspector considered the general MSHA policy in finding that the berms were inadequate to restrain vehicles using the roadway in question, such a reference by the inspector to the inspector's manual and agency guidelines is not an illegal or arbitrary practice as long as the inspector's application of these guidelines and policies to his interpretation of the cited standard is not contradictory to the intent and clear meaning of the standard, Secretary of Labor v. Empire Energy Corporation, 1 MSHC 1751, Docket No. DENV 78-442-P (1979).

Petitioner argues further that the clear intent of the cited standard is to prevent vehicles in use from going over the edges of elevated roadways, and since road conditions and the speed of vehicles may vary, it may be unreasonable to attempt to insure by testing that a berm be sufficient to restrain a vehicle under all circumstances. Assuming normal conditions, petitioner asserts that the height of the axle of the vehicle is a reasonable, workable, and clear guide in estimating whether or not a berm would be an adequate restraint since the wording of the "regulation" indicates that the adequacy of berms is tied to the nature of the vehicles used on the roadway.

In the instant case, petitioner asserts that the inspector was aware that a 16-inch berm had proved inadequate to restrain a passenger vehicle at one roadway location. Petitioner also asserts that whether or not a 22-inch berm would have been effective is not known, because the facts and conditions of the accident are unknown; but the prior accident is a factor to consider in support of the inspector's determination that the existing berms were inadequate. Under the circumstances, petitioner concludes that the respondent cannot show that the inspector was arbitrary and unreasonable in his application of the cited standard in this case, and that petitioner therefore is entitled to summary decision as a matter of law.

In its motion for summary decision, respondent asserts that since it is clear that berms were present along the roadway in question, the alleged violation necessarily turns on the belief by the inspector that the berms provided were not as high as the axle of the largest piece of equipment using the roadway. Since there is no legal requirement that berms be as high as the axle of any particular piece of equipment, respondent maintains that the citation fails to state a violation and must be vacated.

In support of its case, respondent points out that a berm is defined by 30 CFR § 77.2(d) as a pile or mound of material capable of restraining a vehicle, and that the cited standard contains no requirements pertaining to dimensions of berms, nor does it specify materials to be used in constructing berms. Since the standard addresses neither the design, construction nor installation of berms, respondent argues that the definition of "berm" does little to clarify the standard by referring generically to a vehicle, and taken together, the regulatory bases for the contested citation do not place the respondent on notice as to what is required in the way of berms on elevated roadways; the regulations are vague and unenforceable. Respondent maintains that such vagueness cannot be cured by publication of an internal MSHA policy manual which sets forth agency guidelines for interpretation and enforcement of standards. Petitioner admits that such policies are not mandatory requirements upon respondent, yet it refers to the disputed policy as a minimum standard and suggests that respondent is obligated to comply because it did not argue that it was unaware of the policy. If the policy cannot be enforced against respondent, whether respondent had knowledge of the policy is clearly irrelevant.

With regard to the petitioner's assertion that the inspector made an independent evaluation as to whether the berms were capable of restraining a vehicle, respondent observes that the inspector just "mechanically applied the internal MSHA policy". Respondent believes that a policy which assumes that a berm the height of an axle of a vehicle is capable of restraining that vehicle no matter what the speed or weight of the vehicle is inherently ridiculous. By mechanically applying such an arbitrary policy, respondent suggests that an operator could construct berms six feet high, but only one inch thick or the operator could construct its berms of feathers. Since petitioner concedes that it may be unreasonable to test the sufficiency of a berm to restrain a vehicle, respondent asserts that is an implied concession that there may be times when no berm is capable of restraining a vehicle since every driver knows that under some circumstances the berms and guardrails along public highways may help keep an automobile on the road, but will not stand up to a direct blow at excessive speed.

Finally, respondent maintains that the present berm standard is so vague and ambiguous that it cannot be enforced, and that MSHA cannot correct this problem by publishing internal guidelines for its inspectors. If MSHA intends to properly put operators on notice as to precisely what is required to comply with the berm standard, it must engage in rule making to properly promulgate regulations. It cannot, without notice to and opportunity for comment by the operators, enforce an

arbitrary requirement that berms must be as high as the axle of the largest vehicle using the roadway. Respondent argues that the fallacy of such a unilateral action and the reason for the required input from interested parties are abvious when the following questions are considered. Does "largest" vehicle mean the tallest in terms of axle height or heaviest or, perhaps, greatest in overall dimensions? Why should height be the determinative criterion when a relatively low, thick berm might function better than a high, shallow barrier? Should the berm be designed to stop all vehicles, regardless of their speed? MSHA's arbitrary criterion of axle height seemingly fails to take any of these matters into consideration. Since MSHA developed the criterion unilaterally and announced it internally, it cannot be considered a "minimum standard" as petitioner contends. Accordingly, respondent maintains that the citation should be vacated because it fails to allege a violation of a standard, and merely alleges a violation of an internal MSHA policy. The policy is not binding on operators and is so far from the stated requirements of the standard that it does not clarify or interpret the standard. Since the policy imposes arbitrary and capricious new requirements and has not been subject to rule making, it cannot be treated as a standard.

Findings and Conclusions

Fact of Violation

In this case, the respondent is charged with one violation of the provisions of section 77.1605(k). However, the citation details three specific locations where the inspector believed the berms which were present were inadequate. The first location had no berms at all, and since a guardrail which had been installed at that location had been dislodged, the inspector apparently took the position that no berm was present. The height of the existing berms at the other two locations were less than 22 inches. Since the axle height of a tractor used at the mine is 22 inches, the inspector obviously applied this axle height as the standard which he believed the respondent should have used in the construction of the required berms. Although it is not altogether clear from the stipulations entered into by the parties, for the purposes of my decision in this case I will assume that the tractor mentioned in the citation by the inspector is in fact the largest piece of equipment using the roadway in question, and that the inspector relied on this "axle-height" test as detailed in the MSHA policy guidelines referred to by the parties in their respective supporting arguments when he issued the citation.

Although one would think that the intent of section 77.1605(k) is to prevent men and equipment driving along an elevated roadway from going over the elevated and unprotected edge of the roadway, the broad and general language of the standard, as embellished by the regulatory definition of the term "berm", leaves much to the imagination. The language of the standard simply requires that berms or guards "be provided". The term "berm" is defined by section 77.2(d), as "a pile or mound of material capable of restraining a vehicle", but the term "guard" is not further defined. The standard has been the source of much litigation and interpretation, and a representative sampling follows below.

In MSHA v. W. B. Coal Company, LAKE 79-218, January 14, 1981, the operator was charged with a violation of section 77.1605(k) because an inspector believed that the existing berms which ranged from six inches to 24 inches along a 50-to-60 foot stretch of roadway were inadequate. The operator testified that he was never advised that berms were required to be of any specific height, but that prior to the issuance of the citation he had been advised by an inspector that three feet would be adequate to restrain a vehicle. The inspector who cited the violation applied MSHA's "policy" that berms should be the height of the axle on the largest machine which travels a roadway, which would have been 42 inches. In affirming the citation, the Judge ruled that MSHA's policy of axle height, or 42 inches, was not binding on the operator because the operator had no knowledge of the requirement. However, the Judge ruled that implicit in the standard is a requirement that the berms be of reasonable height to offer protection, and he relied on the definition found in section 77.2(d) for reaching this conclusion.

In MSHA v. Heldenfels Brothers, Inc., DENV 79-575-M, the Judge affirmed a violation of the berm "requirements of section 55.9-22", and while he recognized that the standard does not provide criteria by which the minimum height of berms might be determined, he nonetheless accepted the inspector's "rule of thumb" to the effect that a berm must be as high as the axle of the largest vehicle using the road, and ruled as follows at pg. 855, FMSHRC, Vol. 2, No. 4, April 1980:

> The largest vehicles using this section of roadway were Respondent's scrapers. These scrapers had a wheel height of approximately 6 feet and, therefore, an axle height of approximately 2 feet high--1 foot lower than the height which would be required if the rule of thumb applied.
>
> The inspector, in relating experiences with scrapers similar to those used by Respondent and with ridge rows of different heights, stated that the scrapers would go over "a two foot deal all the time." Although the ridge rows were not of exactly the same material, consistency, and size of the berms, the inspector obviously was knowledgeable concerning the type of berm that would contain equipment used at the mine.

In MSHA v. Bishop Coal Company, WEVA 80-41, July 14, 1980, the Judge rejected the notion that small piles of rocks or debris along an elevated roadway constituted a berm. He ruled that the requirement of section 77.1605(k), that berms or guards shall be provided means that they must be adequate to prevent overtravel of the outer bank. The facts of the case as reported by the Judge indicated that a truck had gone over a bank at a dumping location, and he obviously concluded that the piles of rock or debris were inadequate. Interestingly, while the inspector and mine superintendent disagreed as to whether even the bern which was installed for abatement would be sufficient to prevent the occurrence of the accident, both agreed that under certain circumstances the berm would be sufficient.

In MSHA v. Texas Utilities Generating Company, DENV 78-487-P, April 5, 1979, the Judge affirmed a violation of section 77.1605(k), for failure to provide berms or guards on a portion of a haulroad. The inspector who issued the citation was of the opinion that the berms would not prevent a haulage truck which was out of control from running off the roadway, but he indicated that they might be of assistance in guiding a truck, thereby keeping it on the roadway.

In MSHA v. El Paso Rock Quarries, Inc., DENV 79-139-M, December 17, 1979, the Judge affirmed a violation of section 56.9-22; and while he rejected the inspector's notion that berms would stop a fully loaded truck, he did accept the fact that they would serve as a visual warning as to the location of the edge of the roadway, and could possibly slow a truck down enough to give the driver sufficient time to jump.

As noted in the foregoing summary of prior decision dealing with the berm standard, there is no consistent application of the standard, and this leads me to conclude that there is merit to the arguments advanced by the respondent in this case with regard to its assertion that the language of section 77.1605(k) is so vague and broad that it fails to give an operator adequate notice as to what is required for compliance. One would think that after all of the litigation generated by this standard, that MSHA would initiate appropriate rule-making with a view to amending the present language of the standard, or at least publishing specific criteria as part of the published standards for industry guidance, rather than relying on internal "policy" guidelines which all to often are not communicated to a mine operator who is expected to comply with those guidelines.

On the facts presented in this case, it seems clear to me that the inspector applied the literal requirements of MSHA's internal policy guidelines with regard to the height requirements for berms as if they were part of the published mandatory standard, and petitioner's references in its supporting arguments that he applied the "regulations" leads me to conclude that petitioner also believes that an MSHA inspector has the authority or discretion to expand upon the plain meaning of a standard by incorporating unpublished policies as if they were mandatory requirements. I reject petitioner's semantical assertions that the inspector's application of MSHA's internal policy guidelines were not arbitrary and did not contradict the intent and clear meaning of the standard. To the contrary, I agree with the respondent's arguments that the inspector obviously applied the MSHA "axle-height" guidelines in this case. He obviously determined that the height of the axle on the tractor was 22 inches, and they any berms constructed on an elevated roadway where that tractor or other equipment were likely to be used would also have to be constructed at a minimum height of 22 inches. It seems to me that if an inspector can apply such a simple mechanical formula to a regulation requiring berms, then it should be a simple matter for MSHA to indulge in rule-making adopting such an application in a published regulation that would apply across the board to all mine operators.

The parties are in agreement that MSHA's internal policy guidelines do not have the force and effect of a published regulatory mandatory safety standard, and that a mine operator is not obliged to follow them. Petitioner's arguments that the respondent was aware of these policies is immaterial and irrelevant. The fact that a mine operator is aware of a policy that is not a mandatory standard does not subject that operator to a civil penalty assessment for violation of the policy. In my view, MSHA should concentrate its efforts into promulgating standards which are clear and to the point, rather than indulging in the promulgation of policy memoranda which all to often lead to ambiguous and inconsistent enforcement.

In view of the foregoing, and after careful consideration of the arguments advance by the parties in this case, I conclude and find that the respondent has the better part of the argument. I adopt and accept the respondent's arguments in support of its case, and reject those advance by the petitioner. In short, I conclude and find that the inspector exceeded his authority and acted arbitrarily in adopting MSHA's policy guidelines as if they were part and parcel of section 77.1605(k). I further conclude and find that the present language found in section 77.1605(k), is so vague and ambiguous as to render it unenforceable, particularly when MSHA attempts to embelish it through policy guidelines adopted internally rather than through the rule-making processs provided for in the Act. In these circumstances, I further conclude and find that the citation in question should be VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED that Citation No. 981185, issued on January 23, 1981, citing an alleged violation of 30 CFR 77.1605(k) is VACATED, and this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 6 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. CENT 80-339-D
On behalf of GEORGE W. HEINEY AND JOHN GHRAMM,	:	Green Country Mine
Complainants	:	
v.	:	
LEON'S COAL COMPANY, LEON WALKER, AND ROBERT HARTLEY,	:	
Respondents	:	

DECISION FINDING JURISDICTION AND APPROVING SETTLEMENT

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Complainants;
Jot Hartley, Esq., Pitcher, Castor and Hartley, Vinita, Oklahoma, for Respondents, Leon's Coal Company and Robert Hartley;
Ross Hutchins, Esq., Tulsa, Oklahoma on behalf of Complainant Leon Walker;
Lance A. Pool, Esq., Pitchard, Norman and Wohlguth, Tulsa Oklahoma for the Trustee in Bankruptcy.

Before: Judge Melick

This case is before me upon the complaints by the Secretary of Labor on behalf of George W. Heiney and John Ghramm, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 1/ 30 U.S.C. § 801 et seq.,

1/ Section 105(c)(2) of the Mine Safety Act reads as follows:
"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 "Mine Safety Act," alleging that Leon's Coal Company, a partnership, and Leon Walker and Robert Hartley, as individuals, discharged Heiney and Ghramm in violation of section 105(c)(1) of the Act. 2/ An evidentiary hearing commenced March 16, 1982. On March 17, 1982, the parties proposed an agreement to settle the case.

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fn. 1 (continued)
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. I fupon such investifation, 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 allged 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 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 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 his paragraph."

2/ Section 105(c)(1) of the Mine Safety Act reads as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharge 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.

Jurisdiction

At hearing, the Respondent's and the trustee in bankruptcy had alleged that the Federal Mine Safety and Health Review Commission had no jurisdiction to proceed with this case in light of the filing by Leon's Coal Company of a petition for bankruptcy (Civil Action No. 80-00873 in the United States Bankruptcy Court, Northern District of Oklahoma, Tulsa Division). They argued that these proceedings were automatically stayed by the Bankruptcy Act of 1978 and, in particular, under the provisions of 11 U.S.C. § 362(a)(1). At hearing, I held in a bench decision that enforcement proceedings before the Federal Mine Safety and Health Review Commission brought by the Secretary of Labor under section 105(c)(2) of the Mine Safety Act come within a statutory exception to the automatic stay provisions of the Bankruptcy Act.

The automatic stay provisions under 11 U.S.C. § 362 read in part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of -
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; * * *

Exceptions to the automatic stay are also provided under 11 U.S.C. § 362 and one of those exceptions reads as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay - * * *
>
> (4) under subsections (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental units police or regulatory power; (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental units police or regulatory power;

Since the Department of Labor is clearly a governmental unit the only issue is whether this case was one to enforce the police or regulatory powers of that governmental unit. The instant action was brought under the provisions of section 105(c)(2) of the Mine Safety Act to enforce the Federal law regulating certain relationships between mine operators and miners and to prevent

retaliation by mine operators against miners exercising rights protected under the Mine Safety Act. Footnotes 1/ and 2/ supra. This is clearly an exercise of police and regulatory powers which places this proceeding within the section 362(b)(4) exemption to the automatic stay. NLRB v. Evans Plumbing Company, 639 F.2d 291 (5th Cir. 1981); In re Bel Air Chateau Hospital, Inc., 611 F.2d 1248 (9th Cir. 1979), and In the Matter of Shippers Interstate Service, Inc., 618 F.2d 9 (7th Cir. 1980). Accordingly, in spite of the pendency of bankruptcy proceedings this Commission retained jurisdiction to proceed with hearings in the captioned case and to issue a decision and order approving settlement.

Proposal for Settlement

During the hearings in this case, the Secretary proposed a settlement agreement wherein George W. Heiney would receive a back pay award of $3,650, John Ghramm would receive a back pay award of $2,440, and the Complainants and the Secretary would withdraw all other claims in the case including the Secretary's request for a civil penalty. The individual Complainant's, Mssrs. Heiney and Ghramm consented to the proposal on the record and I find that consent to have been intelligent and voluntary. The Respondent's, through counsel, also accepted the proposal on the record. Under all the circumstances, I found that the settlement was appropriate. That bench determination is now affirmed.

ORDER

Leon's Coal Company, Leon Walker, and Robert Hartley are hereby ORDERED TO PAY George W. Heiney the sum of $3,650 as an award of back pay within 30 days of the date of this decision.

Leon's Coal Company, Leon Walker, and Robert Hartley are FURTHER ORDERED TO PAY John Ghramm the sum of $2,440 as an award of back pay within 30 days of the date of this decision.

The request of the Secretary of Labor to withdraw his proposal for a civil penalty is GRANTED.

The Complaint herein is DISMISSED.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: (By certified mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 6 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 82-42
	:	A/O No. 36-00917-03117
v.	:	
	:	Lucerne No. 6 Mine
HELVETIA COAL COMPANY, Respondent	:	

DECISION AND ORDER

This matter came on for a confrontational hearing in Falls Church, Virginia on April 1, 1982. The sole issue presented was whether a two-inch cut in a trailing cable that exposed the undamaged insulated power wires in an abrasion repair to the cable actually existed. The parties stipulated that if the violation did occur it was a nonserious, nofault violation that created no immediate or forseeable shock hazard absent damage to the dielectric strength of the insulation on the power wires. The gravamen of the violation was that the claimed two-inch cut deprived the cable of the full protection mandated by 30 C.F.R. 75.517.

After the parties and trial judge had a full opportunity to examine the three eyewitnesses the parties elected to waive the filing of post-hearing briefs and to submit the matter for a jury verdict decision.

Whereupon, the trial judge found that, without attempting to resolve in detail all of the conflicts in the testimony, the preponderance of the reliable, probative and substantial evidence showed it more probable than not that the violation charged did not, in fact, occur.

The premises considered, therefore, it is ORDERED that the bench decision be, and hereby is, CONFIRMED and the penalty case DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 6 1982

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 82-3-R
	:	Citation No. 857536; 8/31/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 82-105
	:	A.C. No.
v.	:	
	:	McElroy Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Jerry F. Palmer, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
David Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor;
Joyce Hanula, Washington, D.C. for Intervenor, United Mine Workers of America.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" to contest a citation issued to the Consolidation Coal Company (Consolidation) pursuant to section 104(a) of the Act (Citation No. 857536) and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA), for that citation. The issue before me is whether Consolidation violated the regulatory standard at 30 C.F.R. § 48.10(a) as alleged in Citation No. 857536 and, if so, the appropriate civil penalty to be assessed for that violation. An evidentiary hearing on this issue was held in Morgantown, West Virginia, on March 9, 1982.

The citation at bar was issued by MSHA Inspector Kenneth Williams on August 31, 1981, and alleged as follows:

> Training was not conducted during normal working hours for 10 of the 19 employees who received annual training on August 8, 1981, on the 8 to 4 p.m. shift. Nine employees Yoho, Whitlatch, Ice, Smith, Studenc, Edgell, Crow, Campbell, and Robinson were normally working the 4 to 12 p.m. shift. The other employee Robert Hess was normally working the 12 to 8 a.m. shift. Training was conducted by Wayne McCardle.

The cited regulatory standard, 30 C.F.R. § 48.10(a), reads as follows: "Training shall be conducted during normal working hours; miners attending such training shall receive the rate of pay as provided in section 48.2(d) (definition of normal working hours) of this subpart A."

Section 48.2(d) referred to above provides as follows:

> "Normal working hours" means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice. Miners shall be paid at a rate of pay which shall correspond to the rate of pay they would have received had they been performing their normal work task.

The essential facts in this case are not in dispute. On Saturday, August 8, 1981, Consolidation conducted a federally mandated training session on the 8 a.m. to 4 p.m. shift. During the 5-day period immediately preceding August 8th, nine of the ten employees listed in the citation as having attended the training session had been working on the 4 p.m. to 12 midnight shift and one had been working the 12 midnight to 8 a.m. shift. The mine regularly operated on three shifts and the parties stipulated at hearing that it was common practice at the mine for all three shifts to work on Saturdays. The company had the right to require such Saturday work and indeed had exercised that right in the past.

It is also undisputed that Consolidation had the right to "cross-shift" the miners during the week and on Saturdays and had exercised that right in the past. 1/ It is clear under the circumstances that all 10 of the miners listed in the citation could therefore have been properly cross-shifted on

1/ Cross-shifting is the practice of changing a previously scheduled work shift during the week. Thus for example, a miner scheduled in a particular week to work the 8 to 4 shift would be switched mid-week to the 4 to 12 shift.

Saturday, August 8, 1981, to perform work at the McElroy Mine on the 8 a.m. to 4 p.m. shift. Since the miners could have been otherwise scheduled to work during that period of time and since such work was a "common practice" at the mine, I conclude that that period of time was within "normal working hours" as defined in 30 C.F.R § 48.2(d). It follows that Consolidation in fact did properly conduct its training program during that period of time and that it was therefore not in violation of the cited standard. The citation accordingly must be vacated.

ORDER

Citation No. 857536 is VACATED and the contest, Docket No. WEVA 82-3-R is GRANTED. Civil Penalty Proceeding, Docket No. WEVA 82-105 is DISMISSED.

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 7 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 81-15
	:	A.C. No. 44-01647-03014
v.	:	
	:	No. 3 Mine
BETTY B. COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., and David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; John M. Carpenter, Clintwood, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The Secretary initially proposed penalties of $122 for two alleged violations on August 5, 1980, of the mandatory safety standard at 30 C.F.R. § 75.1710 charging that Betty B. Coal Company, Inc. (Betty B.), was operating two of its Fletcher roof-bolting machines without canopies in a section of the No. 3 Mine in which the mining height was 51 to 60 inches. The parties thereafter proffered an oral proposal for settlement of the case. In light of the unusual facts presented, however, I denied the proposal as inappropriate under the criteria set forth in section 110(i) of the Act. 1/

1/ Section 110(i) of the Act requires consideration of the following criteria in determining the amount of civil penalty to be assessed: (1) 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.

The general issues in this case are whether Betty B. has violated the cited standard as alleged and, if so, the appropriate civil penalty to be assessed for the violations. The specific issue is whether there is a conflict between State and Federal regulations on the subject matter at bar and, if so, what is the effect of such conflict upon the resolution of the general issues. The operator has waived its right to a hearing, and the parties submit the issues on a joint stipulation of facts. The essential factual stipulations were submitted as follows:

1. On August 5, 1980, Manuel Hairston, a coal mine inspector for the Federal Mine Safety and Health Administration Department of Labor (MSHA), performed an inspection at the Betty B. No. 3 Mine. During the course of this inspection, Hairston observed that the protective canopies had been removed from the two roof bolters being used in the 3-Main 001 Section. The inspector noted that the coal height in this section of the mine ranged from 51 to 60 inches. As a result of these observations, Inspector Hairston issued valid section 104(a) citations for violations of 30 C.F.R. § 75.1710 (Citation Nos. 0689415, A and B). 2/ The inspector opined that without such canopies the machine operators could be injured by a roof fall. He thought such an event was unlikely, however, because the subject mine did not have a history of roof falls.

2. On August 4, 1980, the day before the above-described Federal inspection, Jerald T. Hileman, a mine inspector with the Virginia Division of Mines and Quarries, had performed a regular inspection at the same mine. During this inspection, Hileman issued an Order of Closure which required the operator to remove the canopies from the subject roof-bolting machines because of insufficient clearance (See, Order of Closure, attached hereto as Exhibit A). 3/ Hileman noted that the two canopies were 58 inches in

---

2/ The citations read as follows:

"The canopies in the 3-Mains 001 Section had been removed from the 2 Fletcher roof bolters which are being used [sic] bolt the roof in that suitable canopies were not provided for such equipment the coal height ranges from 51-60 inches."

3/ The State regulations governing the installation and use of cabs and canopies read as follows:

"To provide the minimum protection, a registered engineer must certify to the Chief Mine Inspector that the cab or canopy proposed to be used meets the following minimum standards outlined below:

"Rule 1. It must be designed for the mine in which it will be used.

"Rule 2. So installed that the minimum structural capacities will support a dead load weight of 18,000 pounds. It must be structurally strong enough to withstand a side load of 4,000 pounds.

"Rule 3. The deck plate or mounting must withstand the same load which the cab or canopy is designed to support. Where possible the structure must be mounted on the main frame of the equipment.

"Rule 4. Cabs or canopies must have a minimum of six inches of overhead clearance below the lowest projection of the roof or roof supports, if it extends above the machine on which it is mounted.

height while the height of the roof and roof support in this section of the mine was 52 inches. 4/ Hileman found that the canopies were disturbing the roof-control measures in many areas of this section. On August 4, 1980, State Inspector Hileman reinspected the section. He thereafter issued a Notice of Correction finding that the operator had complied with the Order of Closure by removing the canopies from the two roof bolters in question and allowed the operator to resume production. (See, Notice of Correction, attached hereto as Exhibit B.)

3. MSHA Citation Nos. 689415A and 689415B were abated after the operator replaced the canopies (at a height of 58 inches) on the two roof-bolting

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fn. 3 (continued)

"A. The Mine inspector may require twelve inches (12") of overhead clearance if evidence is present that indicates that more clearance is needed.

"B. Where the seam height is less than seventy-two inches (72"), special attention must be given to the design before any cabs or canopies are installed.

"Rule 5. The visibility of the operator shall not be obstructed by the desgin [sic] of the cabs or canopy to the extent that the operator must 'lean' out of the structure to see where he is going.

"Rule 6. The structure shall be wide enough to protect the operator from side obstructions such as ribs, overhangs, timbers, etc.

"A. The structure shall also be large enough so as not to restrict the operator to the extent that it would be hazardous for him to operate the machine.

"Rule 7. Cabs or canopies that are adjustable must have a minimum clearance between segments. The bolt or pin used must withstand more than the shear weight of the designated load capacity.

"Rule 8. The top plate must be 'beveled' in the direction of travel to lessen the likelihood of dislodging or loosening roof supports.

"Rule 9. Any other act or practice considered by the Mine Inspector to be hazardous to the operator of the equipment or other mine personnel will result in an order requiring corrective measures.

"Rule 10. Cabs or canopies for roof bolting machines will not be accepted as the sole means of temporary roof support unless they have been approved by the Chief Mine Inspector. They must be so designed as to be firmly positioned against the roof and mechanically held in place until permanent supports are installed. Unless the cab or canopy covers the entire area of unsupported roof to be bolted, safety jacks, or other adequate temporary supports, shall be installed in conjunction with the cab or canopy as prescribed in the roof support plan for the mine in which they are to be used.

"Any violations of the above discovered by the State Mine Inspector shall result in a closure order being issued stating what constitutes the unsafe condition observed and the order shall specify that the equipment in question is not to be operated until the unsafe condition is corrected."

4/ There was apparently an error in transposing these measurements.

machines in question. The violations were abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

4. As of this time, there is no agreement between the Virginia Division of Mines and Quarries and MSHA to resolve conflicts in the enforcement of their canopy standards. Each agency enforces its particular canopy standard as it sees fit without regard to the enforcement practices of the other agency.

5. Betty B. is a small operator within the meaning of the Act and assessment of a civil penalty in this proceeding will not adversely affect the operator's ability to continue in business.

Evaluation of the Evidence

It is not disputed that under the cited Federal regulation, Betty B. was required to provide its roof-bolting machines with "substantially constructed canopies, or cabs, to protect the miners operating such equipment from roof falls and from rib and face rolls." It is apparent, moreover, that the operator was in compliance with the cited standard on August 4, 1980, the day before the Federal inspection but, because of this compliance, was found in violation of an apparently conflicting State regulation. An inspector for the Virginia Division of Mines and Quarries had effectively compelled the operator to remove the Federally required canopies from the subject roof-bolting machines by a closure order issued on August 4. In other words, by complying with the State order on August 4, the operator was placed in a position of violating the Federal regulation. For purposes of determining whether there was a violation in the instant case, however, the question of such a conflict is immaterial. While limited concurrent State authority to regulate mine safety is recognized under the Act, it is clear that in the event of a conflict, the Federal regulation will supercede the State regulation. Section 506 of the Act. See also Rice v. Board of Trade, 331 U.S. 247, 91 L.Ed 1468, 67 S. Ct. 1160, and H. P. Welch Company v. New Hampshire, 306 U.S. 79, 84 L.Ed 560, 59 S. Ct. 438. Within this framework of law, I am compelled to find on the undisputed facts of this case that the Federal standard has been violated as charged.

Apparently the Federal and State regulators have not to this date been able to resolve their enforcement differences in this regard. In the future, in fairness to the operator, if such conflicts cannot be resolved and the Secretary is convinced that the interests of safety are best protected by compliance with the Federal standard, I would expect the Secretary to initiate injunctive proceedings to bar State interference with the enforcement of the Federal standard. Of course, the operators themselves are not without legal recourse and may wish to initiate modification of the application of the Federal standard under section 101(c) of the Act or seek injunctive remedies against conflicting State enforcement activities.

While it is no defense to the violation that the operator was placed in a position of noncompliance because of State regulatory action, this factor is indeed a relevant consideration in determining whether the operator was negligent and the amount of penalty to be imposed. Since it is apparent from

the factual stipulations in this case that Betty B. was in violation of the Federal standard only because of its efforts to comply with conflicting State regulations, I find that it was not negligent in committing the violations. Accordingly, only a nominal penalty is warranted.

ORDER

Betty B. Coal Company, Inc., is ORDERED to pay a nominal civil penalty of $1 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative
Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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ELMER WAYNE STATON, Complainant	:	Complaint of Discrimination
v.	:	Docket No. VA 82-4-DM
KAYNITE MINING CORPORATION, Respondent	:	East Ridge Plant

DECISION AND ORDER

Pursuant to notice the captioned discrimination complaint came on for an evidentiary hearing in Roanoke, Virginia on April 6 and 7, 1982.

At the outset of the hearing the trial judge heard argument on a motion by complainant's attorney for leave to withdraw and for a thirty day continuance to permit complainant to find new counsel. The latter motion was opposed by counsel for the operator. The matter was resolved when complainant agreed to proceed pro se and the operator agreed the trial judge might assist complainant in developing the facts. The operator also agreed to produce three witnesses complainant claimed he needed to present his case. 1/

After extensive settlement discussions in which complainant offered to withdraw his request for reinstatement, the matter proceeded to hearing. As the evidence was developed several recesses were held for the purpose of allowing the parties to seek an accommodation and compromise of their positions. The trial judge participated fully in these discussions to the end that the rights of both parties would be protected and a fair resolution of the matter expedited. When a settlement could not be reached, the matter was recessed overnight and the taking of evidence continued the second day.

After hearing testimony from ten witnesses, including complainant the parties rested, waived further argument or the filing of post-hearing briefs, and requested an immediate bench decision. Whereupon, the trial judge rendered the following decision:

1/ Counsel for the operator is to be commended for his cooperation in ensuring a fair and expeditious disposition of this matter.

After considering and weighing the evidence, including the demeanor and credibility of the witnesses, I find a preponderance of the reliable, probative and substantial evidence shows that Elmer Wayne Staton's perception of an abnormally dangerous or hazardous condition at the fluid bed dryer at Kyanite Mining Company's East Ridge Plant on July 24, 1981 was reasonable under the circumstances.

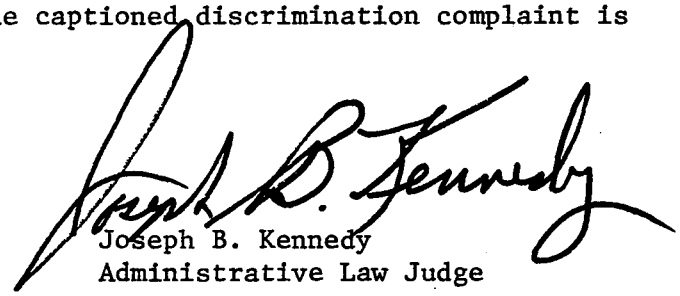
In reaching this conclusion, I have credited fully not only Mr. Staton's testimony but also that of Wayne Davenport. I recognize other perceptions differ from that of the credited witnesses and that from a purely objective standpoint there is evidence to support the view that the perception of the credited witnesses was unreasonable. Nevertheless, under the evidentiary standard set by the Commission in the case of Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 802, at 809-812 (1981), I feel constrained to hold that Mr. Staton's perception, as corrobated by that of Mr. Davenport, requires a finding that his refusal to work under the apprehension of a burn hazard was reasonable even though others, including the trial judge, might reasonably conclude his fear was unrealistic.

The premises considered, therefore, I hold that Mr. Staton's dismissal for refusal of the work assignment in question was unlawful under section 105(c) of the Mine Safety Law.

Accordingly, it is ORDERED that a finding of liability subject to immediate appeal be, and hereby is, entered and that further proceedings with respect to the relief requested by complainant be, and hereby are, stayed pending the outcome of such appeal.

Thereafter, the parties, without the knowledge or presence of the trial judge, adjourned to discuss further a settlement of this matter. They shortly advised the judge that a settlement had been reached and the record was reopened. At that time counsel for the operator stated that the matter had been settled on the following terms and conditions, namely that in return for the operator foregoing its right of appeal and the payment of a sum certain complainant had agreed to a dismissal of his complaint with prejudice. When complainant acknowledged for the record his understanding and acceptance of the terms of the settlement, the trial judge entered an order approving it and directed that subject to payment of the sum agreed upon and the furnishing of complainant's release for the record the matter would be deemed dismissed with prejudice.

Accordingly, it is ORDERED that the bench decision and order approving settlement be, and hereby are, CONFIMRED. It is FURTHER ORDERED that subject to (1) execution of an appropriate release by complainant, (2) payment of the settlement sum agreed upon by the operator, and (3) the filing in this record of the release and acknowledgement of payment the captioned discrimination complaint is DISMISSED with prejudice.



Joseph B. Kennedy
Administrative Law Judge

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E. M. Wright, Jr., Esq., P.O. Box 488, Dillwyn, VA 23936 (Certified Mail)

Kyanite Mining Corp., Hank Jamerson, Safety Director, Dillwyn, VA 23936 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 13 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-240
v.	)	A/C No. 05-02820-03009
C F & I STEEL CORPORATION,	)	Mine: Maxwell
Respondent.	)	

Appearances:

James H. Barkley, Esq., Office of Henry C. Mahlman,
Associate Regional Solicitor, United States Department of Labor,
Denver, Colorado 80294
For the Petitioner

Phillip D. Barber, Esq., Welborn, Dufford, Cook and Brown
Denver, Colorado 80202
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent CF&I Steel Corporation, (CF&I), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Petitioner issued citation number 387763 pursuant to Section 104(a) of the Act [30 U.S.C. 814(a)]. It is alleged that CF&I violated Part 30, Code of Federal Regulations, Section 75.200 which provides as follows:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

> 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.

After notice to the parties a hearing on the merits was on April 1, 1981 in Denver, Colorado.

ISSUES

The issues are whether a violation occurred and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

The CF&I Maxwell Mine is open by one slope from north to south. At the foot of the slope it bends to the right and is developed with 14 parallel entries separated into three development sections. Unit 2 of the mine includes entries 10, 11, 12, 13, and 14. There are two shafts, one entry and one return (Tr. 7).

CF&I reported an unintentional roof fall in entry 14. The fall occurred late in the evening on January 25. The resulting MSHA inspection occurred February 6, 1979 (Tr. 7, 19).

In entry 14 conditions in the roof were good until 9 o'clock on the 25th (Tr. 56-57). The roof was smooth and the roof bolters during the work shift had been drilling into substantial roof (Tr. 58). In the week before the 25th no deficiencies were observed in the roof (Tr. 58). On January 25 they had just broken the crosscut through and the roof condition were good with no water, flaking, spalling, spealing, or sloughing (Tr. 62, 63). About 9 p.m., when the conditions changed, the underground section foreman called the superintendent. The superintendent ordered the men and machinery withdrawn. Breaker props were ordered set up to keep everyone out (Tr. 63). The superintendent further directed that six foot pins be used when starting in the adjacent entry, number 13 (Tr. 63, 64).

On January 26 MSHA's inspector Rivera and CF&I's Massarotti and Cambruzzi went into the 14 entry. [Rivera did not appear as a witness nor does the record indicate how or why he appeared at the mine on January 26]. In any event, it was decided not to take the chance of exposing anyone to the hazards involved in further supporting the roof in entry 14 (Tr. 64).

It was decided to let the roof fall and breaker posts were installed. The timbers prevented anyone entering the area (Tr. 64-65).

On the 26th water was coming out of the roof. This point was marked on a company map. A week later water was encountered in entry 13. This point was also entered on the map (Tr. 67, 68, P1).

When water was seen on the 26th it was decided to continue using six foot bolts throughout this area including the intersections, the entries, and the crosscuts (Tr. 67). CF&I had been using 48 inch pin at the straights as well as six and five foot bolts in the intersections (Tr. 67). Additional measures after the 26th included timbers and steel beams when water was encountered (Tr. 69).

CF&I abated the citation by securing MSHA's approval for a proposed amendment to its roof control plan (Tr. 29-32, 72-73, R2). The three items required by the amendment were in use by CF&I before February 6, 1979 (Tr. 72-73).

DISCUSSION

The citation in this case alleges that "after an unintentional roof fall above the anchorage zone of the roof bolts no changes or revisions have been implemented to improve or upgrade the existing roof control program. The operator shall submit intended revisions or improvements to the District Manager for approval" (R1).

Contrary to MSHA's allegations I find from the evidence that CF&I did, in fact, improve its roof control plan. When the roof began to deteriorate the superintendent ordered an increase in the size of the roof bolts that were to be used in entry 13. Further, the area in which the cave-in occurred was redlined and timbers prevented anyone from entering.

The three changes in the CF&I roof control plan submitted by CF&I to MSHA on March 12, 1979 included more as well as closer roof bolts, additional support if water was encountered, and breaker timbers to confine a caved area. All of these were in use before the inspection date of February 6, 1979 (Tr. 72-73). Accordingly, I conclude that CF&I upgraded its roof control plan and the breakers further prevented workers from entering the hazardous area.

MSHA's second contention focuses on the proposition that given the attendant circumstances CF&I should have done more than merely increase the size of its roof bolts in entry 14.

MSHA is correct in its pronouncement of the law that an operator may be in violation of 30 C.F.R. 75.200, even though it is complying with the minimum requirements of its roof control plan. Zieler Coal Company 2 IBMA 220, September 18, 1973. However, the evidence relied on by MSHA does not stretch as far as MSHA claims.

MSHA asserts that the MSHA inspector had previously advised CF&I that its roof support was inadequate in the presence of adverse roof. The record fairly supports the view that MSHA, since the last review of the roof control plan, had been "after" the company to upgrade the roof control plan. On the other hand CF&I felt the plan was adequate (Tr. 10, 44). CF&I acknowledges that the MSHA inspector told the company that the roof supports in areas of the Maxwell Mine were inadequate (Tr. 87). I am, however, obliged to accept the inspector's testimony that he couldn't remember any adverse conditions in entry 14 before January 25, 1979 (Tr. 19, 27). In addition he couldn't recall that the roof was unsafe before the fire bosses' report. (It was the fire boss who reported the initial roof fall). Since MSHA's theory is that the roof control plan was inadequate in the presence of adverse roof then it bears the burden of establishing that such adverse conditions were present.

MSHA contends that CF&I's records and mapping of the strike zone [1]/ establish that adverse roof conditions existed.

A fair reading of the evidence shows that the so-called records were developed after the roof fall on January 25/26. The MSHA inspector's testimony establishes that CF&I could not have known of the strike zone: at the time the strike zone was marked the inspector couldn't remember how far the zone extended; in addition the mine had not developed far enough to show the strike zone (Tr. 11, 28). The zone would not have been apparent to the operator before February 6, 1979 (Tr. 28). The roof fall was fairly close to the working face so the strike zone couldn't have been noted to any great extent other than the signs that were visible, that is, the changes in the roof (Tr. 28).

Petitioner relies on additional evidence to support his citation. This evidentiary detail is now considered:

1/ A strike zone is a crack or fissure in a roof with water, spalling and sloughing (Tr. 10); also a strike is the direction or bearing of a horizontal line in the plane of an inclined stratum. U.S. Department of Interior Bureau of Mine, A Dictionary of Mining, Mineral and Related Terms, 1089 (1968).

The MSHA inspector testified that when he inspected the mine there was water and spalling 50 to 75 feet outby the caved area (Tr. 41-42). This condition, in his opinion, should have put CF&I on notice prior to January 25/26 that additional roof support was needed (Tr. 41-42). However, I don't find that credible. Basically, I credit CF&I's contrary evidence that there was no water or spalling outside of the caved area (Tr. 71-72).

The inspector further testified that the conditions he found on February 6 would have been readily observable prior to that day (Tr. 44-45). I agree but the foregoing testimony is not determinative of the issue. The condition observed on February 6 had no doubt been there at least from January 25/26.

The uncontroverted testimony from the MSHA inspector is that it is more hazardous to let a roof fall than to adequately support it in the first place. The basis for this testimony is that after a roof fall miners must go in and clean up under an unsupported roof. They must also re-support it.

The clear thrust of MSHA's argument is that roof falls must never occur. This is a laudable objective that cannot always be attained. However, two difficulties arise with MSHA's argument. First of all, there is no evidence that the miners would be working under the unsupported roof while they clean up the rock fall area, and a further difficulty with MSHA's position is that the conditions here rapidly developed and the roof rapidly deteriorated. When this occurred the men and machines were withdrawn. The inspector clearly stated that nobody in their right mind was going to go back into the area after the men were withdrawn. In short, no one claimed that CF&I personnel should attempt to resupport the roof after the initial fall on January 25/26. (Tr. 25, 26).

MSHA's view appears to be based on hindsight rather than on the operative facts.

EVIDENTIARY RULINGS

The Judge excluded evidence of a later roof fall in entry 13 because the record failed to establish any connection between the two roof falls (P1). In addition, the second roof fall was the subject of a decision by Judge Jon Boltz involving the same parties. The case was docketed as WEST 79-291 (3 FMSHRC 1870). The findings in Judge Boltz's case are not factually controlling in this case and in a separate order I refused CF&I's motion to file a supplemental brief citing Judge Boltz's factual findings and his conclusions based thereon (Order, March 19, 1982).

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

Citation 387763 and the proposed penalty therefor are vacated.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 13 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-469
v.	)	A/C No. 05-00296-03046 F
C F & I STEEL CORPORATION,	)	Mine: Allen
Respondent.	)	

Appearances:

James H. Barkley, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado 80294
For the Petitioner

Phillip D. Barber, Esq., Welborn, Dufford, Cook and Brown Denver, Colorado 80202
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent CF&I Steel Corporation, (CF&I), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Petitioner issued citation number 387105 pursuant to Section 104(a) of the Act [30 U.S.C. 814(a)]. It is alleged that CF&I violated Part 30, Code of Federal Regulations, Section 75.200 which provides as follows:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

> 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.

Petitioner seeks a civil penalty of $7000. After notice to the parties a hearing on the merits was held on April 1, 1981, in Denver, Colorado.

ISSUES

The issues are whether a violation occurred and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

CF&I's roof control plan for the Allen Mine in effect on the date of this fatality provides, in part, as follows:

> Two safety jacks must be kept on the bolting machine at all times to be used when adverse roof conditions are encountered and the automated support does not supply adequate protection for the bolt operator (Tr. 36, 41-42, P2).

On February 26, 1979 roof bolter Maestas with his crew, consisting of Silva and victim Casias, were installing roof bolts in the Allen Mine (Tr. 5, 6).

The double boom roof bolter is 32 feet long and 12 feet wide (Tr. 6-7). The bolter has a boom on each side. The bolter consists of two basic parts: the canopy mechanism and the drive mechanism (Tr. 7-8, 190-192). The canopy is powered by an hydraulic jack which, when activated, forces the canopy up against the roof (Tr. 192-193). The portion that can be pressured against the roof measures 22 inches wide and 36 inches long (Tr. 193). "Elephant ears" extend downward at a slight angle

below each canopy. The ears measure 14 inches by 36 inches (Tr. 193). The canopy pressure against the roof seeks to support the roof and the "elephant ears" prevent rock from falling directly on the operator and his helper (Tr. 8, 194).

On the day of this fatality the continuous miner had finished cutting and was backed out of a crosscut. The roof bolting crew was going to roof bolt the crosscut between the two entries (Tr. 10). In order to install a roof bolt Maestas moved the right side of the roof bolter close to the rib line (Tr. 11). In this position it was impossible for Maestas to install the pin and the glue (Tr. 11). In most cases Maestas' helper, Casias, would have operated the left side of the bolter so it was agreed Casis would put up the pins on that side (Tr. 10). Casias came to the side of the bolter and put in the glue and pin. Maestas activated the thrust lever to meet the pin. At this point a slab of rock fell (Tr. 11, 12, 14, 16, P1, R1). As the rock fell it hinged, broke, and a portion of it fell under the supported portion of the roof pinning Casias against the inside of the canopy (Tr. 16, 22, 23, 30). The portion of the rock trapping Casias was four feet wide, seven feet long, and one to three feet thick (Tr. 30). The entire rock fall measured 13 feet by 7 feet (P1, R1).

When the rock fell Casias was standing immediately under the bolter canopy and he was either under, or at the edge of, the permanently supported roof (Tr. 15, 26, P1, R1).

Maestas jumped over and unsuccessfully tried to move the rock. He then used the thrust arm to move the rock (Tr. 16).

The crew was going to roof bolt at the point where the crosscut had been turned (Tr. 19). When turning a crosscut extra support is needed (Tr. 19). Maestas had observed a visible slip 13 to 17 feet away (Tr. 27). A slip, which is like a glass surface, is a possible roof deformity. It is a separation of the roof and there isn't much holding it up. Slips are dangerous (Tr. 18, 19, 31).

There were two safety jacks on the roof bolter used for holding up beams and for temporary roof support. The safety jacks were not used on the day of the accident (Tr. 19-21).

The entry immediately adjacent to where this roof fall occurred was heavily supported by steel beams, steel straps, and timber (Tr. 45).

According to MSHA inspector Jordan whenever you encounter bad roof you use temporary roof supports until permanent support can be installed (Tr. 46-47). In Jordan's opinion Casias could have installed temporary supports while remaining under the permanently supported roof (Tr. 48). Such temporary supports might have provided some protection. They are normally installed by two workers (Tr. 51, 64).

It is a common occurrence that if rock is supported on one edge it will hinge back, as it did here, when it falls (Tr. 62, 88). If temporary supports had been installed they might have enabled Casias to get out of the way, although this is speculative (Tr. 89).

Salapich, the foreman of the roof bolting crew, stated at the closing conference that he observed a slip in the area where the crosscut had been turned. The continuous miner operator tried to bring it down with the head of the miner but it didn't come down. So Salapich and the crew decided to hurry up and bolt it rather than let it sit (Tr. 198-199).

DISCUSSION

I agree with CF&I that MSHA carries the burden proving all of the elements of a violation. Brennan v. OSHRC, 511 F 2d 1139 (9th Cir. 1975).

Accordingly, the two pivitol issues in this case concern whether the rock bolting crew encountered adverse roof conditions and whether the automated support, (ATRS), supplied adequate protection. If both conditions arise then the roof bolters are required to use the two safety jacks which were admittedly on the bolting machine. It should be noted that the temporary supports are in addition to and apart from the canopy and elephant ears on the roof bolter machine. The canopy is generally referred to as the ATRS system.

CF&I initially asserts that the roof was not adverse in the area of the crosscut where the bolting took place. I disagree. The uncontroverted evidence shows otherwise: the entry itself was "heavily" supported by steel beams. According to Arthur Haske, chief coal mine inspector for Colorado, there was adverse roof 50 feet in all directions adjacent to the crosscut (Tr. 133, 145-146). There was a great amount of roof support in the area [of the entry] indicating CF&I felt they needed the support (Tr. 140). The picture is this: the roof of the entry was in such adverse condition that it required straps with pins, 16 foot steel beams, and five inch by five inch by four foot spacers as part of its permanent support system (Tr. 105, R1).

Given this situation one would not anticipate that the roof immediately adjacent to this entry would suddenly become something less than adverse.

In addition, roof bolter Maestas acknowledged that it was common to put beams up in this section (Tr. 19). Here a crosscut was being turned. When turning a crosscut you need extra support (Tr. 19). Safety jacks on the bolter can be used to hold up the beams and also for temporary support (Tr. 19). Further, before the roof fall Maestas saw at least one of the two visible slips 13 feet to 17 feet away (Tr. 27). He further knew that a slip is dangerous and a possible separation of the roof (Tr. 18, 19).

In addition to the foregoing facts the asserted admission of foreman Salapich made at the closing conference, as set forth in the summary, supra, page 4, is uncontroverted.

I agree with CF&I that the determination of whether temporary supports should have been used cannot be based on an after-the-fact determination. However, the preponderance of the evidence clearly establishes that the roof was adverse within the meaning of the roof control plan.

For the reasons previously stated I reject Maestas' opinion that the top was quite good (Tr. 105, 110).

CF&I also contends that the evidence establishes that it was reasonable for the miners to believe that they would be protected by the ATRS canopy. If they are adequately protected then the roof control plan does not require the use of temporary supports. I disagree that the miners were adequately protected by the canopy. The evidence shows that when the rock fell Casias was standing under or at the edge of the permanent roof. That particular location was probably the most dangerous position for him because if a fall occurred the permanent roof could cause part of the rock fall to hinge and fall inward under the permanent support. The ATRS on the roof bolter would not protect the miners in any fashion because the rock was being hinged by the edge of the permanent roof support. If anything the ATRS canopy contributed to the toppling motion of the rock. Maestas describes the accident: "the rock that hit Casias toppled forward on him. When the rock fell the canopy held the front end from falling straight down - it caused the back end to fall first, then break, toppling back on him" (Tr. 30).

Based on the physics of the situation I further credit MSHA inspector Jordan's testimony that rock will frequently fall in a toppling manner (Tr. 212). In other words, if a rock is supported on one edge it will hinge when it falls (Tr. 62). I reject CF&I's contrary evidence from Maestas and Haske (Tr. 107, 136). What the CF&I witnesses are saying is that rock usually falls straight down. I agree. Further, they had never seen rock fall "in this manner." However, we have this situation: the rock was partly held by permanent support, and the portion outside of the permanent support falls. In this circumstance the falling rock will, in my view, usually always hinge and fall under the hinge point, or as in this situation, under the permanent roof support and the canopy.

CF&I contends that MSHA's evidence only suggests that jacks might have been used and they might have saved Casias. CF&I points to inspector Jordan's testimony that it was "highly speculative" what protection, if any, the temporary supports would have provided. Further, Maestas testified that CF&I uses two men to install temporary supports thus their installation might have lead to the death of two miners.

I agree CF&I's analysis of the evidence. It is highly speculative whether the temporary roof supports might have protected Casias. In fact, we can speculate that 16 foot 6 inch I beams, such as were in the entry, might not have contained this rock fall. However, CF&I has misjudged the thrust of the regulation. There was adverse roof and the canopy was inadequate. Unfortunately, we will never know what protection would have protected Casias.

CF&I states that MSHA's indecisiveness underscores the reasonableness of the miners' actions. The record clearly supports indecisiveness by MSHA in its effort to decide whether CF&I violated its roof control plan. I further agree with CF&I that this is not a strict liability standard. In other words this case does not reduce to a roof fall, a fatality, and a citation. MSHA may have been indecisive but the Secretary did in fact issue a citation and the determinative facts are set forth in this decision. Mere indecision by MSHA and conclusionary statements by MSHA inspectors that no violation occurred do not invalidate the Secretary's case.

CF&I further invokes the "greater hazard" doctrine. It is claimed that the installation of temporary support would create a greater hazard than not installing them.

The Review Commission has extensively reviewed the greater hazard doctrine and concluded that there is a statutory procedure for an operator to obtain a waiver or modification of a mandatory standard. Any such relief must be obtained in a forum different from this Commission, that is, such waiver or modification rests with the Secretary of Labor. Penn Allegh Coal Company, Inc., 3 FMSHRC 1392, 1399 (June 1981), 30 U.S.C. 811(c); 30 C.F.R. Part 44.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. 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.

At the trial the Secretary encouraged the Judge to impose a lesser penalty than the proposed $7000 if it was determined that a violation

occurred (Tr. 221, 218). CF&I urges that even if a violation existed it would only be technical and a fine, if any, should be minimal.

As previously discussed there is little evidence establishing a casual connection between the facts of the alleged violation and the death of miner Casias. However, a casual connection in the sense urged by CF&I is not a requirement under the regulation.

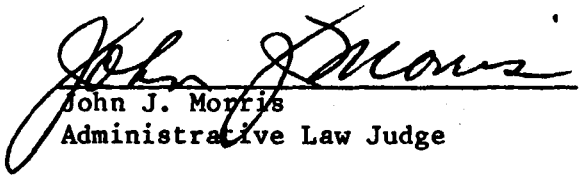
Considering the statutory criteria I deem that a civil penalty of $2500 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citation 387105 is affirmed.

2. A civil penalty of $2500 is assessed.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1982

CAMBRIA COAL COMPANY, Contestant	:	Contest of Citation
	:	Docket No. PENN 81-169-R
v.	:	Citation No. 1043934; 5/8/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cambria Strips & Tipple
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 81-231
	:	A.C. No. 36-02738-03009
v.	:	Cambria Coal Strips & Tipples
CAMBRIA COAL COMPANY, Respondent	:	

DECISION

Appearances: Bruno A. Muscatello, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Contestant/Respondent, Cambria Coal Company; David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner, MSHA.

Before: Judge Merlin

This is a consolidated proceeding consisting of a notice of contest and a petition for the assessment of seven civil penalties. A hearing was held on March 23, 1982. At the conclusion of the hearing, counsel waived the filing of written briefs and presented oral argument in support of their positions.

At the outset of the hearing the Solicitor moved to withdraw the penalty petition with respect to Citation No. 1043930. From the bench I granted the withdrawal.

The Solicitor also submitted at the hearing a motion for approval of settlements. With respect to four citations the motion recommended approval of the originally assessed amounts totalling $216. The proposed settlement for a fifth citation was $64, $20 less than the original amount. A lesser degree of gravity was explained for the reduction. I approved the settlements from the bench.

This left for hearing Citation No. 1043934 which is the citation in the notice of contest PENN 81-169-R.

The citation dated May 8, 1981 sets forth the alleged violation of 30 C.F.R. 77.1607(p) as follows:

> The movable boom mast of the Bucyrus Erie 88-B Dragline was left in the upright position and at a location where a person or persons could walk under this boom mast at any time. This boom mast was also not either secured or lowered to the ground surface when this piece of equipment was originally parked and has been out of service for an unknown period of time. This piece of equipment is located at this time at the 045 pit area.

The mandatory standard, 30 C.F.R. § 77.1607(p) provides as follows:

> Loading and haulage equipment; operation. Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use.

There is no dispute about the facts.[1/] The dragline was parked about an eighth of a mile from the point where

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1/ At the hearing counsel agreed to the admission of all documentary exhibits. However, upon receipt of the administrative transcript I found that the last page of MSHA Exh. No. 2 was missing. This page was a photocopy of a picture of the type of dragline involved. During the hearing, witnesses had identified various parts of the machine by marking them with letters. By letter dated April 9, 1982, the Solicitor has submitted another photocopy which he and operator's attorney have marked and which they have stipulated is a true and correct copy of the missing page. I accept the stipulation and the photocopy offered by counsel is hereby made part of the record as a true and correct copy.

coal was being mined in the pit. The bucket of the dragline was down on the ground and the boom was up in the air. (Op. Ex. No. 3) The dragline had not been used for about 6 to 8 weeks.

Since the boom was not lowered to the ground and since it plainly was not in use, it must be determined whether the mandatory standard applies requiring it to be lowered or secured. If the mandatory standard applies, inquiry must be made whether or not the boom was secured.

The mandatory standard specifically enumerates dippers, buckets and scraper blades. The boom mast is not one of these. The standard also includes "similar movable parts." As the testimony shows, the boom mast moves. MSHA's position is that because the boom moves, it is a movable part similar to dippers, buckets and scraper blades. I cannot accept this argument. If similarity is satisfied only by movability, the word "similar" is superfluous and 1607(p) could accomplish its purpose by referring only to "movable parts." The Solicitor acknowledged this in his closing argument. An interpretation which relegates part of a definition to surplusage is to be avoided.

Dippers, buckets and scraper blades are similar to each other in function because they come in contact with the earth by picking it up or leveling it. All of them are the furthermost part or the extremity of the total operation to which they are attached. The boom mast does not have these characteristics. Rather it moves and directs dippers, buckets and scraper blades and similar movable parts. In addition, the boom is an integral part of the assembly of the heavy-duty crawler machine as evidenced by the fact that it is included and described in the crawler's specifications (MSHA Exh. No. 2). Dippers, buckets and scraper blades are not so included. Accordingly, the boom is not similar either in placement or function to the items enumerated in the standard. Based upon the foregoing, I conclude the boom is not covered by the standard and the citation must be vacated.

The inspector's selective and uneven enforcement of the standard also demonstrates that it does not apply here. The inspector stated that he would not issue a citation where a lowered and not-in-use boom is in the active pit area. The inspector said that under these circumstances he would not issue a citation because no danger exists in the active pit area since people would not walk under the boom there. The standard however, is not premised upon the boom's location and the inspector has no authority to carve out such an exception. Conversely, if the citation in this case were upheld, citations would have to be issued in situations where the location is the active pit although the inspector himself admits they would not be necessary and does not issue them in such cases.

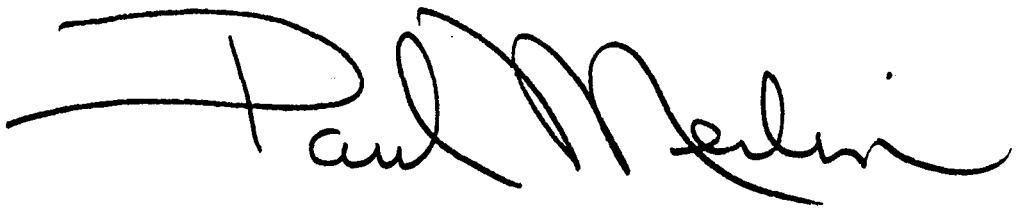
Finally, even if the boom were within the purview of the mandatory standard as a similar movable part, the citation still would be invalid because the boom was secured. The boom had a braking system. The inspector expressed the view that even with the braking system fully operative the boom was not secured because brakes are subject to mechanical failure. The inspector would require external blocks or cribbing although he admitted this would be difficult. Moreover, the inspector admitted there is no basis in the mandatory standard or any MSHA manual for his position. The testimony demonstrates that the boom in fact had three separate securing devices: (1) a brake on the drum; (2) a ratchet-type mechanism on the gear; and (3) a worm gear. All of these devices were explained in detail at the hearing. I find that any one of them secured the boom. MSHA introduced no evidence to show that they were inoperative. Indeed, the inspector expressly stated that he did not test the brakes. Accordingly, I conclude all three systems were working and that the boom was secured within the meaning of the standard.

ORDER

It is Ordered that the penalty petition be withdrawn with respect to Citation No. 1043930.

It is Ordered that the operator pay $280 with respect to Citation Nos. 1043927, 1043928, 1043931, 1043932 and 1043933 within 30 days from the date of this decision.

It is Ordered that Citation No. 1043934 be Vacated and that Notice of Contest PENN 81-169-R be Granted.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 15 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 81-224-M
	:	A/O No. 41-02821-05002
v.	:	
	:	Docket No. CENT 81-231-M
ALLEN KELLER COMPANY, Respondent	:	A/O No. 41-02821-05003
	:	
	:	Keller Crusher and Pits

DECISION

Appearances: Ron Howell, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Petitioner;
Mr. Michael Eilers, Mr. Al Farest, Allen Keller Company, Fredericksburg, TX, for Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act) 1/ to assess civil penalties against Allen Keller Company.

1/ Sections 110(i) and (k) of the Act provides:

"(i) The Commision shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violtions, 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concenring the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

The parties stipulated that:

1. Twenty-one thousand, eight hundred and fifty six (21,856) tons per year were worked at the Keller Crusher and Pits and that it was a small mine;

2. There were 4 violations in the previous 24 months, and that

3. The assessed penalties would have no effect on Respondent's ability to remain in business.

The citations herein issued by Mr. Charles E. Price, MSHA Inspector, for alleged violations of mandatory safety standards in Part 56 of Title 30, Code of Federal Regulations, were served on Mr. Herbert Kelone at Keller Crusher and Pits. This was the only inspection of this mine made by Mr. Price.

Citations 162343 and 162349

On Citation No. 162343, issued February 26, 1981, the inspector noted: "The work platform where the generator was mounted was not provided with hand rails. (Trailer) work platform was approximately four foot off the ground. Employee was on the platform at least two times a day."

In terminating the citation the inspection noted: "The elevated work platform where the generator was mounted was provided with hand rails."

30 C.F.R. § 56.11-27 provides: "Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary."

On Citation No. 162349, issued on February 26, 1981, the inspector noted: "The K406 haul unit was not provided with a fire extinguisher. Employee drove the unit eight hours a day."

In terminating the citation the inspector noted: "The K406 haul unit was provided with a fire extinguisher."

30 C.F.R. § 56.4-24(c) provides: Fire extinguishers and fire suppression devices shall be (c) replaced with a fully charged extinguisher or device or recharged immediately after any discharge is made from the extinguisher or device.

The parties entered into a settlement agreement to reduce the $30 assessment for Citation 162343 to $22 and to reduce the $44 assessment in Citation 162349 to $32. Based on the information furnished by the parties and an independent review and evaluation of the circumstances, I find the settlement proposed is in accord with the provisions of the Act. The settlement agreement is approved. An assessment of $22 is entered for Citation 162343 and an assessment of $32 is entered for Citation 162349.

Citations 162351 and 162354

On Citation 162351, issued on February 26, 1981, the inspector noted: "The cab of K405 haul unit was not kept clear of extraneous materials. Three soda pop cans were rolling around in the cab. Unit was operated eight hours a day."

In terminating the citation the inspector noted: "The cab of K405 haul unit was cleaned of all extraneous materials."

30 C.F.R. § 56.9-12 provides: "Cabs of mobile equipment shall be kept free of extraneous materials."

On Citation 123454, issued February 26, 1981, the inspector noted: "Employee was observed using compressed air to blow out a filter, and was not using safety glasses or other suitable protective devices to protect his eyes from flying particles. Employee was stopped until eye protection could be provided."

In terminating the citation the inspector noted: "Employee works on service truck which is used on a road job most of the time. Employee not on property."

30 C.F.R. § 56.15-1 provides: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

Pursuant to a motion that these two citations be vacated because Petitioner could not meet its burden of proof. Citations 162351 and 162354 are vacated and the proceedings in regard to these two citations are dismissed.

Citations 162277, 162278, 162279, 162280, and 162344.

These five citations, issued on February 26, 1981, alleged a violation of 30 C.F.R. § 56.14-1 which provides: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

In regard to each of these five citations it was established by the evidence that there were five different physical locations on the work site with tail pulleys or tail rollers at each separate location, and none of them had a guard on either side. The inspector stated that he calls the equipment referred to as a tail pulley in the regulations a tail roller and that he used that designation in his citations. Since the conveyor belts were not numbered at this mine the inspector identified the equipment in his citations by the names given him by the foreman. Although the five tail pulleys were separate equipment they were in close proximity.

It was probable that an accident might occur resulting in loss of limb or life. Two employees doing clean up work in the vicinity of the unguarded tail pulleys were shovelling spillage.

The inspector acknowledged that Respondent exercised good faith in achieving rapid abatement after notification of the violations in each of the citations.

Allen Keller Company had taken steps to insure that all pinch points were guarded and guards had been installed on tail pulleys in locations other than those in which the citations were issued. The mine had been inspected three times previously and no citation had been issued by another inspector regarding pinch points. The inspector issuing the citations was not aware of the prior inspections. The conditions noted, which were near the office, were open and obvious. The equipment was partially, but not sufficiently, guarded by its location. Although the conditions existing were violations of the mandatory standard the negligence of Respondent was slight.

On Citation 162277 the inspector noted: "Tail pulley for contractor conveyor belt located approximately one foot from the ground was not guarded. Two employees do clean-up work in the area eight hours a day."

In terminating the citation the inspector noted: "The tail pulley for contractor conveyor belt was guarded."

The evidence established that the pinch points on the bottom between the belt and the pulley were protected to some extent by the frame but that a possible pinch point existed between the pulley and the frame.

An assessment of $44 is entered for this violation.

On Citation 162278 the inspector noted: "The tail pulley for screen conveyor belt located approximately one foot from the ground was not guarded. Two employees work in the area eight hours a day."

In terminating the citation the inspector noted: "The tail pulley for the screen conveyor belt was guarded."

An assessment of $50 is entered for this violation.

On Citation 162279 the inspector noted, "The tail pulley for the return conveyor belt was not guarded. Two employees work in the area eight hours a day." In terminating the citation the inspector noted, "The tail pulley for the return conveyor belt was guarded."

An assessment of $50 is entered for this violation.

On Citation 162280 the inspector noted, "The tail pulley for the loading conveyor belt was not guarded. Two employees work in the area eight hours a

day." In terminating the citation the inspector noted, "The tail pulley for the loading conveyor belt was guarded."

At the hearing, the inspector stated that the loading conveyor belt came out from under the finished product bin which loaded the trucks and that the tail pulley was set more in less in a hole. There was quite a lot of spillage of the finished product requiring clean up work.

An assessment of $50 is entered for this violation

On Citation 162344 the inspector noted, "Tail roller for the short conveyor belt mounted on elevated work platform was not guarded. Two employees worked in the area eight hours a day." In terminating the citation the inspector noted, "The tail roller for the short conveyor belt was guarded."

At the hearing, the inspector stated that the short conveyor belt was mounted, along with a generator, on a flat-bed truck.

An assessment in the amount of $50 is entered for this violation.

Citation No. 162347

On Citation 162347, the inspector noted, "Berms or guards were not provided on the outer banks of the elevated ramp going to the primary hopper." Elevation on both sides was 0 to 20 feet. Two R 22 Euclid haul units backed onto the ramp all day. In terminating the citation on February 26, 1981, the inspector noted, "Berms were built on the outer edges of the elevated ramp." The citation alleged a violation of 30 C.F.R. 56.9-22 which provides: "Berms or guards shall be provided on the outer bank of elevated roadways."

The evidence established that the elevated ramp was in effect an extension of the roadway and as such was part of the roadway. It allowed the haul unit to back up to the primary crusher and make its dump. The ramp was 20 feet wide and 40 to 50 feet long with a slight upward incline. The top of the ramp was 8' to 10' from the ground. Since there were no berms or guards on the elevated roadway the operator was in violation of 30 C.F.R. § 56.9-22.

Although the speed of a haul units on the ramp was only 3-4 MPH it could roll off the roadway and turn over in the absence of berms or guards. The inspector's uncontradicted testimony was that a fatality was a possibility. The evidence established the probability of serious injury to the operator of the vehicle. The inspector observed two haul units with a driver in each of them. One of them was backing up on the roadway.

The inspector testified that the condition was "out in the open." The evidence established that Respondent should have known that the condition existed. Although inspectors in the past had not required berms in such locations this particular elevated ramp was not there at the time of those inspections. Under the circumstances the negligence of Respondent was moderate.

The inspector acknowledged that Respondent demonstrated good faith in rapidly abating the condition after the citation was issued.

An assessment in the amount of $50 is entered for this violation.

Citation No. 162348

On Citation 162348 the inspector noted "Access to the cab of K 430 haul unit was not maintained in a safe condition. Bottom step was bent and broke loose on one side." In terminating the citation the inspector noted "Access to the cab of K 430 haul unit was repaired in good condition."

The citation alleged a violation of 30 C.F.R. 56.11-1 which provides that "Safe means of access shall be provided and maintained to all working places."

The step was bent and completely broken on one of the haul units. There were two means of access to the unit. The defective step was at the front of the haul unit. The step on the side was in good condition. The haul unit was not running at the time of the citation but it had previously been operated and remained available for use. Since one of the means of access to the haul unit was not maintained in a safe condition and there was nothing to prevent the step from being used the condition was in violation of 30 C.F.R. 56.11-1. Equipment need not be actually in use for there to be a violation: See Eastern Associated Coal Corporation, 1 FMSHRC 1473, 1979; CCH OSHD par. 23,980 (1979).

The probability that the driver of the truck, the only person exposed to the unsafe condition, would be injured is established by the evidence. The inspector testified that if the other end of the rung about 18 to 20 inches off the ground came loose it could result in an injured leg perhaps causing lost time.

The haul unit operates in rocky areas and the stock pile can readily break or damage the steps. The inspector acknowledged that there was a possibility that the Respondent did not know of this condition under the circumstances even though there was a requirement that the equipment operator inspect self-propelled equipment before it is operated. Negligence on the part of the operator was established.

The inspector acknowledged that the operator demonstrated good faith in abating the condition by rapidly repairing the steps after the citation was issued.

An assessment in the amount of $36 is entered for this violation.

Citation No. 162350

On Citation 162350 the inspector noted "Fire extinguisher in the cab of K 405 haul unit was not replaced with a fully charged extinguisher after

being discharged. Employee drove the unit eight hours a day." In terminating the citation the inspector noted "The K 405 haul unit was provided with a fully charged fire extinguisher." The citation alleged a violation of 30 C.F.R. 56.4-24(c) which provides:

> (c) Fire extinguishers and fire suppression devices shall be replaced with a fully charged extinguisher or device or recharged immediately, after any discharge is made from the extinguisher or device.

The inspector found the fire extinguisher discharged but he testified that he did not remember how he determined that the fire extinguisher was in a discharged condition. He also stated that he would not have issued a citation if there had been a record showing that the extinguisher had been inspected recently. Mr. Eilers testified for Respondent that the device was a 5 pound fire extinguisher with a gauge. Although the inspector did not remember the gauge or how he determined the discharged condition his testimony was adequate to establish the existence of the condition. The evidence was not rebutted. Since the record establishes that the discharged extinguisher was not recharged or replaced as required, the operator is in violation of 30 C.F.R. 56.4-24(c).

One employee was exposed to a burn hazard resulting from the condition. There were other fire extinguishers in various locations around the crusher site easily accessible to the haul unit operators. It is improbable that a person would be injured as a result of the condition.

The inspector testified that the operator should have known of the condition if the required safety checks were made. Mr. Eilers testified that the extinguishers become discharged by vibration of the haul units. He requires haul unit operators to report discharged fire extinguishers and he makes personal inspections of the fire haul units and extinguishers. The foreman told the inspector that undoubtedly in morning they had left some of the fire extinguishers behind and that they would be on the operation shortly. Moderate negligence is established by the record.

The operator demonstrated good faith in abating the condition after issuance of the citation.

An assessment in the amount of $20 is entered for the violation.

Citation No. 162353

On Citation 162353 the inspector noted "Fire extinguisher on K 479 service truck was discharged. Truck carried approximately 250 gallons of diesel fuel, 100 gallons of gasoline, 100 gallons of transmission fluid and grease. Truck was operated eight hours a day. In terminating the citation the inspector noted "The K 79 service truck was removed from the property. Company alleged the truck was provided with a fully charged fire extinguisher."

The testimony of the inspector that the fire extinguisher was discharged was not contradicted. A violation of 30 C.F.R. 56.4-24(c) was established by the evidence. Although the inspector acknowledged the possibility that there was another fire extinguisher in the truck that he did not check it was established that at least one extinguisher was discharged. The actual presence of an additional extinguisher would have some bearing on the gravity the violation but it would not meet the requirements of the regulations.

The uncontradicted testimony of the inspector was that there was a possibility of a fatality. It is probable that the condition could have caused serious injury in the event of a fire.

The Respondent should have known of the condition if the required preshift examination and reports by the equipment operator had been made. The equipment operators did not report the discharged fire extinguisher to Respondent. Mr. Eilers also personally made periodic inspections but his last inspection was made on January 22, 1981. The negligence of Respondent was moderate.

The operator demonstrated good faith in abating the condition after the citation was issued.

An assessment of $28 is entered for this violation.

Assessments

Citation	Amount
162343	$22
162349	32
162277	44
162278	50
162279	50
162280	50
162344	50
162347	50
162348	36
162350	20
162353	28
	$432

Order

Respondent is ORDERED to pay Petitioner the sum of $432 within 30 days from the date of this order.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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APR 15 1982

UNITED STATES STEEL CORPORATION, Contestant	:	Contest of Citations
	:	Docket Nos. / Citation and Date
v.	:	LAKE 81-102-RM 293736 1/22/81
SECRETARY OF LABOR,		LAKE 81-103-RM 293739 2/9/81
MINE SAFETY AND HEALTH		LAKE 81-114-RM 293740 3/9/81
ADMINISTRATION (MSHA), Respondent	:	Contest of Order
	:	Docket No. LAKE 81-115-RM Order No. 296501; 3/9/81
	:	Minntac Mine
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH		
ADMINISTRATION (MSHA), Petitioner	:	Docket Nos. / Assessment Control Nos.
	:	LAKE 81-152-M 21-00282-05024 I
v.		LAKE 81-167-M 21-00282-05026 R
		LAKE 81-168-M 21-00282-05025 R
UNITED STATES STEEL CORPORATION, Respondent	:	Minntac Mine

DECISION

Appearances: Louise Q. Symons, Attorney, Pittsburgh, Pennsylvania, for United States Steel Corporation;
Stephen P. Kramer, Esq., U.S. Department of Labor, for the Secretary of Labor and MSHA;
Clifford Kesanen, Virginia, Minnesota, Miners' Representative, Local 1938, United Steelworkers of America.

Before: Administrative Law Judge Steffey 1/

This consolidated proceeding involves four notices of contest and three petitions for assessment of civil penalty. Two of the notices of contest were filed on February 23, 1981, by United States Steel Corporation (USS) in Docket Nos. LAKE 81-102-RM and LAKE 81-103-RM and the remaining two notices of contest were filed by USS on March 27, 1981, in Docket Nos. LAKE 81-114-RM and LAKE 81-115-RM. The Secretary of Labor filed the petition for assessment of civil penalty in Docket No. LAKE 81-152-M on June 22, 1981, and thereafter

1/ These cases were originally assigned to Administrative Law Judge John F. Cook and were reassigned to me after Judge Cook ceased to work for the Commission because of a reduction in force. Therefore, the decision has been written by me in its entirety, but the hearing was held before Judge Cook on August 26 and 27, 1981, in Duluth, Minnesota, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

filed the petitions for assessment of civil penalty in Docket Nos. LAKE 81-167-M and LAKE 81-168-M on July 20, 1981. All of the notices of contest and the civil penalty cases relate to three citations and one order of withdrawal which were written by an MSHA inspector after a truck had rolled over on January 22, 1981. The petitions for assessment of civil penalty seek to have penalties assessed for each of the four violations alleged in the three citations and order of withdrawal whose validity is challenged in the four notices of contest filed by USS.

Additions to the Record

The hearing record which I received from Judge Cook consisted of 390 pages of transcript. Although the transcript shows that Judge Cook received in evidence Exhibits M-1 through M-7 and subsequently gave them to the reporter to be returned to him with the transcript (Tr. 13; 390), no exhibits were with the transcript when I received it. After the reporter had advised me that she did not have the exhibits, I requested that MSHA's counsel provide me with replacement copies of Exhibits M-1 through M-7. Additionally, at my request, MSHA's counsel supplied me with two exhibits which are hereinafter identified as Exhibits M-8 and M-9 and those exhibits are received in evidence in the part of my decision which deals with the notices of contest filed in Docket Nos. LAKE 81-114-RM and LAKE 81-115-RM.

Issues

The issues raised by the notices of contest are (1) whether USS violated section 103(a) of the Act when it refused to allow an inspector to travel to the place where a truck had rolled over, (2) whether USS violated section 103(a) of the Act when it refused to allow an inspector to interview a foreman until an attorney provided by USS was present, and (3) whether USS violated 30 C.F.R. §§ 55.9-1 and 55.9-2 when it allegedly failed to record and correct a misalignment in a truck and whether such alleged failure was unwarrantable under the provisions of section 104(d)(1) of the Act.

The issues raised by the three petitions for assessment of civil penalty are whether the violations which are the subject of the notices of contest occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Counsel for USS and MSHA filed simultaneous posthearing briefs which were received on November 2, 1981, and November 3, 1981, respectively.

Findings of Fact

My rulings on the issues raised in this proceeding will be based on the findings of fact set forth below:

1. An MSHA inspector, James R. Bagley, was conducting a regular inspection at United States Steel Company's Minntac Mine in Minnesota on January 22, 1981. The inspector was accompanied by James Barmore, a safety engineer who works for USS, and by Larry Claude, an auto mechanic who works

for USS and who is co-chairman of the Safety Committee of the United Steelworkers of America (Tr. 15-16; 134; 181). About noon, the three men interrupted their inspection and returned to the mine office building for the purpose of eating lunch. As they were walking down the hall to Barmore's office, another USS employee advised Barmore that there had been an accident involving a rollover of 2-1/2-ton Ford truck No. 856 used by three of USS's employees who were assigned to the Bull Gang or shovel-repair crew (Tr. 17-18; 136; 181-182).

2. Barmore considered it within the scope of his duties to investigate the accident (Tr. 209). He went into his office to obtain his camera, and at that time, he received a radio communication further advising him that the accident had occurred. When Barmore came out of his office, he stated to Claude, the Union's representative, that he and Claude would have to go to the scene of the accident (Tr. 182). Bagley, the inspector, walked behind Barmore and Claude to the main door of the office building. Claude passed through the main door in front of Barmore, at which time, Barmore turned to the inspector and asked him where in the _____ he thought he was going and what he intended to do (Tr. 18; 136; 182-183). The inspector stated that he intended to accompany Barmore and Claude to the site of the accident (Tr. 18; 137; 183). Barmore explained to the inspector that he had a contractual obligation to investigate accidents in conjunction with a Union representative, but that he could not permit the inspector to accompany him in USS's truck to the site of the accident because he did not want his arrival at the scene of the accident in the company of an inspector to be misinterpreted as the initiation of an MSHA investigation of an accident when, in fact, it was a combined company-union investigation (Tr. 19; 55; 137; 183; 209-212; 362). The inspector believed that Barmore was improperly precluding him from going to the scene of an accident and stated that Barmore should permit him to go to the accident site as a matter of courtesy even if Barmore felt the inspector's presence was intrusive during Barmore's initial examination of the accident site (Tr. 19; 137; 184).

3. When Barmore repeatedly insisted that the inspector could not travel to the accident site in the same vehicle with Barmore and Claude, the inspector acceded to Barmore's refusal to allow him to travel to the accident site. Barmore had assured the inspector that, after Barmore and Claude had returned from their inspection of the accident site, Barmore would give the inspector a report of what he had observed and show the inspector any pictures made (Tr. 19; 189). When Barmore arrived at the accident site, he found that other USS personnel were already at the accident site and that another Union representative was also at the scene (Tr. 139; 186-187). Since other USS personnel were measuring the length and depth of skidmarks and gouge marks in the roadway, Barmore made some pictures and concluded that he should rejoin the inspector at the mine office. The inspector ate lunch while waiting for Barmore and Claude to return (Tr. 20).

4. Barmore and Claude returned to the mine office from their investigation of the accident within a period of from 30 to 45 minutes (Tr. 20; 188). Barmore laid the pictures he had made on his desk and the pictures were

handed to the inspector by Claude (Tr. 21; 189; 203). Two employees beside the driver had been riding in the truck when it rolled over. All three employees had been taken to a clinic for examination and Barmore, at that time, was unsure of the extent of their injuries (Tr. 188). Eventually, it was found that two of the employees had strained backs and one employee had suffered a chipped elbow (Exh. M-7). They were all placed on restricted duty for a short time and did not suffer any permanent serious injuries (Tr. 39-40; 164-165; 278; 332; 375). The truck was damaged extensively in that the box or bed of the truck was torn off during the rollover, most of the leaves in the left rear spring were wrenched loose and strewn along the roadway, and the rear half of the drive shaft was jerked loose and thrown down on the roadway (Tr. 130; 145; 165; 252-259; 299-301; 303-304; 381).

5. The driver of the truck, Martin Kaivola, had reported to his supervisor, Cedric Roivanen, on January 21, 1981, the day before the rollover, that the left rear wheels had slipped backwards about 2-1/2 inches from their normal position (Exh. M-5; Tr. 37; 50; 99; 156; 322). The report to Roivanen was made about 1 p.m. and Roivanen asked Kaivola if the truck could be used for the remainder of Kaivola's day shift. Kaivola stated that it could and Roivanen told Kaivola to turn the truck in for repair at the end of his shift so that the problem could be corrected on the afternoon shift. Kaivola left early on January 21, 1981, with Roivanen's express permission and Kaivola's two assistants failed to turn in any report to the auto repair shop or to Roivanen's office that the shifting in the truck's rear end needed to be corrected (Tr. 155-156). Roivanen was so busy with his duties of determining the location of shovels in need of repair and ascertaining the availability of spare parts, that he forgot that Kaivola had reported the shifting problem in the rear end of Truck No. 856 (Tr. 327-328).

6. Truck No. 856 was continued in use on the afternoon shift of January 21, 1981, without being repaired (Tr. 47; 157). The truck was sitting in its usual location on the morning of January 22, 1981, when Kaivola came to work (Tr. 158). Kaivola and one of his assistants checked the oil in the truck's engine and examined the truck in general. Kaivola wondered whether the shifting in the rear end had been corrected (Tr. 97; 159; 380). The truck looked all right to him and was, therefore, driven to two different shovel-repair jobs on January 22 (Tr. 162; 381). Shortly after Kaivola and his two assistants had left the second job site and were on their way to turn in some parts for repair, Kaivola noticed smoke coming from the left rear dual wheels (Tr. 96; 162; 381). He stated that the rear end must have shifted again because smoke was coming from the left rear tires (Tr. 163). Richard Boucher and Richard Woullet, both of whom were apprentice wheelwrights, were riding in the truck with Kaivola (Tr. 88; 373). Boucher turned to look at the smoke mentioned by Kaivola. At that moment, some thumping noises were heard and the truck flipped completely over and landed back on its wheels (Tr. 165; 381).

7. The word "accident" is defined in section 3(k) of the Act as including "* * * a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person". The Secretary has defined

the word "accident" in 30 C.F.R. § 50.2(h) as including 12 different situations, but the portion of section 50.2(h) which is most pertinent to the rollover involved in this proceeding is section 50.2(h)(2) which states that an accident is "[a]n injury to an individual at a mine which has a reasonable potential to cause death." If an operator finds that an accident within the meaning of section 50.2(h) has occurred, the operator is required by section 50.10 to notify MSHA immediately that an accident has occurred and MSHA is required by section 50.11(a) to notify the operator within 24 hours whether MSHA intends to conduct an investigation of the accident. Section 50.11(b) requires each operator to investigate all accidents which occur. If the operator's investigation results in a conclusion that no "accident" within the meaning of section 50.2(h) has occurred, the operator does not have to report the "accident" to MSHA immediately, but the operator is required by section 50.20 to report the accident to MSHA within 10 days after its occurrence on a Form 7000-1. "Immediately" reportable accidents also have to be reported to MSHA on a Form 7000-1 (Section 50.20-5).

8. All of USS's personnel who investigated the rollover of Truck No. 856 unanimously concluded that no "accident" within the meaning of section 50.2(h) had occurred and the accident was reported to MSHA only on a Form 7000-1 (Tr. 185; 226-227; 240; 278-283). The reason for their concluding that no accident within the meaning of section 50.2(h)(2) had occurred was that none of the three employees (Kaivola, Boucher, and Woullet) who were riding in the truck at the time the rollover occurred received an injury which had "* * * a reasonable potential to cause death" (Tr. 278). Steven D. Starkovich, Barmore's supervisor, took the position at the hearing that since the investigation showed that no "accident" reportable to MSHA under section 50.10 had occurred, MSHA had no reason to investigate the "accident" under section 50.11(a). Starkovich stated that Barmore had correctly refused to allow the inspector to accompany him and Claude to the accident scene because the inspector had no right to investigate an accident until USS's personnel had first investigated the accident in order to determine whether a reportable "accident" within the meaning of sections 50.2(h) and 50.10 had occurred (Tr. 276-278).

9. Barmore and Starkovich took the position that Barmore had only refused to allow the inspector to ride in the vehicle with Barmore and Claude to the accident scene. They maintained that the inspector was still free to go to the accident scene by an alternative means. Barmore and Starkovich agreed that it is the practice at the Minntac Mine for one of USS's safety engineers to accompany the inspectors on all inspections and to provide the vehicle in which they travel to the various inspection sites. Although Barmore's refusal to allow the inspector to ride with him left the inspector without any obvious means of transportation, Barmore and Starkovich stated that the inspector could have called Thomas Wasley, another MSHA inspector who was also at the Minntac Mine on January 22, 1981, for the purpose of requesting that Wasley bring his MSHA vehicle to the mine office so as to transport the stranded inspector to the accident scene. Even though Barmore stated that the inspector could have requested permission to use any of about 50 USS vehicles which were parked close to the mine office, Starkovich

stated that if the inspector had called him, he would have refused to take the inspector to the accident site until after he had first checked with Barmore to find out whether a "reportable" accident within the meaning of sections 50.2(h)(2) and 50.10 had occurred (Tr. 184; 192; 197; 199-201; 211; 270; 273-275; 280; 287-291).

10. When the inspector returned to his office on January 22, 1981, he told his supervisor that he believed Barmore had interfered with his right to inspect and that he would like to write a citation for Barmore's refusal to allow him to go to the accident site (Tr. 23). His supervisor agreed with him, so the inspector thereafter wrote Citation No. 293736 dated January 22, 1981, under section 104(a) of the Act alleging that USS had violated section 103(a) of the Act because:

> During a regular inspection on January 22, 1981, at approximately 12:10 p.m. Jim Barmore, Safety Engineer, was informed in the presence of this inspector that an accident had occurred at the Prindle Road crossing in the East Pit. The accident involved the Number 856 Bull Gang Service Truck which rolled over with three employees in a six-man cab. Upon expressing my intent to accompany the safety engineer and the miners' representative to the accident site, I was told by the safety engineer that he did not have to and would not permit me to visit the accident site. This action by the safety engineer interfered with an authorized representative in carrying out the requirements of section 103(a) of the Act. I was not given the opportunity to evaluate the cause of the accident or to determine if any mandatory safety or health standard had been violated.

11. MSHA did not contest USS's determination that the rollover of Truck No. 856 on January 22, 1981, was an unreportable accident under section 50.2(h)(2) (Tr. 241). Therefore, MSHA did not have any reason to determine whether the accident should be investigated under section 50.11(a). On February 5, 1981, about 2 weeks after the occurrence of the accident, however, MSHA received a complaint requesting that MSHA conduct an investigation of the accident. Pursuant to the complaint, Inspector Bagley returned to Minntac Mine on February 9, 1981, along with Inspector James C. King, for the purpose of conducting an investigation of the rollover accident which had occurred on January 22, 1981 (Tr. 28). The inspector on January 23, 1981, had already served Citation No. 293736, described in Finding No. 10 above, on Barmore (Tr. 26-27). The inspector terminated the citation after Barmore's supervisor agreed to allow the inspector to examine Truck No. 856 and interview the employees who were riding in the truck (Exh. M-3, p. 4; Tr. 29). The inspector examined the truck which had been towed to the auto shop (Tr. 32). The truck had not been repaired in any way (Tr. 33-34). The inspector also interviewed Kaivola, the driver of the truck, on February 9, 1981, but the other two employees, Boucher and Woullet, who had been riding in the truck at the time of the rollover (Tr. 39-40), were attending a vocational technical school and were unavailable for interviewing on February 9, 1981 (Tr. 41).

12. As previously indicated above, Starkovich was supervisor of Minntac operations. When Inspector Bagley requested that Starkovich permit him to interview Roivanen, the supervisor of the employees who were riding in the truck at the time of the rollover, Starkovich stated that the inspector could interview Roivanen only in the presence of an attorney to be provided by USS (Tr. 30). Although the inspector requested several different times on February 9 that he be permitted to interview Roivanen, Starkovich or Rantala, a safety engineer, repeated each time that no interview could be conducted until such time as one of USS's attorneys was present (Tr. 35-36). Starkovich called Pittsburgh to ask about an attorney's availability, but no date was set on which the inspector could return for interviewing Roivanen in the presence of an attorney. Starkovich indicated to the inspector that he would let him know when an interview of Roivanen in an attorney's presence could be arranged (Tr. 30).

13. When Inspector Bagley did not hear from Starkovich on Tuesday, February 10, 1981, he returned to the Minntac Mine on Wednesday, February 11, 1981, along with Inspector Wasley, and again asked that he be permitted to interview Roivanen. Starkovich repeated that Roivanen could be interviewed only in the presence of an attorney. Starkovich also advised the inspectors that if they were to go to see Roivanen out of an attorney's presence, that Roivanen would only look at them and would not attempt to answer their questions (Tr. 42-43; 244-245; 267; 365; 370).

14. When Inspector Bagley returned to his office on February 11, 1981, he explained to his supervisor that he believed that Starkovich's repeated refusals to allow him to talk to Roivanen was an interference with an MSHA investigation and that he thought a citation should be written for that refusal (Tr. 43-44). His supervisor agreed with him and Inspector Bagley wrote Citation No. 293739 dated February 9, 1981, alleging a violation of section 103(a) of the Act because:

> On February 9, 1981, at approximately 10:30 while attempting to continue an accident investigation involving the rollover accident of No. 856 Bullgang truck which occurred on January 22, 1981, in the East Pit, Inspector James C. King (A.R.#735) and myself (James R. Bagley, A.R.#782) were denied the right to confer with Cedric Roivanen, bullgang foreman. Upon expressing our intent to confer with the foreman, Steve Starkovich, supervisor of safety, U.S. Steel's Minnesota ore operations, informed us that we could not confer with the foreman unless a U.S. Steel corporate lawyer was present. On February 11, 1981, at approximately 11:00 a.m. during a subsequent attempt to confer with Cedric Roivanen, bullgang foreman, Steve Starkovich continued to deny Inspector Thomas C. Wasley (A.R.#902) and myself (James R. Bagley A.R.#782) the right to confer with the foreman. This action by Steve Starkovich constitutes interference with and impedence of three authorized MSHA representatives during the course of an MSHA accident investigation.

15. When Inspectors Bagley and Wasley returned to the Minntac Mine

on February 12, 1981, they served the above-described Citation No. 293739 on Starkovich and he immediately called someone in order to find out when an attorney could be provided so that the citation could be abated. After he had completed the phone call, he advised Bagley that an attorney would be present the next day, February 13, at 1 p.m. so that they could interview Roivanen (Tr. 45; 246; 377). The inspectors also on February 12 interviewed Boucher and Woullet, the other employees who had been riding in the truck with Kaivola at the time of the rollover, by going to the vocational school and talking to them about 4 p.m. (Tr. 42; 248; 373-374).

16. Roivanen was interviewed by the inspectors on February 13, 1981 (Tr. 45; 248; 367). Roivanen stated that he had been advised by his supervisor that he should not talk to an MSHA inspector about the truck's rollover unless an attorney provided by USS was present (Tr. 334-335; 343). Roivanen experienced some anxiety when he was told that an attorney would have to be present at the interview, but it did not perturb him excessively because he said he did not think that he had done anything wrong (Tr. 334; 336). Roivanen was advised by Inspector Bagley that nothing might result from the inspectors' investigation of the truck's rollover, or that a citation or order might be written as a result of the investigation (Tr. 86; 336; 338; 369). Roivanen agreed that Kaivola had told him about the shifting of the truck's rear end and that he had forgotten about the matter at the end of the shift and did not make any oral or written report concerning the repair of the truck's rear-end alignment (Tr. 327-329). Roivanen also stated that he would have driven the truck after having been advised of the shifting rear end because shifting rear ends were common occurrences and that nothing, so far as he knew, had ever happened as a result of a shifting rear end prior to the accident on January 22, 1981, other than the fact that the tires would rub in the wheel wells so much that they would smoke extensively and would sometimes stall out the engines entirely so that the trucks couldn't be driven and had to be towed to the repair shop (Tr. 356; 358). Roivanen claimed that he was surprised when the rollover occurred on January 22, 1981, because he had never heard of such an accident as that prior to the time the truck flipped over (Tr. 333-334).

17. As to whether the shifting rear end had been properly reported and recorded, Roivanen said that they had tried to start a procedure which involved the writing of walk-around reports by the men in his shovel-repair department (Tr. 330). At first the walk-around reporting forms were given to all the men, but they failed to fill them out (Tr. 355). Then the foremen tried giving the forms or sheets only to the employees to whom vehicles were assigned. They received almost no cooperation from the 130 men in their department (Tr. 351-352). The only way that they could have enforced the written system of submitting daily inspection reports would have been to have handed out disciplinary action against those who failed to fill out the slips. The foremen felt that disciplining the men over their failure to fill out slips would only cause general turmoil and the foremen reluctantly resorted to their former procedure under which the employees were still urged to fill out a walk-around sheet and place it on a clip board in the foremen's office if an actual repair was needed, but it was also

permissible for an employee merely to report a needed repair orally to his supervisor and then take a vehicle to the auto shop for repair after the supervisor had approved the making of the repair (Tr. 358). In the case of the rear-end problem reported by Kaivola in this proceeding, Roivanen said that Kaivola had reported the matter to him orally and that, if the matter had been taken care of as Roivanen intended, it would have been reported orally by Kaivola or Boucher or Woullet to the auto shop (Tr. 352; 355). The auto shop did keep written records of all repairs which were requested and the auto shop's records were maintained on a permanent basis with respect to approximately 654 vehicles used in the Minntac operations (Tr. 313-314).

18. John Primozich was foreman in charge of the auto repair shops which performed all maintenance and repair work on the vehicles used in the Minntac operations (Tr. 292). He said that from 900 to 2,850 vehicles passed through the shops for maintenance within a single month (Tr. 294). He testified that it was common to see vehicles with shifting rear ends and that employees did not always turn them in for repair (Tr. 294). Often he would see shifting rear ends and other problems and ask that the vehicles be brought to the shop for repair before they were further used. Sometimes it was necessary for him to appeal to a supervisor before a given employee would cease operating a vehicle long enough for it to be repaired in the shop (Tr. 298). Primozich said that he would not personally continue to drive a vehicle with a 2-1/2-inch shifting of the rear end because that sort of condition will continue to deteriorate and may cause a serious accident such as that which occurred on January 22, 1981 (Tr. 37; 322-323). It was Primozich's opinion that the rollover of Truck No. 856 was caused by leaves falling from the left rear spring so as to produce a lifting action between the wheels and the box or the ground (Tr. 304).

19. After he had completed his investigation of the rollover accident which occurred on January 22, 1981, Inspector Bagley wrote Order of Withdrawal No. 293740 dated March 9, 1981, under section 104(d)(1) of the Act alleging a violation of section 55.9-1 because:

> On January 22, 1981, at approximately 11:25 a.m., an accident occurred near the Prindle Road crossing in the East Pit. The accident involved the Number 856 Bull Gang service truck which rolled over injuring three employees. A subsequent investigation revealed that the left side rear axle housing apparently shifted back which allowed the rear duals to contact the truck box. Statements made by Martin Kaivola, driver of the truck, and Richard Boucher, injured and witness, indicated that on January 21, 1981, the day before the accident, it was reported to their foreman, Cedric Roivanen, that the truck's rear end was shifted back approximately 2-1/2 inches. During a follow-up interview with Cedric Roivanen, Bull Gang Foreman, he confirmed that the shifting rear end had in fact been reported to him on January 21, 1981, but that he had forgotten about it. The company could produce no records of the unsafe condition being reported, hence did not demonstrate reasonable care in recording or maintaining a record

of an equipment defect which was reported and which affected the safety of three employees. This constitutes an unwarrantable failure.

20. Inspector Bagley's investigation of the rollover of Truck No. 856 also caused him to write Order of Withdrawal No. 296501 dated March 9, 1981, under section 104(d)(1) of the Act alleging a violation of section 55.9-2 because:

> On January 22, 1981, an accident occurred near the Prindle Road crossing in the East Pit. The accident involved the Number 856 Bull Gang service truck which rolled over injuring three employees. A subsequent investigation revealed that the left side rear axle housing apparently shifted back, which allowed the rear duals to contact the truck box. Statements made by Martin Kaivola, driver of the truck, and Richard Boucher, injured and witness, indicated that on January 21, 1981, the day before the accident, it was reported to their foreman, Cedric Roivanen, that the truck's rear end was shifted back approximately 2-1/2 inches. During a follow-up interview with Cedric Roivanen, Bull Gang Foreman, he confirmed that the shifting rear end had in fact been reported to him on January 21, 1981, but that he had forgotten about it. The truck was not removed from service to correct the reported defect, but continued to be used for the remainder of the shift on which it was reported. The truck was also used on the following afternoon shift and again during the shift on which the accident occurred. The failure of the operator to act on information that gave him knowledge, or reason to know, that an unsafe condition existed, which affected the safety of three employees, is unwarrantable.

21. Starkovich testified that USS's investigation of the rollover accident resulted in a conclusion that the weight of the truck and the speed at which the truck was being driven contributed to the accident. USS's claim that the truck was traveling at a speed of at least 39 miles per hour when it turned over was based on a speed formula and calculations made by a highway patrolman using measurements supplied by USS's personnel (Tr. 249-250). The formula was not supported at the hearing because Starkovich did not know what assumptions the highway patrolman had made about the fact that the truck had rolled over, thereby losing much of its weight, or what assumptions had been made as to the number of wheels which may have been on the ground to slide at any given time (Tr. 250-258). Kaivola, the driver of the truck at the time of the accident, stated that he was traveling between 30 and 35 miles per hour just before the accident occurred (Tr. 164; 173). Boucher, one of the employees riding in the truck when it rolled over, stated that he had driven the truck on the day before the accident and had noticed that the speedometer was not working (Tr. 382). Moreover, Boucher testified that the truck was equipped with a governor which would not permit the truck to be driven at a high rate of speed even if they had wanted to drive it fast (Tr. 382). Primozich, foreman of the repair shop, stated that he had driven a similar vehicle at 30 miles per hour after the accident, but that driving

another vehicle did not add much to his determination as to what caused Kaivola's truck to roll over and that he did not know for certain what effect speed might have had in causing the accident (Tr. 306).

22. The parties stipulated that James R. Bagley, James King, and Tom Wasley were duly authorized representatives of the Secretary at all relevant times, that Minntac Mine is owned and operated by USS, that products from the Minntac Mine enter commerce and that USS is subject to the jurisdiction of the Act and the Commission, that payment of penalties will not adversely affect USS's ability to continue in business, that USS demonstrated a good-faith effort to achieve rapid compliance after being cited for alleged violations, that USS's history of previous violations is that reflected in Exhibit M-1, and that USS is a large operator (Tr. 12).

Consideration of Parties' Arguments

Docket Nos. LAKE 81-102-RM and LAKE 81-167-M

Introduction

In a notice of contest filed on February 23, 1981, in Docket No. LAKE 81-102-RM, USS seeks review of Citation No. 293736 issued on January 22, 1981, pursuant to section 104(a) of the Act, alleging a violation of section 103(a) of the Act. In a proposal for a penalty filed on July 20, 1981, in Docket No. LAKE 81-167-M, the Secretary of Labor seeks assessment of a civil penalty for the violation of section 103(a) alleged in Citation No. 293736.

Citation No. 293736, as modified on February 26, 1981, alleges that USS violated section 103(a) when one of USS's safety engineers, James Barmore, refused to allow Inspector Bagley to accompany him to the place where one of USS's trucks had rolled over while a driver and two other USS employees were riding in it (Exh. M-3). Barmore heard about the truck's rolling over while he, the inspector, and Larry Claude, a miners' representative, were walking up the hallway in USS's office building about noon. Barmore obtained his camera from his office and stated that he and Claude would have to go to the site of the place where the truck had rolled over, but Barmore refused to allow the inspector to accompany him and Claude because Barmore claimed that he was contractually obligated to conduct a company-union investigation of accidents. The inspector told Barmore that it was wrong for Barmore to refuse to allow him to go with Barmore to the scene of the truck's rollover, but Barmore, nevertheless, refused to allow the inspector to ride with him and Claude to the place where the rollover had occurred (Finding Nos. 1 and 2, supra).

The inspector did not write Citation No. 293736 until he had returned to his office and had discussed the matter with his supervisor (Finding No. 10, supra). The inspector believed that Barmore's refusal to allow him to go with Barmore and Claude to the place where the truck had rolled over was

a violation of section 103(a) of the Act. 2/

Inspection versus Investigation

USS's brief (p. 4) argues that the inspector was at USS's mine for the purpose of conducting an inspection under section 103(a) of the Act when he learned that an accident had occurred on mine property. Upon learning of the accident, USS claims that the inspector "decided that he should drop his regular inspection and begin an accident investigation" [Emphasis is part of USS's argument.]. USS's brief (p. 5) then claims that the Act clearly differentiates between regular inspections and accident investigations. A regular inspection, it is said, takes place under the authority of section 103(a), whereas accident investigations are governed by subsections (b), (d), (j), and (k) of section 103. USS notes that subsection (b) relates to hearings to be conducted by the Secretary with respect to accidents, subsection (d) requires operators to investigate all accidents, and that subsections (j) and (k) impose an obligation on operators to report accidents to the Secretary and give the Secretary authority to preserve the accident site and take necessary steps to protect people. USS emphasizes that absurd results would occur if operators had to preserve the scene of such minor accidents as a stubbed toe or a mashed thumb. Therefore, USS points out that the Secretary has defined the word accident in

2/ Section 103(a) of the Act reads as follows:

Sec. 103. (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 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 to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and 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 or investigation 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.

30 C.F.R. § 50.2(h)(2), to the extent here pertinent, as "[a]n injury to an individual which has a reasonable potential to cause death".

USS's brief (p. 6) points out further that section 50.10 requires an operator to report an accident to MSHA immediately only if the accident is of a type specified in section 50.2, that is, in this instance, an accident causing injuries which have a reasonable potential to cause death. Since the evidence in this case clearly shows that the three employees involved in the truck's rollover had sprained backs and a chipped elbow, no one has ever claimed that the accident here involved had a reasonable potential to cause death (Finding No. 4, supra). USS's brief continues its explanation by observing that if an accident does involve an injury with a reasonable potential to cause death, it must be reported to MSHA immediately under section 50.10, but once the accident is reported, section 50.11(a) requires the MSHA District or Subdistrict Manager to determine within 24 hours after notification whether to conduct an investigation.

Based on the provisions in the Act and regulations discussed above, USS's brief (p. 6) contends that the inspector had no decision-making authority to determine whether the truck's rollover was an accident requiring an MSHA investigation. USS argues that the inspector was insisting upon investigating an incident, rather than an accident having a reasonable potential to cause death. USS claims that the regulatory scheme can work only if USS and other operators are given a chance to determine what they are dealing with before deciding whether an accident has occurred which requires them to call MSHA immediately and await MSHA's 24-hour determination as to whether an investigation by MSHA will be conducted. USS's brief (p. 7) argues that Barmore explained to the inspector that it was necessary for Barmore to conduct a joint company-union investigation and that Barmore did not actually prevent the inspector from going to the place where the truck had rolled over, but simply had forbidden the inspector to ride in the same vehicle in which he and the miners' representative were riding. It is said that Barmore did not want the inspector to accompany him to the scene of the accident because other USS personnel at the accident site would be likely, upon seeing the inspector with Barmore, to believe that management had endorsed MSHA's taking over an investigation which should have been a joint undertaking by management and the union.

Disposition of USS's "Inspection versus Investigation Argument"

There are so many fallacious aspects to USS's argument to the effect that an inspector can't examine the site of an accident which occurs when he is present at a mine for the purpose of conducting a regular inspection, that it is difficult to decide which erroneous aspect of the argument to consider first. It should first be observed that the purpose and scope of Part 50 of the Code of Federal Regulations is explained in Section 50.1 which states that:

> * * * The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining

to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under Part 50, MSHA will develop rates of injury occurrence * * * [and] * * * data respecting injury severity * * *.

Part 50, in carrying out its announced statistical purpose, requires operators to report all accidents, regardless of severity, to MSHA on Forms 7000-1. In promulgating Part 50, MSHA recognized, however, that section 103(j) of the Act requires operators not only to notify the Secretary of the occurrence of accidents, but also requires the operator to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause" of accidents. Therefore, section 50.2(h) categorizes 12 different kinds of accidents as to which an operator is required to give "immediate notification" under section 50.10. When MSHA receives "immediate notification" under section 50.10 that an accident has occurred, MSHA is then required by section 50.11(a) to determine within 24 hours whether MSHA plans to conduct an investigation of the accident. Section 50.12 provides that the operator may not alter an accident site, without MSHA's permission, until the investigation has been completed. It is obvious, therefore, that the purpose for requiring "immediate notification" of serious accidents is to provide an orderly and immediate procedure under which operators will know within 24 hours after reporting such accidents whether they are required by section 103(j) to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause" of the accident.

The fact that an operator is required to provide "immediate notification" as to a specific type of accident does not, however, relieve the operator of the obligation of reporting the accident to MSHA on a Form 7000-1, just as the operator is required to report any other accident not serious enough to be included within the 12 categories of "immediate-notification" accidents listed in section 50.2(h). Section 50.20-5 not only requires the reporting of "immediate-notification" accidents on Forms 7000-1, but provides the operator with code numbers for identifying the 12 categories which are applicable to "immediate-notification" accidents.

It can be seen from the explanation set forth above, that Part 50 was designed to provide MSHA with statistical data pertaining to all kinds of accidents regardless of their seriousness. MSHA is not precluded from investigating accidents which are of a less serious nature than "immediate-notification" accidents. Investigation of accidents not in the "immediate-notification" category, in my opinion, are provided for in section 103(a)(1) which Inspector Bagley's Citation No. 293739 claimed, until modified to section 103(a), was violated by USS in this proceeding. As the quotation of section 103(a) in footnote 2, page 12, supra, shows, inspectors are authorized to "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 * * *" [Emphasis supplied.]

The inspector's (Tr. 75) and my reliance on the phrase "the causes of accidents" in section 103(a)(1) has, however, been taken away by the opinion of the D.C. Circuit Court of Appeals in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, et al., Nos. 79-2518, et al., ____ F.2d _____, decided February 23, 1982, in which the court majority stated on page 9 of its slip opinion that the Secretary of Labor is given no authority under clauses (1) and (2) of section 103(a) because the functions enumerated in those two clauses "appear" to have been delegated only to the Secretary of Health, Education, and Welfare [now Secretary of Health and Human Services]. Judge Tamm's dissenting opinion, at page 7, states that:

> * * * It is beyond cavil that only two of the four sets of purposes 18/ for which mine inspections are to be conducted fall under the aegis of the Secretary of Labor, * * *
>
> 18/ As the majority notes, two of the four sets of purposes enumerated in § 103(a) fall under the investigatory domain of the Secretary of Health and Human Services. Maj. op. at 9 n.10. Specifically, the information-gathering purposes set forth under numbers (1) and (2) of § 103(a) are within the aegis of the Health and Human Services Secretary. By contrast, the Secretary of Labor is directed by § 103(a) to conduct inspections to determine "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards" or with other administrative orders promulgated under relevant legislation. 30 U.S.C. § 813(a) (Supp. II 1978).

It is not surprising that the inspector was uncertain as to the exact portion of section 103(a) to rely on in writing his Citation No. 293739 (Tr. 63) because, up to the time I read the court's opinion in the UMWA case, supra, I thought that the Secretary of Labor had authority to perform the functions set forth in both clauses (1) and (2) of section 103(a) and I thought that the only difference between the Secretary of Labor's and the Secretary of Health and Human Services' functions under those two clauses was that the Secretary of Health and Human Services could give advance warnings in doing his functions under section 103(a)(1) and (2), whereas the Secretary of Labor could not. Since the inspector has modified Citation No. 293739 to allege a violation of section 103(a), his citation is on sound legal footing, but USS is still entitled to know exactly what provisions of section 103(a) authorize an inspector to investigate an accident if the inspector is on mine property in the first instance for the purpose of engaging in a regular inspection. It is sufficient for upholding the inspector's citation if a review of the Act's provisions shows that the inspector had authority to go to the scene of the accident which occurred while he was on mine property.

The court's UMWA opinion, supra, leaves the Secretary of Labor fully clothed with the following powers under section 103(a):

> Authorized representatives of the Secretary [of Labor] or the Secretary of [Health and Human Services] shall make frequent inspections and investigations in coal or other mines each year for the purpose of * * * (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. * * * [Emphasis supplied.]

The language quoted above shows beyond dispute that even though the inspector had come to the Minntac Mine on January 22, 1981, to make a regular inspection, he is authorized to make frequent inspections and investigations and that there is nothing in section 103(a) which requires that such investigations be restricted to those which have been reported by an operator as "immediate-notification" accidents under section 50.10. Proceeding further into section 103(a), it is further beyond dispute that the inspector on January 22, 1981, had authority to inspect or investigate any place on mine property where an imminent danger might exist or where a violation of a mandatory health or safety standard might occur.

It is worth noting that both section 104(a) of the Act, governing the issuance of citations for violating the mandatory health and safety standards, and section 107(a), governing issuance of imminent danger orders, provide that those provisions are applicable regardless of whether an inspector is engaging in an "inspection or investigation". There is nothing in either section 104(a) or in section 107(a) which provides that the word "inspection" applies only if the inspector is conducting an inspection authorized under section 50.11 after an "immediate notification" of an accident under section 50.10.

It would be fairly easy to argue that there is nothing about a truck's rolling over which could possibly be considered to be an imminent danger. That sort of conclusion, however, is not supported by the facts because Barmore, one of USS's safety engineers, testified that one of the primary concerns he had when he got to the scene of the accident was whether a leaking tank might cause a fire and that he asked one of the foremen to keep people away from the truck for that reason (Tr. 186-187). After the inspector conducted an investigation of the truck's rollover at a subsequent time, pursuant to a complaint filed under section 103(g)(1) of the Act, the inspector cited USS for two violations of the mandatory health and safety standards with respect to events leading up to the truck's rolling over.

The foregoing considerations show that Inspector Bagley had authority under section 103(a) to go to the scene of the truck's rollover for the purposes given in clauses (3) and (4) of section 103(a) and that Barmore unlawfully restrained the inspector from carrying out his functions under the Act when Barmore refused to allow the inspector to travel to the scene of the truck's rollover.

The position taken in USS's brief to the effect that the inspector had no authority to investigate the truck's rollover was, in some respects,

not supported by USS's own witnesses. If it were true, as USS argues, that an inspector may only investigate "immediate-notification" accidents, then the inspector would have had no authority to investigate the truck's rollover even if he had been standing within 1 foot of the place where the truck flipped over. Yet Starkovich, one of USS's witnesses, stated that if the inspector had been riding by the place where the truck rolled over at the time it flipped over, he would have had a right to investigate it because "[h]e's got a right to stop there at that time" (Tr. 281). Starkovich recognized that he couldn't logically use the various provisions of the Act like a straitjacket to prevent the inspector from investigating an accident which has occurred in his presence, even if the inspector may have come to the mine in the first instance only to engage in a regular inspection.

USS's argument that an inspector should not be permitted to go to the site of an accident until the operator has had a chance to determine whether it is an "immediate-notification" accident has other serious flaws. One of them is that if the truck's rollover could be considered to be an "immediate notification" accident only if it resulted in injuries having a reasonable potential to cause death, that determination did not depend at all on Barmore's claim that he had to go to the scene of the accident to determine whether an "immediate-notification" accident had occurred. Barmore had no medical training which qualified him to make a conclusion that an injury might have a reasonable potential to cause death (Tr. 180). The three USS employees injured in the truck's rollover were taken to a clinic before Barmore ever arrived at the scene of the accident (Tr. 140; 188; 219). The determination of whether an accident has occurred involving a reasonable potential to cause death would have to be based on the opinion of the medical experts who examined anyone suffering from injuries caused by the accident.

Since the injured employees had been taken to a clinic immediately after the accident, Barmore, the inspector, and the miners' representative could have eaten their lunch in a normal fashion and then Barmore could have called the clinic or hospital and could have asked the physician who examined the three employees whether their injuries had a reasonable potential to cause death. Inasmuch as all of the injuries were minor in nature, the physician's answer would have been in the negative and Barmore could then have advised Bagley that the rollover had not resulted in an "immediate-notification" accident, that the accident would be reported in due course on a Form 7000-1, and that there would be no occasion for MSHA to determine within 24 hours under section 50.11(a) whether an investigation would have to be conducted. If the procedure outlined above had been followed, there would have been no reason for Barmore to go to the scene of the rollover nor for Barmore to have prohibited the inspector from going to the scene, if the only reason for Barmore's conducting a combined company-union investigation was to determine whether an "immediate-notification" accident had occurred.

Exclusivity of Management-Union Investigation

USS's brief (p. 7) claims that Barmore "explained in detail why it was not appropriate for the inspector to ride with him to a joint union/management

safety investigation". The preponderance of the evidence shows that Barmore did not explain anything in detail until after he had returned from the accident investigation. Claude, the miners' representative, testified that the entire conversation between Barmore and the inspector, before they left to investigate the rollover, did not take more than 2 minutes (Tr. 362) and that the most that was said about the joint union-management investigation was stated by Barmore after he had returned from the accident scene (Tr. 363). The inspector could recall no specific reference to the union contract and said Barmore had, at most, referred to his contractual obligation to take Claude with him when he went to investigate the accident (Tr. 55; 65; 122). Even Barmore's testimony about the nature of his explanation of the joint union-company investigation is unconvincing because his answers are evasive and he was not even certain as to the specific section or wording of the contract which required him to conduct a joint union-management investigation (Tr. 211). A "detailed" explanation of USS's obligation to conduct joint union-management investigations ought to include a reading of the portion of the contract which allegedly required such an exclusive investigation out of the presence of an MSHA inspector.

According to Barmore's testimony, so many USS personnel had gathered at the scene of the accident, that it was necessary for him to ask someone to keep people away from the scene because Barmore was fearful that a leaking tank might cause a fire (Tr. 186-187). Moreover, there were other USS personnel, such as Tim Jayson, at the scene with more expertise in investigating vehicular accidents than Barmore possessed (Tr. 187; 189). Additionally, Barmore saw Jim Dunston, another miners' representative, at the scene of the accident and Barmore asked him to participate in the accident investigation so that Barmore and Claude could return to the mine office where Barmore had left the inspector (Tr. 186). When it is considered that Barmore left the measurement of distances of skid marks, etc., to the discretion of other USS personnel, when it is realized that Barmore entrusted the union aspect of the investigation to a miners' representative other than the representative who had accompanied Barmore to the scene, when it is considered that Barmore left the determination as to the cause of the rollover to other USS personnel, when it is recognized, as hereinbefore noted, that Barmore had to leave the determination of whether the accident involved injuries having a reasonable potential to cause death to other persons, it is hard to find anything about the accident which depended upon anything which Barmore himself did--other than perhaps the making of some pictures. The facts discussed above largely destroy Barmore's claim that if the inspector had accompanied Barmore to the scene, USS personnel would have concluded that the investigation of the truck's rollover was being conducted by MSHA, instead of by USS and the union, because the inspector would have been only a single person amid a host of USS personnel who had come to look at the scene of the truck's rollover.

It should also be pointed out that most investigations of accidents are conducted by a group of people who represent the company, the union, and both State and Federal agencies charged with administering safety regulations. Each person who participates in an accident investigation makes

his or her own conclusions as to the cause of the accident and arrives at his or her own recommendations as to the steps which should be taken to avoid similar accidents in the future. Having an MSHA inspector present when investigations are being made would have no deleterious effect on USS's ability to conduct a joint company-union investigation.

Inspector's Shortcomings

USS's brief (p. 7) finds fault with the inspector for failing to request that he be taken to the site of the accident after Barmore and Claude had returned from the scene of the rollover and had shown him the pictures Barmore had made and had given him a description of what had happened. As I have indicated above, Barmore spent more time after his return from the accident investigation, than he had before the investigation, explaining why he could not take the inspector to the accident site. The inspector, having just heard the reasons for his being precluded from going to the accident site reemphasized, would hardly have had any reason to reassert his desire to be taken to the scene of the accident.

USS's brief (p. 7) also criticizes the inspector for having failed to issue an order to preserve the scene of the accident. That criticism is inconsistent with USS's primary argument that the inspector had no decision-making authority to determine whether an accident would be conducted under section 50.11(a). As previously explained, the primary purpose for requiring "immediate notification" of accidents under section 50.10 is to enable MSHA to advise the operator within 24 hours whether the scene of the accident has to be preserved. The inspector 's testimony shows that he had not intended to go to the scene of the accident for the purpose of conducting an investigation under section 50.11(a) (Tr. 57). Therefore, he certainly would have had no reason to issue an order pursuant to section 103(j) of the Act requiring USS to preserve the scene of the accident.

It is a fact, however, that the inspector could have argued, pursuant to section 103(k) of the Act, that since he was present when Barmore learned about the accident, the inspector had an absolute right to accompany Barmore to the scene of the accident because, under section 103(k), when an inspector is present at the scene of an accident, as Inspector Bagley was in this instance, the inspector has authority to issue appropriate orders "to insure the safety of any person in the coal or other mine" where the accident occurred. Section 103(k) also provides that if a recovery plan needs to be implemented, the operator is required to obtain the approval of the MSHA inspector before the recovery plan is implemented. When a truck rolls over, it is often necessary to extricate injured people from the truck and such recovery efforts may take hours to accomplish. Therefore, since Inspector Bagley was present when Barmore learned of the accident, Barmore should have taken the inspector with him to the scene of the accident lest he encounter some difficulties about which the inspector's advice and consent would have been useful, if not required.

The Factual Question of Inspector's Preclusion from Going to Accident Site

USS's brief (pp. 7-9) argues that Inspector Bagley was only told that he could not be permitted to ride to the scene of the accident with Barmore. It is contended that nothing was said or done which would have precluded the inspector from continuing his inspection of the mine property. It is further claimed that the inspector was left in an office with a phone and that he was free to call other USS personnel or the other MSHA inspector, who was elsewhere on mine property, for the purpose of obtaining a substitute truck to continue his inspection or travel to the scene of the accident. USS claims that while it was USS's policy to have a management representative accompany an inspector while he is on mine property, that he has the power under the Act to go anywhere on mine property he may choose to go even if USS's management does not consent to his traveling alone.

The facts are at odds with the foregoing arguments. When Barmore initiated his conversation with the inspector, advising him that he was precluded from going to the accident site, his attitude was belligerent. Both the inspector and the miners' representative indicated that Barmore asked the inspector where in the blank he thought he was going (Finding No. 2, supra). The use of objectionable words in a question of that nature does not initiate a conversation in a manner which shows that the person asking the question is planning to take much time to explain why the question has been asked. The miners' representative testified that the initial conversation with the inspector did not take more than 2 minutes and that most of the explanation was done after Barmore and he had returned from the scene of the accident (Tr. 362-363).

The inspector's view of Barmore's actions and statements are best expressed in the following questions and answers (Tr. 118):

> Q. Was there anything he [Barmore] said to you which you -- you personally would have -- would have or could have interpreted as saying that "You can't go to the accident scene in my vehicle, but you can walk down there if you want to"?
>
> A. No.
>
> Q. Okay. So the impression you got from everything he said to you was that you can't go, period?
>
> A. That's true.

Barmore's attitude after his return from the accident scene continued to be bellicose, as is obvious in the inspector's testimony at transcript pages 22-23:

> Q. I see. During -- during this conversation in the -- in the office, did you have any conversations with Mr. Barmore

concerning your right to -- to speak with the employees of U. S. Steel while you were on the mine property?

A. Now, there was one incident when I came back to the office after I'd eaten my lunch and Larry Claude had called me and told me that I could come back to Mr. Barmore's office. After I went back to the office, it was, um -- there was a few moments of silence there. It was tense. And, ah, sort of in order to get a conversation going, I mentioned that, ah, on my way down to the hygienist's office, I'd been talking to an employee of U. S. Steel. I don't know his name. This employee had asked me if I was an MSHA inspector on the property. I said yes, I was, and he wanted to discuss with me some things that had taken place earlier at the property, ah, about citations, orders, things of that nature.

But I mentioned that to Mr. Barmore, that this guy was a pretty nice guy. And Jim [Barmore] got kind of upset. He said I didn't have any right to talk to anybody on the property about those kinds of things without him or another safety engineer present.

Q. I see.

A. I pointed out that it wasn't me that had solicited that -- that conversation. I was -- I was asked the question, and I answered it.

Since the testimony of the miners' representative corroborates the inspector's testimony to the effect that Barmore made no detailed explanation about his obligation to perform a union-company investigation, and since Barmore's attitude was belligerent to every effort made by the inspector to bring about amiable discussions, I conclude that the inspector was fully entitled to believe that he had been precluded from going to the accident site at all on January 22, 1981, the day the accident occurred.

The evidence also shows that Barmore's refusal to allow the inspector to accompany him and Claude to the accident site effectively precluded the inspector from going there by any other means. First, it is agreed that it was USS's practice to provide a safety engineer to accompany inspectors on mine property and it was USS's policy to provide a vehicle, driven by USS's employee, to transport the inspectors to any place on mine property where inspections were to be made (Finding No. 9, supra). Further, it was USS's policy to have the safety engineer make all arrangements for inspections to be made, including obtaining a miners' representative to accompany the inspector during his tour of the mine, pursuant to section 103(f) of the Act (Tr. 267; 269). In such circumstances, when Barmore refused to permit the inspector to accompany him and Claude to the accident scene, the inspector was precluded from going at all because the inspector was left without transportation, without a safety engineer to accompany him, and without a miners' representative to accompany him. Although Barmore claimed that the

inspector could have requested permission to use any of about 50 USS vehicles parked near the mine office (Tr. 197), it is a fact that Starkovich, Barmore's supervisor, testified that if the inspector had asked him for a vehicle to go to the scene of the accident, he would have refused to take the inspector to the scene of the accident until he had first checked with Barmore to find out what sort of accident was involved (Tr. 275; 280).

Although USS also claimed that Inspector Bagley could have called the other inspector who was on mine property that day, Bagley said that he did not know where the other inspector was and Starkovich also stated that he didn't know for certain where the other inspector was (Tr. 56; 272). Even if the other inspector had been located, a controversy would undoubtedly have occurred because the other inspector was also accompanied by another safety engineer who would have been reluctant to allow the other inspector to leave his presence for the purpose of taking Inspector Bagley to the scene of an accident to which Barmore had already ruled that Inspector Bagley could not go.

Therefore, I find that none of the excuses given by USS for refusing to allow the inspector to accompany Barmore to the scene of the accident are supported by the facts in this case, or the provisions of the Act, or Part 50 of the Code of Federal Regulations, and that USS violated section 103(a) of the Act when its agent prevented Inspector Bagley from going to the scene of the accident on January 22, 1981. I also find that Citation No. 293736 was properly issued and should be affirmed.

Assessment of Civil Penalty

In the preceding portion of this decision, I have found that a violation of section 103(a) of the Act occurred when Barmore refused to permit the inspector to examine the place where the truck rolled over. MSHA has requested that a civil penalty be assessed for that violation in the proposal for a penalty filed in Docket No. LAKE 81-167-M. The six criteria set forth in section 110(i) of the Act must be considered in assessing civil penalties.

On February 1, 1982, Unit B of the Fifth Circuit issued an opinion in Allied Products Co. v. Federal Mine Safety and Health Review Commission, No. 80-7935, reversing an administrative law judge's decision as to which the Commission had denied a petition for discretionary review. The court agreed that the violations alleged by MSHA had occurred, but it remanded the case so that the amounts of the penalties could be recalculated. The court found that MSHA had waived the normal formula set forth in 30 C.F.R. § 100.3 for assessing penalties and then had failed to make the narrative findings which are required to be made when MSHA waives the routine penalty formula. The court also found that the administrative law judge had failed to explain how he had considered some of the six criteria.

There is nothing in the court's decision to show that the court was aware of the fact that the Commission has ruled in several of its decisions that administrative law judges are not bound, in cases in which hearings have

been held, by the assessment procedures which are employed by the Assessment Office in proposing civil penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U. S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); and Co-Op Mining Co., 2 FMSHRC 784 (1980)). Of course, when a judge determines the size of a civil penalty on the basis of evidence presented in a hearing, he must specifically show how he has considered the six criteria. I do not believe that the court's decision in the Allied Products case requires me to determine a penalty by using the provisions of section 100.3 so long as I explain clearly how I have applied the six criteria in arriving at a penalty.

History of Previous Violations

It has always been my practice to increase a penalty under the criterion of history of previous violations if the evidence in a given proceeding shows that the operator has previously violated the same section of the regulations which is before me in a given case. Since I did not preside at the hearing in this proceeding, I could not inquire of MSHA's counsel whether USS has previously violated section 103(a) of the Act. Inasmuch as the record does not contain the sort of information which I normally use for assessing penalties under the criterion of history of previous violations, it is necessary in this proceeding for me to depart from my usual practice and use the assessment formula in section 100.3(c) for the purpose of evaluating USS's history of previous violations.

Exhibit M-1 reflects that for the 24 months preceding the occurrence of the violations involved in this proceeding, USS paid penalties for a total of 560 violations, or an average of 280 violations per year. Section 100.3(c)(1) shows a table which assigns penalty points based on an operator's average penalties per year. According to that table, if an operator has an average of over 50 penalties per year, five penalty points are required to be assigned for each violation being considered. Inasmuch as USS has paid penalties for more than 50 violations per year, USS's history of previous violations requires that five penalty points be assigned in this proceeding for each violation which is hereinafter found to have occurred.

Section 100.3(c) also contains paragraph (2) which is required to be used in assigning penalty points under the criterion of history of previous violations. Under paragraph (2), up to 15 penalty points are assignable if the violations written by an inspector on each day he works at a given mine total more than 1.7 violations. Paragraph (2) of section 100.3(c) cannot be used in this proceeding to assess penalties because Exhibit M-1 does not show the inspection days which were involved in USS's having paid penalties for 280 violations per year. Because of the lack of information in the record, I cannot use paragraph (2) of section 100.3(c) to assign any penalty points under the criterion of history of previous violations.

It should also be noted that if the formula in section 100.3 is used only for determining a portion of a given civil penalty under a single

criterion, an under-assessment as to that criterion will result because the assignment of penalty points under section 100.3 is intended to be cumulative as the points are determined in sequence for each of the six criteria and the size of the penalty should increase as each criterion is, in turn, considered. For example, when the five penalty points determined above under section 100.3(c)(1) are applied in the conversion table in section 100.3(g), the amount of the penalty is only $10, whereas if those same five penalty points were to be added to a cumulative total of 30 assigned points, so as to increase the number of penalty points from 30 to 35, the additional five points would increase the total penalty from $90 for 30 penalty points to $130 for 35 penalty points, or would increase the penalty by $40, instead of the penalty of $10 which results if one applies five penalty points to the bottom of the conversion table. Since I am using the provisions of section 100.3(c)(1) solely because of limitations in the record, I do not believe that my assessment of a penalty of $10 under history of previous violations can be considered to be improper, even though I shall be assessing a smaller amount under the criterion of history of previous violations than is warranted for an operator as large as USS.

Size of the Operator's Business

Finding No. 22, supra, indicates that the parties have stipulated that USS is a large operator. It has always been my practice to use the criterion of the size of an operator's business as a gauge of how large a penalty should be assessed under the other criteria. For example, if a violation is so serious in a small mine that its occurrence is very likely to kill or seriously injure one or more employees, I would normally assess a penalty of not more than $3,000 or $4,000 under all six criteria. If a moderately large operator should be involved, I would probably increase the penalty up to $6,000 or $7,000 under all six criteria. If a large company, such as USS, should be involved, I would probably assess a maximum penalty of $10,000 under all six criteria.

Under the foregoing principles, any penalty assessed in this proceeding should be in an upper range of magnitude if I should find that the other five criteria have adverse implications.

Effect of Penalties on USS's Ability To Continue in Business

Finding No. 22, supra, shows that the parties have stipulated that the payment of penalties will not adversely affect USS's ability to continue in business. The criterion of economic condition is of primary importance only in those cases in which an operator proves that it is experiencing financial losses of such magnitude that payment of penalties would prevent it from being able to discharge the interest on its indebtedness, pay its employees, and purchase necessary supplies. In this proceeding, the fact that payment of penalties will not affect USS's ability to continue in business will be applied only in the sense that any penalty required by the other criteria will not need to be scaled down to prevent the obligation of payment of the penalty from causing USS to discontinue in business.

Good-Faith Effort To Achieve Rapid Compliance

Finding No. 22, supra, shows that the parties have stipulated that USS demonstrated a good-faith effort to achieve compliance after the inspectors had issued the citations involved in this proceeding. Under the assessment formula in section 100.3, an operator may be assigned up to a maximum of 10 points under the criterion of whether the operator made a good-faith effort to achieve rapid compliance. Under section 100.3(f), if the operator demonstrates a normal good-faith effort to achieve compliance, that is, the operator achieves compliance within the time allowed by the inspector, the penalty is neither increased nor decreased under the good-faith abatement test. If the operator shows recalcitrance about compliance with the standard cited, up to 10 penalty points may be assigned. On the other hand, if the operator demonstrates an outstanding effort to achieve compliance by correcting the violation in much less time than that given by the inspector, the penalty otherwise assessable under the other criteria is reduced by up to 10 penalty points.

It has been my practice to use the same principles set forth in section 100.3(f) insofar as penalties are determined by the operator's good-faith effort to achieve rapid compliance, the only difference being that I sometimes add more than an equivalent of 10 penalty points when an operator deliberately refuses to correct a violation which has been cited, and I have decreased a penalty by more than the equivalent of 10 penalty points when the evidence in a given proceeding showed that the operator had shut down his entire operation in order to correct a violation in much less time than the inspector had allowed.

In this proceeding the parties have stipulated that USS "demonstrated good faith in abating the citations at issue within the time given for abatement" (Tr. 12). The stipulation is satisfactory for assessing a penalty under the criterion of good-faith abatement with respect to Citation No. 293736 because, although the inspector failed to insert any termination due date in the citation when it was written, the inspector modified the citation on February 26, 1981, to insert a termination due date of February 9, 1981. The inspector had terminated the citation on February 9, 1981, by stating that USS had allowed him to inspect No. 856 truck and interview the three employees involved in the rollover of the truck. Since USS abated the violation within the period of time allowed by the inspector, there was normal abatement and the penalty otherwise assessable under the other five criteria should neither be increased nor decreased as a result of USS's normal effort to achieve rapid compliance.

Gravity

The violation of section 103(a) was moderately serious because Barmore's refusal to permit Inspector Bagley to accompany him and Claude to the scene of the truck's rollover prevented an MSHA inspector from being able to carry out his functions as an inspector, those functions being, as hereinbefore explained, the checking of accident sites to determine whether an imminent

danger exists and whether violations of the mandatory health and safety standards have occurred. USS claims that inspectors have the power to go anywhere on mine property without the operator's permission, citing Judge Melick's decision in Summitville Tiles, Inc., 2 FMSHRC 740 (1980), in which he held that "a warrantless nonconsensual MSHA inspection of Summitville was legally permissible". USS asserts also that it was not necessary for the inspector to obtain the operator's knowing consent prior to making an inspection. The fact remains that Barmore's sudden, hostile, and arrogant manner of forbidding the inspector to accompany him precluded the inspector from being able to inspect the scene of the accident when he could have been in a position to determine whether an imminent danger existed and whether any health and safety standards had been violated. In depriving the inspector of a means of transportation, in terminating his ability to have one of USS's safety engineers as an escort, and in preventing the inspector from having a miners' representative available to accompany him, Barmore effectively denied the inspector from being able to travel to the scene of the accident (Finding Nos. 1 through 4, 9 and 10, supra).

Barmore's refusal to permit the inspector to go to the scene of the accident on January 22, 1981, was so upsetting to the inspector that he returned to his office so as to discuss the matter with his supervisor and wrote a citation alleging that USS had violated section 103(a) of the Act in precluding him from inspecting the scene of the truck's rollover. That citation was served upon Barmore the next day, January 23, 1981. The citation was not terminated until February 9, 1981, when the inspector was permitted to examine the truck after it had been towed or hauled to USS's auto repair shop. The delay which resulted in the inspector's being able to examine the truck and interview witnesses not only prevented the inspector from being able to get first-hand information at the scene of the accident, but brought about a considerable duplication of effort which could have been avoided if the inspector had been permitted to accompany Barmore to the scene of the accident in the first instance.

Considering the demoralizing effect which Barmore's action had on MSHA's inspection responsibilities, a penalty of $500 is warranted under the criterion of gravity.

Negligence

Barmore's action in preventing the inspector from going to the scene of the accident was deliberate and constituted a high degree of negligence. Barmore had a certain amount of disdain for the inspector simply because the inspector tries to do his job with as little abrasiveness as possible. The foregoing conclusion is supported by Barmore's answers to the following questions (Tr. 201-202):

> Q. I'll attempt to rephrase it. So it would be reasonable, would it not, on the part of Inspector Bagley to take your refusal to allow him to accompany you to the accident site as a refusal to permit him to go to the accident site at all?

A. I can't read Jim Bagley's mind. I don't know how he thinks.

Q. I'm not asking you that.

A. Yeah. Okay.

Q. I'm just asking if it would not be reasonable.

A. Well, considering Jim Bagley, yeah. But not -- for me. If I was an MSHA inspector, I would not have, you know --

The Commission has indicated that judges are to avoid being critical of management (Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), but it is difficult to appraise negligence in a given case without examining the attitude of the operator's supervisory personnel. Barmore's indifference about the way he treated inspectors would not be as strong a reason for adversely evaluating USS's management if Barmore's supervisor had not believed that Barmore should be upheld in his denial of the inspector's right to go to the scene of the accident and if Barmore's supervisor had not also stated that he would have refused to take the inspector to the scene of the accident until he had first checked with Barmore to see if such action was consistent with Barmore's refusal to take the inspector to the scene of the accident in the first instance (Tr. 275; 280; Finding No. 9, supra.).

Barmore's use of rough language in addressing the inspector at the outset of the denial was an indication of his lack of ordinary courtesy (Tr. 19; 136-137). Barmore's attitude toward the inspector after Barmore had returned from the scene of the accident continued to be hostile and bellicose in that he upbraided the inspector even for talking to a USS employee who asked the inspector a question while the inspector was walking down the hall toward Barmore's office (Tr. 22). In short, at no time during the hearing did any of USS's supervisory personnel make any effort to show that they disagreed with the manner in which Barmore had acted even though they otherwise approved of his action as a matter of general principle.

In view of the fact that USS's violation of section 103(a) was deliberate and was done with considerable animosity and hostility which had an adverse effect on MSHA's inspection program in general, I find that the refusal to permit the inspector to go to the scene of the accident was done with a sufficiently high degree of negligence as to warrant assessment of a civil penalty of $1,000 under the criterion of negligence.

By way of summary, I have found that a large operator is involved, that there was a normal good-faith effort to achieve compliance, that there is insufficient evidence to support more than a minimal penalty under the criterion of history of previous violations, that payment of penalties will not adversely affect USS's ability to continue in business, that the violation was moderately serious, and that it involved a high degree of negligence. The total penalty of $1,510 assessed under the criteria of gravity,

negligence, and history of previous violations would, of course, be less than that amount if a large operator were not involved, if payment of penalties would have an adverse effect on USS's ability to continue in business, and if USS had showed other than a normal good-faith effort to achieve rapid compliance.

I am aware that MSHA's brief (pp. 8 and 13) proposed a penalty of only $600 for the violation of section 103(a), but it is obvious that MSHA's brief did not consider in detail the evidence of record which makes the violation more serious and more negligent than the violation would have been if it had been done in an atmosphere of professionalism and courtesy which should prevail when the personnel involved have been trained in their fields of endeavor as is true of those who comprise USS's management (Tr. 180-181; 238-239).

Docket Nos. LAKE 81-103-RM and LAKE 81-168-M

Introduction

In a notice of contest filed on February 23, 1981, in Docket No. LAKE 81-103-RM, USS seeks review of Citation No. 293739 issued on February 9, 1981, pursuant to section 104(a) of the Act, alleging a violation of section 103(a) of the Act. In a proposal for a penalty filed on July 20, 1981, in Docket No. LAKE 81-168-M, the Secretary of Labor seeks assessment of a civil penalty for the violation of section 103(a) alleged in Citation No. 293739.

Citation No. 293739 alleges that Starkovich, USS's supervisor of Minntac operations, refused to allow Inspector Bagley and two other inspectors to interview Roivanen, USS's foreman of three employees who were riding in a truck when it rolled over, unless one of USS's lawyers was present. The inspectors asked to talk to Roivanen three different times on February 9, 1981, and returned to the mine for the purpose of interviewing Roivanen on February 11, 1981. All requests were denied until such time as an attorney could be obtained. Inspector Bagley returned to the mine on February 12, 1981, and served Starkovich with Citation No. 293739 alleging a violation of section 103(a) because the inspector believed that Starkovich's refusal to allow him to talk to Roivanen until an attorney could be provided amounted to interference and impedence of three inspectors who were engaged in an accident investigation. After Starkovich was served with the citation, he made a phone call to USS's lawyers in Pittsburgh and an attorney was made available so that the inspectors were able to interview Roivanen the next day, February 13, at 1:00 p.m. (Finding Nos. 12 through 15, supra).

The Right to Counsel

USS's brief (pp. 9-13) argues for five pages that it did not impede the inspectors' investigation by insisting that Roivanen be provided with representation by one of USS's attorneys before he was interviewed by the inspectors. The only case cited throughout USS's purely legal arguments is the Commission's decision in Everett Propst and Robert Semple, 3 FMSHRC 304

(1981), in which the Commission ruled that an inspector does not have to give a Miranda warning to personnel he interviews when he is conducting an investigation because such warnings apply only when the person being interviewed has been taken into custody (3 FMSHRC at 309). Since the Commission's Propst decision supports MSHA's contentions in this proceeding, rather than USS's arguments, I spent several days in the law library trying to find some cases which support USS's position and I discovered that I couldn't find any cases to support USS's arguments. Likewise, MSHA's brief (pp. 8-9) failed to cite a single case in support of its legal argument that USS violated the Act in refusing to allow the inspectors to interview Roivanen unless an attorney was present, but I found several cases which support MSHA's position.

USS's brief (p. 9) refers to Roivanen's "right to experienced counsel" (Br. p. 11). A person's right to counsel is based on the Sixth Amendment to the Constitution which provides, in pertinent part, "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense." USS's brief (p. 9) strives to bring the aspect of a criminal prosecution into play in this proceeding by observing that it was possible that the inspectors' investigation of the truck's rolling over would result in the inspectors' writing a citation pursuant to section 104(d), or the unwarrantable failure provisions of the Act. USS argues that since Starkovich was aware of the fact that MSHA routinely audits unwarrantable-failure citations and orders for the purpose of determining whether criminal charges should be made, that the inspectors' desire to interview Roivanen carried with it a sufficient threat of criminal prosecution to require that Roivanen be furnished with an attorney to be provided by USS.

The Supreme Court held In Re Groban, 352 U.S. 330 (1957), that an Ohio State Fire Marshall could investigate the cause of a fire and prohibit the witnesses' attorneys from being present. The Court stated (at p. 332):

> The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel.

The Court went on to say (p. 333):

> Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of counsel for his defense. Until then his protection is the privilege against self-incrimination. * * * The mere fact that suspicion may be entertained of such a witness, as appellants believed exists here, though without allegation of facts to support such a belief, does not bar the taking of testimony in a private investigatory proceeding.

Of course, the Administrative Procedure Act, 5 U.S.C. § 1005, provides that "[a]ny person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied,

represented, and advised by counsel." The Supreme Court's holding in the Groban case is still applicable except when a formal trial-type atmosphere is provided for by an agency's rules. In Hannah v. Larche, 363 U.S. 420 (1960), the Supreme Court held that the Civil Rights Commission, in compelling persons to appear before it for investigations, should permit such persons to have the advice of counsel, but the Court agreed with the Commission that such counsel, as a matter of right, could not participate in the investigations. The Court said that investigations should not be transformed into trial-like proceedings which would result in the injection of collateral issues and reduce the investigations to a shambles and stifle the agency's fact-finding efforts. In United States v. Mandujano, 425 U.S. 564 (1976), the Supreme Court held that a witness in a grand jury proceeding does not have to be given the equivalent of Miranda warnings and that he may not testify falsely as a means to keep from incriminating himself. A witness may refuse to answer under the Fifth Amendment, but if the prosecutor believes that the witness' testimony is vital to assist him in bringing action against others, the prosecutor may obtain his testimony by offering him immunity against prosecution. In his concurring opinion in the Mandujano case, Justice Brennan noted at page 603 that it was ironic that the Groban and Hannah cases had been used for denial of assistance of counsel in administrative proceedings, but the Court specifically reaffirmed its holdings in the Hannah case in 1969 in Jenkins v. McKeithen, 395 U.S. 411, although it ruled in the Jenkins case that the due process requirements of the Fourteenth Amendment apply in proceedings before a state commission if the commission's function is solely that of exposing individuals to violations of criminal laws.

The cases discussed above deal with situations in which counsel were actually present, but their participation was limited either by their being excluded from the place of interrogation or their freedom to object to questions and make oral arguments was curtailed. The Supreme Court recognized in the Groban case that in purely fact-finding situations, counsel could be excluded entirely from the place of questioning, whereas in the Hannah case, the attorneys' right to cross-examine, object, and argue was curtailed.

In this proceeding, USS claims that it wanted to provide Roivanen with an attorney who was well versed in the meaning of the Act so that he would have known that the reason Roivanen needed an attorney was to assist Roivanen in answering questions which might lead to his being charged with a criminal violation if the inspectors should happen to write an unwarrantable-failure citation or order. USS's brief (p. 10) argues that the inspectors' writing of the citation forced USS to abate it the next day with the result that USS was forced to have Roivanen represented at the interview by one of its attorneys who was not at all versed in the intricacies of the Act. Therefore, USS's brief (p. 11) contends that the inspectors' insistence upon speed deprived Roivanen of one of his most fundamental rights, "the right to experienced counsel".

Purely apart from the factual question of whether the inspectors forced USS to act so quickly that only an inexperienced attorney could be made

available, the broad legal implications of its argument are not well established. The "right" to an attorney under the Sixth Amendment depends upon an interrogation coming within the ambit of the Supreme Court's rulings in Miranda v. Arizona, 384 U.S. 436 (1966). The absolute right to an attorney first comes into play only when a person suspected of a crime is actually taken into custody and is cut off from the outside world. At such times, he must be advised that he has a right to be represented by counsel during any interrogation and, since the right to an attorney under the Sixth Amendment does not depend upon a person's financial ability to pay, the person in custody must be advised not only that he has a right to counsel, but that if he cannot afford to hire competent counsel, an attorney will be appointed for him (384 U.S. at 472-473).

In this proceeding, Roivanen was to be interviewed at USS's mine and his freedom was at no time threatened in any way. He had not been accused of any crime. Therefore, his right to counsel under the Sixth Amendment was not brought into play. Under the Fifth Amendment, a person is entitled to refuse to answer questions which might tend to incriminate him. Roivanen had the right to claim the privilege against self-incrimination, but Roivanen did not claim that privilege in this proceeding. Instead, USS notified Roivanen that he should talk to the inspectors only if an attorney provided by USS was present. At no time does the transcript reflect that USS advised him of his right to claim the privilege against self-incrimination. As indicated above, Roivanen could be asked to answer questions, subject to his right against self-incrimination, without his actually being provided with counsel during the interrogation unless the proceeding at which the questions are to be asked are the equivalent of a hearing so as to bring into play the Administrative Procedure Act's provision that a person compelled to appear before an agency "shall be accorded the right to be accompanied, represented, and advised by counsel."

None of the trial-type procedures involved in actual hearings were involved in this proceeding. Roivanen had not been subpoenaed or even requested to appear before any agency. He was simply going to be interviewed by inspectors at his regular place of work in familiar surroundings. Starkovich said that he believed the inspectors were actually conducting a special investigation under section 103(g)(1) of the Act (Tr. 241). That was a fair evaluation of the type of investigation the inspectors were conducting because the investigation was being conducted solely because MSHA had received a complaint under section 103(g)(1) asking that an investigation be made of the incident involving the rollover of a truck on mine property. Although Citation No. 293739 refers to the claims that USS interfered and impeded an "accident investigation", it is a fact that the accident was being investigated solely because MSHA had received a request under section 103(g)(1) that the accident be investigated.

Regardless of whether the inspector was conducting an accident investigation or a "special inspection" under section 103(g)(1), the inspectors were certainly not involved in an accusatory, trial-type proceeding. MSHA does not have rules published in the Code of Federal Regulations to govern

investigations which may be conducted under section 103(b) of the Act, but MSHA apparently still follows a Manual for Investigation of Coal Mining Accidents prepared by MESA when that organization was a part of the U. S. Department of the Interior. That manual may be purchased from the Superintendent of Documents as Stock No. 024-019-00022-5. With respect to accident investigations, the manual presumes that a preliminary gathering of information would precede a formal hearing at which witnesses would be asked to testify with a court reporter. As to such preliminary gathering of facts, the manual states on pages 7 and 8:

> 3. Statements of Persons--Statements shall be obtained from all persons having information relevant to the investigation. As determined by the team leader, such statements shall be taken either (a) verbatim--if recorders are used, the person giving the statement shall be so informed and his consent shall be obtained, (b) by a court reporter, or (c) informally with a summary thereof. Statements shall be taken from each person separately to obtain his personal recollection of the relevant events and circumstances. If State officials are simultaneously conducting an investigation, they may be afforded an opportunity to take testimony from persons jointly with MESA; however, should a person desire to give testimony to MESA alone, he shall be given the right to do so.

The manual explains that if an actual public hearing is deemed necessary in connection with an accident investigation, notice of the hearing will be given in the Federal Register. For that type of actual hearing, the manual specifies on page 8:

> A. All witnesses, whether subpoenaed or appearing voluntarily, shall be sworn and advised of their legal rights with regard to the giving of testimony.
>
> * * *
>
> E. When circumstances warrant, further procedural rules applicable to the hearing may be issued prior to and/or during the hearing.

Inasmuch as the manual provides for advising each witness of his or her legal rights, it is assumed that, as in the Hannah case, supra, each witness would be permitted to have the advice of counsel, but since the hearing is solely a fact-finding investigation, the attorneys would not be permitted to turn an investigation into a trial-type proceeding where they would be permitted to object to questions, call witnesses of their own choosing, or argue the merits of any legal or factual issue. Thus, even in an accident investigation involving a hearing, a witness is not entitled to the right to counsel under the Sixth Amendment in the sense that such right is explained in the Supreme Court's Miranda decision, supra.

The interviews which the inspectors conducted with respect to the truck's rollover were taped with the witnesses' consent, but if the witness objected to having his interview taped, the interview was conducted without use of any recording equipment (Tr. 36-37). It is certain, therefore, that the type of interview, as to which USS insisted upon having an attorney present, was an informal investigation which did not carry with it the right of counsel under the Sixth Amendment.

The Privilege Against Self-Incrimination

The Fifth Amendment to the Constitution provides, in pertinent part, that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself". As far back as 1892, the Supreme Court held in Counselman v. Hitchcock, 142 U.S. 547, that a person testifying before a grand jury is entitled to claim the privilege against self-incrimination and that privilege has been extended to apply to any kind of proceeding, regardless of whether it is criminal or civil in nature, or involves an administrative or court proceeding. The privilege protects any disclosures which a witness has reason to believe could be used against him in a criminal prosecution (In re Gault, 387 U.S. 1 at 49 (1967); Murphy v. Waterfront Commission, 378 U.S. 52 at 94 (1964)).

Therefore, if Starkovich had explained to the inspectors that Roivanen had the right to refuse to answer any question which might tend to incriminate him, the inspectors could not have objected to Roivanen's asserting that privilege in reply to any question that might have been asked him. Starkovich, however, did not take that approach. Instead, he forbade the inspectors to talk to Roivanen unless an attorney of USS's own choosing were present. Moreover, Roivanen was not asked if he wanted an attorney present when he talked to the inspectors. Roivanen was simply told that USS would rather that he have an attorney provided by USS present when he talked to the inspectors. Roivanen's own testimony shows how he reacted to USS's order that he not talk to the inspectors unless an attorney provided by USS was present (Tr. 334):

> Q. Okay. Now, when did you first learn that the Mine Safety and Health Administration was interested in this accident?
>
> A. I believe, ah, probably Bob Wittbrodt [his immediate supervisor], ah, called me. This was several -- several days. I'm not sure of the date. And, ah, told me that, ah, the Company would prefer that I use counsel concerning this 856 truck accident. And, ah, that really got my head spinning, you know, wondering what really is going on now because I hadn't been, um, really involved other than the -- I believe the -- the accident investigation. And, ah, I knew nothing of the fact, that I hadn't really done anything wrong.
>
> * * *

Q. Did Mr. Wittbrodt tell you that you should or should not talk? Did he tell you, "Don't talk to anyone from the Mine Safety and Health Administration?"

A. No. He just called me, and it was a short, short conversation. He just said, "The Company would prefer that you had counsel regarding the 856 truck." And, ah, I said, "Okay".

Despite the fact that Roivanen says he was not advised to refuse to talk to the inspectors at all, Starkovich testified as follows (Tr. 265-267):

Q. You're saying that on -- on February 9th, you told the inspector that he could go talk to the foreman?

A. On when? No. I said on February 11th during the conversation. We -- we were talking back and forth, and Jim [Inspector Bagley] was stating his position, and I was stating our -- my position, our position.

Q. Okay.

A. And during this conversation, I made a comment to him, "Well, if you want to go up there and look at him for five hours, you can, but he's not -- he won't say anything to you."

* * *

Q. So you're -- you're denying that you made a statement that "Even if we did let you go up," your're denying --

A. I never said, "If we let you go up." I said, "If you went up there, you'd -- he'd just look at you for five hours anyway, and he wouldn't say anything."

On the other hand, Inspector Wasley testified as follows (365; 370):

Q. Did he [Starkovich] make any reference to -- to your being able to go down and talk with him [Roivanen] at all?

A. He did say that even if we were allowed to talk to the foreman [Roivanen], he would not answer for us.

Q. Do you specifically remember him saying it in this way?

A. Well, because I considered it a denial both ways.

* * *

Q. Okay. Now, during the meeting of February 11th, 1981, when you were talking to Mr. Starkovich --

A. Yes.

Q. -- do you remember him making any comment about talking to Mr. Roivanen for five hours?

A. For five hours?

Q. Yes.

A. Well, he said that even if we were allowed to talk to Cedric [Roivanen], that he wouldn't answer. Regardless of what the time was, five hours or whatever, he would not answer any of our questions. That's what Steve [Starkovich] said.

Q. Well, do you remember Mr. Starkovich saying that you could look at -- that even if you looked at Mr. Roivanen for five hours, he wouldn't answer your questions?

A. That was a -- yeah. That part of the statement was there, yes.

The importance of the statement by Starkovich that Roivanen would not talk to the inspectors if they tried to interview him out of the presence of an attorney provided by USS is that the only constitutional right which Roivanen had, when interviewed by the inspectors, was the right to refuse to answer questions which he felt might incriminate him, but when the inspectors insisted on asking questions before an attorney was provided, Starkovich prevented them from talking to Roivanen because Roivanen had been given instructions to say nothing unless an attorney provided by USS was present.

After USS provided an attorney on February 13, 1981, Inspector Bagley was permitted to interview Roivanen. The testimony does not show, however, that the attorney ever cautioned Roivanen about his right to refuse to answer questions which might incriminate him. The inspector was carefully questioned about what kind of warnings the inspector gave Roivanen before the interview started (Tr. 86-87):

Q. Did you give Mr. Roivanen any Miranda warnings at the beginning of that interview?

A. Miranda? Oh. Is that where you warn somebody of their rights. I, um -- as far as I know, the inspectors were not required to give Miranda warnings. However, at the request of the -- the U. S. Steel attorney that was present -- his name was Ron Fischer -- um, he asked at the beginning of our interview if I would inform Mr. Roivanen of the possible, you know, consequences of the interview, of the accident investigation, that would be -- there would be a possibility of citations being issued, orders, could be unwarrantable, could

be willful. I just tried to discuss with Mr. Roivanen, um, what he was doing there, what could come of it.

Q. Okay. Was Mr. Roivanen surprised at what could come of it?

A. No.

Q. Did Mr. Fischer indicate to you that he understood the provisions of the Act?

A. No. He never, ah -- he never interjected himself hardly at all.

There is nothing in the record which indicates that Roivanen was ever actually advised that he had the right to refuse to answer any questions which might result in providing information which might tend to incriminate him. USS's brief (pp. 9-11) claims that the attorney who represented Roivanen at the interview was not experienced in interpreting the Act and that USS was forced to send an inexperienced attorney to represent Roivanen because the inspector had issued a citation which USS was compelled to abate by sending an inexperienced attorney instead of the experienced attorney which USS would have preferred to send.

USS had been advised on February 9 that the inspectors wanted to interview Roivanen. The citation was not issued until February 12. If USS had acted promptly, it could have sent an experienced attorney to the Minntac Mine by February 13, the day on which the interview was actually conducted. Although Starkovich claims that he thought he had the date of February 17 established as the date on which Roivanen, Boucher, and Woullet would be interviewed, the two inspectors who were present when USS insisted upon having an attorney present for the interview both testified unequivocally that no specific dates were ever mentioned (Tr. 80; 84; 365; 374). I think the inspectors' testimony is more credible than Starkovich's on the question of a date because Starkovich at no time ever claimed that he reminded the inspectors when the citation was served that he understood he had until February 17 to provide an attorney. I do not believe that Starkovich, who was very forceful in maintaining his position on all other matters, would have been timid about insisting to the inspectors that he understood he had until February 17 to provide an attorney at the time they handed him Citation No. 293739. In any event, there is nothing in the record to show that Starkovich even asked the inspectors to give him time enough to get an attorney with more experience in interpreting the Act than the one who was provided.

Assuming, arguendo, that USS did rely on a less experienced attorney than it would have preferred, it is clear that all the attorney had to do was to advise Roivanen that the answer to a given question might tend to incriminate him. No extensive knowledge of the Act would have been required for that kind of representation, particularly if the allegedly

inexperienced attorney had been briefed by USS's experienced attorneys before he appeared at the interview. Moreover, the courts have held that, even when the right to an attorney within the purview of the Sixth Amendment exists, which was not true in this case, the Sixth Amendment does not require a defendant to be represented by an attorney who is perfect, or errorless (Cardarella v. United States, 375 F.2d 222, 232 (8th Cir. 1967); Sherrill v. Wyrick, 524 F.2d 186 (8th Cir. 1975), cert. den., 424 U.S. 923 (1976); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960)).

Additionally, the claim in USS's brief to the effect that the inspector's writing of Citation No. 293739 prevented USS from providing Roivanen with adequate counsel is not supported by the record, as the following testimony of Starkovich shows (Tr. 261):

> Q. Okay. What I asked you was is there any reason in your mind why any licensed attorney could not adequately represent the rights of the foreman who was to be interviewed by the MSHA inspector?
>
> A. Well, the answer to that question, we've got lawyers, as Mr. Fischer was hired by the corporation to work for the corporation. So why should we go and hire a lawyer?
>
> Q. Right. But in other words, you're saying that you feel -- you felt that Mr. Fischer was adequately qualified to perform that function, is that not right?
>
> A. To sit in the interview?
>
> Q. Yes.
>
> A. Oh, definitely.

As has been shown above, the only justifiable reason that USS had for insisting that Roivanen be represented by counsel at the interview would have been for the purpose of having an attorney present to advise him when he should refuse to answer a given question on the ground that the answer might tend to incriminate him. As has also been shown above, Roivanen did not ask to be represented by counsel and it does not appear that he was ever advised that he had a right to refuse to answer any particular question. One reason that USS may have for failing to mention Roivanen's right against self-incrimination may be that it is a personal right which can only be raised by the person who wishes to use it. A corporation cannot plead the privilege against self-incrimination (Hale v. Henkel, 201 U.S. 41, 74 (1906); Baltimore & Ohio R. Co. v. I. C. C., 221 U.S. 612, 622 (1911); and Wilson v. United States, 221 U.S. 361 (1911)). In the Wilson case, the court explained that an individual has no duty to the state or his neighbors to divulge his business as he receives nothing from the state, whereas a corporation is a creature of the state which is incorporated for the benefit of the public. Since a corporation receives special privileges and franchises, its officers

may not refuse to produce the corporation's books and records in response to a subpoena even if such production results in the officers' being indicted along with the corporation.

For the foregoing reason, there is considerable merit to the argument in MSHA's brief (pp. 8-9) to the effect that only Roivanen was entitled to ask that he be represented at the interview by counsel.

Conflict of Interest

Since it has been demonstrated above that Roivanen did not have a Sixth Amendment right to be represented by counsel at the interview and that the only constitutional right he had at the interview was his right against self-incrimination, there is also considerable merit to the argument in MSHA's brief (pp. 8-9) to the effect that USS could not properly insist upon Roivanen's being represented at the interview by counsel employed by USS to do its own corporate work. If a person does have a Sixth Amendment right to counsel, he must be given a fair opportunity to secure counsel of his own choice (Chandler v. Fretag, 348 U.S. 3, 9-10 (1954); Powell v. State of Alabama, 287 U.S. 45, 71 (1932)).

Wholly apart from the question of whether USS had the right to provide Roivanen with counsel, is the question of whether Fischer was representing Roivanen at the interview or his real client, USS. In Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974), the court held that a person who was entitled to counsel under the Sixth Amendment had been denied due process because the defense attorney also represented the principal witness for the prosecution. The court stated that (504 F.2d at 1245):

> * * * In these circumstances, counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the accused is thus counterpoised against solicitude for his client the witness. The risk of such ambivalence is something that no attorney should countenance, much less create. We hold that the situation presented by the facts of this case is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation essential to a fair trial.

In MacKenna v. Ellis, 280 F.2d 592, 595 (5th Cir. 1960), the court held that an accused person is entitled to have the "wholehearted assistance of counsel and to the undivided loyalty of counsel."

In United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973), the court reversed Hart's conviction of gambling charges because a single attorney, retained by his employers, had represented Hart, his employers, and three other codefendants at the trial. The attorney did not differentiate Hart's position from that of the other codefendants. The court explained (478 F.2d at 209-210):

> The legal standard to be applied to a claim of prejudice from joint representation is clear enough. The right to counsel guaranteed by the sixth and fourteenth amendments contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammelled and unimpaired assistance applies both prior to trial in considering how to plead, * * * and during trial * * *. Recognizing that the right to such assistance of counsel may be waived, * * * we refused to find any such waiver from a silent record. * * * we have rejected the approach that before relief will be considered the defendant must show some specific instance of prejudice. * * * Instead, we have held that upon a showing of a possible conflict of interest or prejudice, however remote, we still regard joint representation as constitutionally defective. Walker v. United States, 422 F.2d 374 (3d Cir.), cert. den., 399 U.S. 915, 90 S.Ct. 2219 (1970). * * * The Walker test of possible conflict of interest or prejudice, however remote, must be applied, moreover, in light of the moral competency standard of adequacy of representation by counsel adopted in this circuit. * * * Normal competency includes, we think, such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar. [Citations to cases omitted.]

In this proceeding, USS insisted on Roivanen's being represented by counsel on the ground that the inspectors might write unwarrantable failure citations or orders which, in turn, might be reviewed by MSHA for possible criminal violations. That which might have resulted in commencement of a criminal action against Roivanen would not necessarily result in a criminal action against USS. It appears that if the test used by the court in the Davenport case, supra, namely, a showing of possible conflict of interest, however remote, were to be applied to Fischer's representation of Roivanen at the interview, the representation by Fischer would have to be held to have been defective because of the possible conflict of interest. The record shows that Roivanen was not sure that USS's attorney was there solely to protect his interests (Tr. 345-346).

The Right to a Miranda Warning

USS's brief (p. 11) states as follows:

> * * * According to MSHA and its Review Commission, an MSHA inspector does not have to give a foreman Miranda warnings or even mention the possibility that criminal sanctions may be invoked before interviewing an employee. Everett Propst and Robert Semple, 2 MSHRC 1156 (1981). Thus in MSHA's view, a car thief apprehended in the streets is entitled to more information than a mine foreman.

As I have already observed, supra, the Commission held in the Propst case that MSHA inspectors do not have to give Miranda warnings because the

persons being interviewed are not in custody and their freedom is not in any way threatened when they are interviewed by MSHA inspectors. There are hundreds of cases holding that the police do not have to give Miranda warnings unless they have narrowed their search for a suspect to a person to such an extent that they have placed the suspect under arrest so that his freedom to go and come as he pleases is restricted. USS's claim that a car thief apprehended in the streets is entitled to more information than a mine foreman, is incorrect. In Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969), a car thief was apprehended by the police and was not given any Miranda warnings before the police asked him for his driver's license and vehicle registration card. When he was unable to provide those articles, he was further asked about his employer and his destination. When he later complained that he had not been given Miranda warnings, his claims were rejected. The court stated, in part, as follows (407 F.2d at 1397):

> It follows that the time when the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in-custody" questioning. Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative. [Emphasis is part of court's opinion.]

In United States v. Marzett, 526 F.2d 277 (5th Cir. 1976), the court held that a Miranda warning did not have to be given to a suspect, not in custody, who answered questions of the police concerning the location of a shotgun. The court held in United States v. Evans, 438 F.2d 162 (D.C. Cir. 1979), cert. den., 402 U.S. 1010, that a Miranda warning did not have to be given in a situation in which a policeman apprehended a thief who had been recognized on the street on the basis of a police radio broadcast. The suspect was taken back to the place where a burglary victim had recognized him for the purpose of determining whether the policeman had apprehended the proper person.

In Birnbaum v. United States, 356 F.2d 856 (8th Cir. 1966), the court held that a defendant had no constitutional right to counsel when he was interrogated by an FBI agent prior to the time when any charge had been lodged against him. In United States v. Robson, 477 F.2d 13 (9th Cir. 1973), the court held that where a taxpayer was not deprived of his freedom in any way, an agent of the Internal Revenue Service was under no duty to inform him of his constitutional rights, or advise the taxpayer of the fact that the investigation could have potential criminal consequences, or tell the taxpayer of the fact that the agent had an informant's tip suggesting possible tax evasion. It was further held in the Robson case that the taxpayer's consent to search of his records for audit by the agent could reasonably be accepted as a waiver of warrant even though the record did

not disclose that the taxpayer was aware of the precise nature of his Fourth Amendment rights. In United States v. Irion, 482 F.2d 1240 (9th Cir. 1973), cert. den., 414 U.S. 1026 (1973), the court held that questioning of a defendant in his motel room by customs officers who learned that defendant had been on a sailboat which landed without clearing customs did not constitute "in custody" interrogation requiring Miranda warnings to be given before such statements may be used at trial. In United States v. Hickman, 523 F.2d 323 (10th Cir. 1975), cert. den., 96 S.Ct. 778 (1976), the court held that the initial stopping of a towing truck and boat containing contraband did not constitute a sufficient impairment of defendants' freedom by customs agents to require Miranda warnings.

A Violation of Section 103(a) Occurred

In this proceeding USS is charged by MSHA with a violation of section 103(a) 3/ in Citation No. 293739 because USS's supervisor of Minntac operations refused to allow the inspectors to interview a foreman unless an attorney provided by USS was present. The citation claims that such restriction "* * * constitutes interference with and impedence of three authorized MSHA representatives during the course of an MSHA accident investigation." I believe that I have already cited enough legal support to show that USS had no right to insist that a foreman could not be interviewed until USS provided one of its attorneys to be present during the interview. There are many cases which specifically hold that persons are not entitled to be represented by counsel in circumstances almost identical to those which occurred in this proceeding.

The case which is most analogous to the situation involved in this proceeding is F. J. Buckner Corp. v. N.L.R.B., 401 F.2d 910 (9th Cir. 1969), cert. den., 393 U.S. 1084. In the Buckner case, Buckner was interviewed by an attorney who worked for NLRB. Buckner's responses were taken down in longhand and later were typed and were signed by Buckner. The trial examiner, or administrative law judge, admitted Buckner's "affidavit" in evidence and

3/ Citation No. 293739 (Exh. M-4), as originally issued, alleged a violation of section 103(a)(1), but the inspector issued a subsequent action sheet on February 27, 1981, in which he stated that the citation was being modified to allege a violation of section 103(a) instead of a violation of section 103(a)(1). Although the modification of Citation No. 293739 in this proceeding (Exh. M-4, p. 3) does not contain words modifying the violation from section 103(a)(1) to section 103(a), the proposal for a civil penalty filed in Docket No. LAKE 81-168-M seeks a penalty for the violation of section 103(a) alleged in Citation No. 293739 and the proposal is accompanied by a modification dated February 27, 1981, showing that the inspector modified Citation No. 293739 long before the hearing was held in this proceeding. Therefore, respondent was not prejudiced by the fact that the exhibits introduced at the hearing in this proceeding failed to include the inspector's modification showing that the inspector had modified Citation No. 293739 to allege a violation of section 103(a) instead of a violation of section 103(a)(1).

considered its contents in finding Buckner guilty of unfair labor practices. As to the use of Buckner's statements obtained by NLRB's attorney, the court stated (401 F.2d at 914):

> In an effort to secure a person's privilege against self-incrimination, prosecutors are required to demonstrate that certain procedural safeguards were used before the statements of a defendant may be used against him. Critical among those procedural safeguards is a warning that the defendant has the right to an attorney. A defendant has this right at every stage of a proceeding against him [Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)], and it does not depend upon a request [Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1965)].
>
> However, the point at which this warning must be given has been the subject of much controversy. In Escobedo v. State of Illinois, 378 U.S. 478 at 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), it was held that this point is reached when an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. In Miranda v. State of Arizona, 384 U.S. 436 at 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), it was held that this point was reached when law enforcement officers initiated questioning after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> Petitioner herein argues that since Buckner could at some time in the future become the subject of a criminal proceeding upon matters involved in the instant case, statements made in the absence of a Miranda warning should have been excluded from consideration by the Trial Examiner. An extension of the Miranda doctrine to situations where there is no criminal charge under investigation and where a statement is given by a person who has been in no way deprived of his freedom would be wholly unwarranted.

It cannot successfully be argued that the inspectors had no right to investigate the rollover of the truck. It is not necessary to base the inspectors' investigation on the question already extensively considered in this decision, that is, whether the truck's rollover was a reportable accident under section 50.2(h) requiring an immediate decision by MSHA as to whether an investigation should be undertaken within 24 hours. The reason that it is not necessary to consider the question of whether an accident reportable under section 50.2(h) or section 50.10 existed is that the inspectors had received a request for an investigation to be made under section 103(g)(1) of the Act. That section provides that "* * * upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title." Starkovich said that he understood that the

inspectors had come to the Minntac operation to perform a "103(g)(1) special investigation (Tr. 241). Therefore, the inspectors could have based their investigation of the truck's rollover on the authorization contained in section 103(a) as that section gives them authority to determine "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." They also have the authority under section 103(a) to inspect mines to assist the Secretary in developing "guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and [the Secretary's] experience under this Act and other health and safety laws." In performing such inspections, the inspectors are given "a right of entry to, upon, or through any coal or other mine."

MSHA received on February 5, 1981, a request that the truck's rollover be investigated. The request was given to Inspector Bagley and he went to the Minntac Mine on Monday, February 9, 1981, to investigate the accident. Starkovich allowed the inspector to talk to the driver of the truck, but Starkovich wouldn't let the inspector talk to the driver's foreman, Roivanen, until an attorney could be provided. The inspectors asked to talk to Roivanen three different times on February 9, but all requests were denied. The delays which the inspectors encountered are described in Finding Nos. 11 through 14, supra, and need not be repeated here. There can be no question but that USS impeded the inspectors' investigation, which section 103(g)(1) states should be performed "as soon as possible", by simply asserting that Roivanen had a right to counsel.

A few more holdings by the courts in circumstances almost identical to the facts in this case should be cited to show beyond any doubt that USS did not have a right to insist that Roivanen be afforded counsel before he could be interviewed by MSHA inspectors. In Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973), cert. den., 415 U.S. 933, the court affirmed a denial of a writ of habeas corpus involving a person who was convicted of driving a motor vehicle after his driving license had been revoked under the Virginia Habitual Offender Act. His claim was based on a contention that his rights were violated at the license revocation hearing by the fact that he was not provided with assistance of counsel. The court stated (485 F.2d at 505-506):

> A right to counsel must find its constitutional basis in either the commands of the Sixth Amendment or the general guarantee of fundamental due process granted by the Fourteenth Amendment. The petitioner apparently rests his claim primarily on the Sixth Amendment. In pressing such claim, he is confronted at the outset with the fact that the right to counsel given by the Sixth Amendment extends only to criminal or quasi-criminal cases, and proceedings for the revocation of a driver's license under the Virginia Habitual Offender Act have been authoritatively held to be a civil and not a criminal action. * * * [Footnotes omitted.]

In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court held that a defendant was not entitled to counsel before he was identified by a victim in a police station. The circumstances were that the defendant had been picked up and was taken to the police station after he had produced three travelers' checks and a Social Security card bearing Willie Shard's name. Shard was brought to the police station to see if he could identify the suspect. Shard recognized the defendant as soon as he walked into the police station and saw the defendant sitting at a table. The Court said that the question raised was not the defendant's right against self-incrimination, but his right to counsel. The Court stated (406 U.S. at 688):

> In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, 287 U.S. 45 (1932), it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. * * *

By way of summary, the cases hereinbefore cited show that when the inspectors sought to interview Roivanen on February 9, 1981, the only constitutional right he had was his privilege against self-incrimination. That was a personal privilege which only Roivanen had a right to assert. It was improper for USS to refuse to permit the inspectors to talk to Roivanen until such time as USS could provide one of its corporate lawyers to be present at the interview because the corporate lawyer's primary client at the interview was USS, not Roivanen. Even if a lawyer were allowed to be present at the interview, he could only advise Roivanen as to his privilege against self-incrimination. The lawyer would not be entitled to object to questions or make legal arguments so as to turn the interview into a quasi-judicial proceeding. Even if Roivanen had personally asked the inspectors if he could have an attorney present at the interview, the most that the inspectors would have had to allow would have been the opportunity to discuss questions with his attorney, if he suspected the answers would tend to incriminate him, but the inspectors could have required that Roivanen's attorney be excluded from the room where the interview was conducted, subject to Roivanen's right to leave the room to seek his attorney's advise about whether he should claim his privilege against self-incrimination as to any specific question.

Since Roivanen was not in custody or charged with any kind of violation of law, he was not entitled to be given a Miranda warning and he was not entitled to a Sixth Amendment right to be represented by counsel at the interview. Therefore, when USS delayed the interview from Monday, February 9, 1981, to Friday, February 13, 1981, it delayed and impeded an investigation which the inspectors, under the exhortations in section 103(g)(1) of the Act, were obligated to complete "as soon as possible." Such delay constituted a violation of section 103(a) as alleged in Citation No. 293739. For the foregoing reasons, I find that Citation No. 293739 dated February 9, 1981, was validly issued and should be affirmed.

Assessment of a Penalty

The proposal for a penalty filed in Docket No. LAKE 81-168-M seeks assessment of a civil penalty for the violation of section 103(a) alleged in Citation No. 293739. Inasmuch as I have found that the violation occurred, it is now necessary that a penalty be determined for the violation pursuant to the six criteria. I have already considered the six criteria in considerable detail with respect to the previous violation of section 103(a) under consideration in this proceeding. Specifically, I have already found that respondent is a large operator and that payment of penalties will not cause it to discontinue in business.

History of Previous Violations

I have already explained, in assessing a penalty for the prior violation of section 103(a), that the record in this proceeding is not complete enough to permit me to make a finding as to whether USS had violated section 103(a) before January 22, 1981, when the first violation of that section involved in this proceeding was cited.

The second violation of section 103(a) occurred in a citation written on February 9, 1981, which means that the second violation occurred about 18 days after the first violation. The record in this proceeding, therefore, shows that USS has a history of a previous violation of section 103(a) which occurred on January 22, 1981. I believe that the prior history of one violation should be considered because Starkovich was advised on February 9, 1981, that an attorney should be obtained "as soon as possible" (Tr. 30). When the inspector returned to the mine on February 11, 1981, and was again denied permission to talk to Roivanen because an attorney was not present, he was warned that a citation would be issued for USS's refusal to allow him to talk to Roivanen (Tr. 43). Barmore claims that he would have allowed the inspector to go to the scene of the truck's rollover on January 22, 1981, if the inspector had warned him that a citation would be written (Tr. 202). Here, Starkovich was warned that a citation would be issued if an attorney were not obtained promptly.

Consequently, Starkovich should have profited from USS's previous experience when the prior violation of section 103(a) was cited and should have realized that his failure to obtain an attorney promptly would again result in the inspector's writing a citation for a violation of section 103(a). It has been my practice to increase a penalty by a small amount when I find that the same section of the Act which is before me for assessment of a penalty has been violated on a single prior occasion. I believe that the criterion of history of previous violations should be used to increase a penalty when there is an indication of a large number of previous violations. If a penalty has been increased because of a very adverse history of previous violations and, thereafter, in a subsequent proceeding, the evidence shows that, over a recent time period, respondent has succeeded in reducing the number of violations in the recent period as compared with the number which occurred in a prior period, the penalty should accordingly be decreased.

In this instance, since there is only a single prior violation of section 103(a), I believe that the penalty should be $50 more than it would have been if USS had not ever previously violated section 103(a). Additionally, as pointed out in considering respondent's history of previous violations in connection with the prior violation of section 103(a), I found that respondent should be assessed $10 under the criterion of respondent's history of previous violations because USS has an average of more than 50 previous violations per year. Therefore, the penalty for the second violation of section 103(a) should be a total of $60 under USS's history of previous violations.

Negligence

If the circumstances otherwise warranted it, the fact that the second violation of section 103(a) was deliberate and intentional, could be used to find that the violation was associated with gross negligence because the advice of USS's legal staff in Pittsburgh had been sought at the time Starkovich refused to allow the inspector to interview Roivanen until one of USS's attorneys could be present at the interview. On the other hand, USS appears to have been acting in good faith when it asserted that it was entitled to insist upon the presence of counsel at any interview which might involve the issuance of an unwarrantable-failure citation or order.

A respondent ought to be able to claim an erroneous constitutional right, if that right is claimed in good faith, without exposing itself to a large civil penalty, provided that respondent, in asserting that right, does not expose its miners to any hazard. In Bituminous Coal Operators' Association, Inc. v. Ray Marshall, 82 F.R.D. 350 (D.D.C. 1979), the court noted that it would be necessary for an operator to violate section 103(f) 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."

In this instance, the matter which the inspector wished to investigate involved a truck which had rolled over on January 22, 1981. The three miners riding in the truck received only minor injuries and were placed on restricted duty. When the inspectors went to investigate the incident on February 9, 1981, one of the injured miners was back at work and the other two were attending a training class. The truck which had rolled over had been hauled from the scene of the accident to the vicinity of USS's repair shops and no repairs had been performed on it. Therefore, although USS's assertion that it wished to have an attorney present when Roivanen was interviewed did prevent the investigation from being completed "as soon as possible", the 4-day delay in the inspectors' interview with Roivanen did not seriously impede the gathering of any important facts.

For the reasons given above, I conclude that an amount of $10 is the most that should be assessed under the criterion of negligence for USS's

second violation of section 103(a).

Gravity

A considerable amount of what has been said above about the criterion of negligence is applicable to the criterion of gravity. If USS's refusal to let the inspectors interview Roivanen for a period of 4 days had occurred in connection with a serious violation which exposed miners to unsafe conditions while Starkovich and the inspectors argued the merits of USS's contention that Roivanen could not be interviewed unless one of USS's attorneys was present, it could then be said that the insistence on the presence of an attorney was a serious violation.

MSHA's brief (pp. 9-10) agrees that the violation was not serious because Roivanen's statements at the interview provided the inspectors with little additional information which they had not already obtained from interviewing other USS employees. MSHA, however, states that the practice of operators' insisting upon having an attorney present before supervisory employees may be interviewed would constitute a serious threat to MSHA's abilities to carry out its functions if such tactics were to be used on a wide scale. There is considerable merit to MSHA's argument about a wide-spread use of the contention that no supervisory employee can be interviewed unless an attorney is present, but there seems to be no indication that USS is employing the tactic on a wide-spread basis--at least pending the decision in this proceeding where it appears that USS is testing its legal position. Moreover, since the issuance of a citation in this instance produced an attorney overnight, I assume that MSHA now knows how to deal with such contentions when and if operators insist on having attorneys present at future interviews by inspectors.

In light of the considerations above, I find that the violation was nonserious and that a penalty of $10 should be assessed under the criterion of gravity.

Good-Faith Effort To Achieve Rapid Compliance

It has been my practice neither to increase nor decrease a penalty otherwise assessable under the other five criteria if I find in a given case that an operator has corrected a violation within the time provided by an inspector in his citation. That is also the procedure which is used when one applies the assessment formula set forth in section 100.3(f). In this instance, the inspector did not provide an abatement period in his citation until he arrived at USS's mine and had served the citation on Starkovich, supervisor of Minntac operations. After Starkovich received the citation, he immediately called USS's legal staff and asked when he could abate the alleged violation. Starkovich could have argued that an attorney would have to be sent from Pittsburgh and that one could not be there before Monday of the following week. Instead, he arranged for one of USS's attorneys near the mine site to be made available on the next day at 1 p.m.

It appears that USS acted with extraordinary speed in abating the violation once the inspector cited it. It is to USS's credit that once the inspector cited it for a violation in connection with its refusal to allow Roivanen to be interviewed unless an attorney was present, USS acted as promptly to abate the violation as could have been expected. Since the record shows that the inspector placed a compliance date on the citation of Friday, February 13, 1981, at 1 p.m., solely because Starkovich stated that an attorney would be provided by that time, it must be concluded that USS is responsible for the rapid abatement of the violation.

In such circumstances, I would ordinarily be able to find that the penalty assessable under the other five criteria should be reduced because of USS's extraordinary speed in achieving compliance. USS's brief (pp. 10-11) complains, however, that the inspector's insistence upon rapid abatement coerced USS into providing a USS attorney with less competence in mine safety law than USS wanted to send. USS's complaints about its having to abate the violation largely offsets a conclusion that the speed of abatement should be used as a reason for reducing the penalty otherwise assessable because section 110(i) refers to "good faith" in achieving rapid abatement, rather than to a grudging or reluctant compliance. Therefore, I do not believe that USS should be given credit for more than normal good-faith abatement. Such a finding is consistent with the parties' stipulation to the effect that USS showed good faith abatement as to all violations after the citations were written (Tr. 12). When normal good-faith abatement has been found to have occurred, the penalty otherwise assessable under the other five criteria is neither increased nor decreased under the criterion of demonstrated good-faith in achieving rapid compliance.

For the reasons given above, USS should be assessed a penalty of $80 for the second violation of section 103(a). The $80 penalty is comprised of $60 under the criterion of history of previous violations, $10 under the criterion of negligence, and $10 under the criterion of gravity. The penalty would be less than $80 if USS were not a large operator and would be less than $80 if USS had shown that payment of penalties would adversely affect its ability to continue in business.

Docket Nos. LAKE 81-114-RM, LAKE 81-115-RM and LAKE 81-152-M

Introduction

In notices of contest filed on March 27, 1981, in Docket Nos. LAKE 81-114-RM and LAKE 81-115-RM, USS seeks review of Order Nos. 293740 and 296501, respectively. Both orders were issued on March 9, 1981, pursuant to section 104(d)(1) of the Act. Order No. 293740 alleges a violation of 30 C.F.R. § 55.9-1 and Order No. 296501 alleges a violation of 30 C.F.R. § 55.9-2. In a proposal for a penalty filed on June 22, 1981, in Docket No. LAKE 81-152-M, the Secretary of Labor seeks assessment of civil penalties for the violations of sections 55.9-1 and 55.9-2.

Order No. 293740 alleges that USS violated section 55.9-1 by failing to record a defect affecting safety on a truck at a time when the truck's rear end had shifted back 2-½ inches. Order No. 296501 alleges that USS

violated section 55.9-2 by failing to correct the shifted rear-end in the same truck cited in Order No. 293740 before the truck was used. Both orders are being considered simultaneously because the facts are interrelated (Finding No. 16 (in part) and Nos. 17-21, supra).

Defect Affecting Safety

The pertinent part of section 55.9-1 which is alleged to have been violated in Order No. 293740 reads as follows:

> * * * Equipment defects affecting safety shall be reported to, and recorded by the mine operator.

Section 55.9-2 was alleged to have been violated in Order No. 296501. Section 55.9-2 reads as follows:

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

USS's brief (p. 14) argues that before either section 55.9-1 or section 55.9-2 can become operative, there must exist one or more "equipment defects affecting safety". USS argues that normal understanding of that phrase would have to mean that the standards involved were "* * * intended to cover defects which are normally associated with safe operation of a vehicle" (Br. 14). The brief continues with its argument by contending that whether the mechanical problem cited by the inspector constituted an equipment defect affecting safety should be interpreted in light of the knowledge and understanding of USS's personnel at the time the problem was first observed, rather than after a truck had rolled over under circumstances which had never previously been known to cause a truck to turn over.

USS concludes the above-described argument by contending that since the mechanical problem cited by the inspector was not one which normally could be considered to be a defect affecting safety, USS's personnel were justified in not reporting and recording its existence immediately and were justified in considering the problem to be something which could be postponed and corrected as a routine maintenance item in due course. It is further argued that pending such maintenance work, USS's personnel properly continued to use the equipment until such time as routine maintenance work would eventually have corrected the problem (Br. 15-16).

The foregoing argument is not supported by the facts. The first aspect of USS's argument which must be addressed is that USS's brief insists on referring to the problem in the rear end of its No. 856 truck as "a one-half inch shift in the rear end of" (Br. 16) its truck. An employee named Kaivola was the driver of the truck at the time it rolled over. According to Inspector Bagley, Kaivola told him that "* * * the left-side rear duals were dogged back about two and a half inches" (Tr. 37). During cross-examination by USS's attorney, Kaivola stated "* * * the axle had shifted maybe half an inch or so" (Tr. 168). The dual wheels on the truck were enclosed by an elliptical indentation in the truck's bed which Kaivola called a "wheel well"

(Tr. 175). There was not much clearance between the wheel and the well in which it turned. Therefore, the 2-½-inch shift in the "rear duals" is not the same as the ½-inch shift in the "axle". USS's brief uses the reference to ½-inch because such usage makes the shift in the truck's rear end sound minimal and enhances its argument that a driver, observing only a ½-inch shift in an axle would certainly be justified in assuming that correction of a ½-inch shift in an axle could be postponed until such time as the truck was in the shop for routine maintenance work.

The fact is, however, that a shift of ½-inch in an axle is not like a ½-inch dent in a fender or a ½-inch misalignment in a license plate. Primozich, USS's foreman of the repair shops, made that clear when he stated that "* * * the wheel and the axle assembly can walk back and forth to break the spring" (Tr. 296). He also stated that "* * * depending how far it shifts back, we've had it where they've shifted back, and the drive shaft literally fell on the ground. Well, then the vehicle won't move" (Tr. 311). Primozich testified that the shifting of rear ends was not as much a problem now as it used to be. He stated that (Tr. 305-306):

> * * * For a while there, it was terrible. I had springs on racks up there you wouldn't believe, and I must have two to three hundred drive shafts stored at Minntac.

In other words, even though the axle had shifted only ½-inch, the rear dual wheels had shifted 2-½ inches in the wheel well on the left side. It was easier for Kaivola to see a 2-½-inch shift in the wheel well than it was to see a shift of ½-inch in the axle, but the two conditions existed simultaneously and served as the basis for Kaivola's conclusion that the shifting of the rear end should be reported to his foreman, Roivanen.

The preponderance of the evidence controverts USS's claim that prior experience with shifted rear ends would not have enabled USS's personnel to believe that a shift in a truck's rear end could result in an accident if not soon corrected. Although Roivanen said that past experience did not cause him to think that a shifted rear end would cause a truck to flip over, he stated that shifted rear ends in the past had caused the tires to burn in the wheel well and that the rubbing could be severe enough to stop the truck's operation (Tr. 356).

Kaivola, the driver of the truck which rolled over, testified as follows (Tr. 172):

> I considered it a safety problem. But I didn't think that it -- it was bad enough to where we couldn't drive it up out of the pit. Like -- like was mentioned earlier, we sometimes drive them up to the shops unless they're to the point where they have to come and retrieve them.

Primozich, the repair shop foreman, testified that he felt shifted rear ends were maintenance problems, but he refused to categorize them as safety items because he feared that USS would impose on him an obligation to check rear ends on each piece of equipment just as he is required to check brakes as a

safety item. Primozich made that point clear in the following statement (Tr. 312):

> A. I wouldn't consider it a safety problem. We seem to go from one extreme to the other here. Ah, we either catch them when they come to the shop for routine maintenance, or we go to the other extreme where we wind up with either the tires flat or the differential sitting under the truck. There doesn't seem to be a happy what you would call median in this. So I don't consider it a safety problem. Also going through twenty-eight hundred vehicles at a maximum to 900, there's no way that my people can go through each individual unit as a safety item.

At other places in his testimony, Primozich stated that shifted rear ends would cause "excessive tire wear" (Tr. 310) and could stretch the brake lines so much that the brakes would fail and also could cause the drive shaft to fall out (Tr. 322). Primozich also testified that he would not drive a truck if the rear end had shifted back 2-½ inches because he would not feel safe in doing so (Tr. 322). USS's brief (p. 16) argues that Primozich testified that he would not drive a vehicle with a shift of 2-½ inches only as a result of the rollover in this proceeding, but the testimony (Tr. 310 and 322) cited in USS's brief shows only that Primozich was having a considerable amount of difficulty in reconciling his conflicting testimony which, on the one hand, classified shifting rear ends as a maintenance problem, and on the other hand, showed that shifting rear ends could lead to worn tires and blowouts, ruptured brake lines, and disengaged drive shafts.

The testimony which I have reviewed above shows that a shift of 2-½ inches in a rear end is a defect affecting safety within the meaning of section 55.9-1 and section 55.9-2. The word "defect" is defined in Webster's Collegiate Dictionary as a "shortcoming" or "imperfection" and the word "safety" is defined as "the condition of being safe from undergoing or causing hurt, injury, or loss". It should be recalled that on the same day that Kaivola found the 2-½-inch shift in the rear end of Truck No. 856, he also found that the right front tire was worn down to the cords (Tr. 160; 385). Excessive tire wear is one of the signs of a shifted rear end (Tr. 310). Shifted rear ends can also cause tires to rub in the wheel wells and cause complete stoppage of a truck (Tr. 356). Shifting of rear ends can also lead to broken brake lines and cause drive shafts to fall out (Tr. 296; 324).

Since the evidence clearly shows what can happen to trucks when they are continued in operation after a shift in the rear ends occur, it is certain that a shifted rear end is a "shortcoming" or "imperfection" in any truck having a shifted rear end. Inasmuch as a "shortcoming" or "imperfection" is a "defect" and since excessively worn tires, brake failure, and the falling out of drive shafts constitute conditions which would prevent persons riding in a vehicle with a shifted rear end from feeling "safe from undergoing" an "injury or loss", I believe that the record supports a finding, and I so find, that a shift of 2-½ inches in the rear end of the No. 856 truck constituted a "defect affecting safety" within the meaning of section 55.9-1 and section 55.9-2.

Occurrence of Violations

The evidence unequivocally shows that the driver of the truck, Kaivola, reported the shifted rear end to his foreman, Roivanen, but Kaivola went home early and reminded Roivanen that he would not be on hand at the end of his shift to take the truck to the repair shops (Tr. 156-157). Therefore, the defect in the rear end of the truck was reported to Roivanen, one of USS's supervisory employees. He candidly testified that he was so busy with identifying the locations of shovels requiring repair that he forgot about the defect which Kaivola had reported to him (Tr. 328-329). Roivanen also testified that USS's plan for the reporting and recording of defects in his section had deteriorated so much that the oral report of the defect to him was all that Kaivola was required to do at the time the defect was reported to him on January 21, 1981 (Tr. 351). Although USS has a well-organized repair shop where all reported defects are recorded, the repair shops can't record defects which are never reported to its personnel (Tr. 298; 314). Therefore, Roivanen's failure to pass on to the repair shop the defect reported to him by Kaivola was a violation of section 55.9-1 because the defect, although reported to Roivanen, was never recorded by anyone because Roivanen completely forgot about the defect.

The violation of section 55.9-2 was a direct consequence of Roivanen's failure to record the defect or advise the repair shop that the defect existed. The failure to take the No. 856 truck to the repair shop on either the afternoon or evening shift resulted in the truck's being found on the "ready" line by Kaivola when he came to work on the day shift on January 22, 1981 (Tr. 158). Although Kaivola wondered about whether the shift in the rear end had been corrected, he made no actual inquiry to find out for certain and drove the truck to the site of repair jobs without realizing that the shift in the rear end had not been repaired (Tr. 159). Kaivola saw smoke coming from the left rear dual wheels just a few seconds before the truck flipped over (Tr. 163). The foregoing facts support my conclusion that section 55.9-2 was violated because the equipment defect in the No. 856 truck was not corrected before the equipment was used.

In Ideal Basic Industries, Cement Division, 3 FMSHRC 843, 844 (1981), the Commission interpreted section 56.9-2 [which is identical to the wording of section 55.9-2] to mean "* * * 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". The evidence in this proceeding shows that the No. 856 truck was used while its rear wheels and drive shaft were out of alignment so that the truck was traveling at an angle causing excessive wear of the tires and exposing the driver and other personnel to possible injury as a result of blowouts, dropping out of the drive shaft, and brake failure.

The Violations Were Unwarrantable Failures

Both USS's brief (p. 16) and MSHA's brief (p. 12) refer to the definition given by the former Board of Mine Operations Appeals in Zeigler Coal Co., 7 IBMA 280 (1977), in their arguments with respect to whether the violations of sections 55.9-1 and 55.9-2 resulted from unwarrantable

failure on the part of USS's employees. The Board held in the Zeigler case that an unwarrantable failure may be said to have occurred if it involves a "* * * 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". (7 IBMA at 295-96).

The first argument raised by USS's brief (p. 17) in support of its claim that the violation was not the result of unwarrantable failure is that the foreman thought that the shifted rear end was a maintenance item which should be taken care of in due course in the interest of good scheduling of repairs and economy. That argument has already been found to be fallacious in the preceding section of this decision and need not be reconsidered here except to note that the foreman of the repair shops emphasized that it was important that shifts in rear ends be reported to the repair shops promptly because the longer the repairs were delayed, the more expensive the costs of repairs became. The foreman specifically pointed out that tires wear excessively and springs, brakes, etc., may fail if the repairs are delayed (Tr. 295; 298; 318). Consequently, USS's argument that the shifted rear end could have been delayed to be repaired as a maintenance item in the interest of good scheduling and economy is rejected as not supported by the record.

The second argument in opposition to the inspector's finding of unwarrantable failure in USS's brief (p. 17) is that the foreman who failed to report the shifted rear end is conscientious and always has defects corrected when they affect safety. USS cites the testimony of Boucher, one of the passengers in the truck which rolled over, at transcript page 379, where Boucher testified that the foreman had Kaivola take the No. 856 truck to the repair shop as soon as they reported to him the fact that the right front tire was worn down to the cords. As I have already pointed out, the severe wearing of tires is one of the characteristics of a shifted rear end. Therefore, when the foreman was advised of the wearing of a tire down to the cords, he should have been more concerned than he was, of the report that the rear end of the truck had shifted. The foreman was aware of the fact that the wheels would rub in the wheel well and smoke and even stall out the trucks' engines when their rear ends had shifted (Tr. 356). Consequently, while the record shows that the foreman ordered a tire worn down to the cords to be replaced, the record also shows that that same foreman was so busy with determining the location of shovels which needed repairing, that he completely forgot to have the No. 856 truck taken to the repair shop to have the rear end realigned. The foreman's failure in this instance not only exposed the men using the truck to possible injury, but also resulted in USS having to purchase a replacement truck because No. 856 was a total loss, according to the inspector (Tr. 32).

The next argument in USS's brief (p. 17) in opposition to the inspector's finding of unwarrantable failure is that USS asks why the action of the driver in failing to fill out the required inspection form was not also an unwarrantable failure and why the failure of the driver on the next shift to report the truck's misalignment was not also the result of

an unwarrantable failure. The short answer to both of those questions is that they were unwarrantable failures. Roivanen testified that he and the other foremen had permitted the reporting of needed repairs in writing on forms provided by USS to deteriorate to a system under which it was permissible for the employees to report orally any defects which needed repairing. In fact, Roivanen specifically stated that the employees under his supervision were "just not inspecting" the vehicles assigned to them (Tr. 351-352).

The fact that Roivanen and the other foremen could not control the 130 "guys" (Tr. 152) in their department sufficiently to require them to fill out written forms pertaining to needed repairs is not a reason to hold that the inspector made a mistake in finding that Roivanen's failure to see that truck No. 856 was repaired was an unwarrantable failure. As the Commission majority stated in El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981), the Act "* * * does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard".

Effect of Modifying the Underlying Citation

The inspector's Order Nos. 293740 (Exh. M-5) and 296501 (Exh. M-6) here under review were both issued under section 104(d)(1) of the Act and both were based on underlying Citation No. 293731 (Ech. M-2) issued under section 104(d)(1) of the Act. The second sentence of section 104(d)(1) 4/ requires that an unwarrantable-failure citation be issued under the first sentence of section 104(d)(1) before an inspector may issue an order of

4/ Section 104(d)(1) of the Act reads 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.

withdrawal under that section. USS's brief (p. 18) states that it contested underlying Citation No. 293731 in a proceeding before Judge Vail and that Judge Vail granted the Secretary's motion to amend Citation No. 293731 to show that it was issued under section 104(a) of the Act, instead of under section 104(d)(1) of the Act. USS correctly points out that when MSHA changed the basis for issuance of Citation No. 293731 to that of a citation issued under section 104(a), there was no longer in existence an underlying citation to serve as the foundation for Order Nos. 293740 and 296501.

When USS's counsel pointed out at the hearing before Judge Cook that underlying Citation No. 293731 was the subject of a review proceeding before a different judge, it was agreed that Judge Cook would not write the decision in this proceeding until the results of the other proceeding were known (Tr. 9; 387). At the hearing, MSHA's counsel stated that if the underlying citation should be modified or vacated, that MSHA would either amend the orders here involved or ask Judge Cook to do so (Tr. 387). After the cases in this proceeding were transferred to me, I wrote a letter on February 4, 1982, to counsel for both parties and suggested that MSHA modify the orders in this proceeding in accordance with the statement of MSHA's counsel at the hearing.

In response to the aforementioned letter, MSHA's counsel mailed to me on March 2, 1982, modifications of Order Nos. 293740 and 296501. The modifications provided by MSHA's counsel will be given exhibit numbers and made a part of the record. The last exhibit received in evidence at the hearing by Judge Cook was Exhibit M-7. There is marked for identification and received in evidence as Exhibit M-8 a one-page modification of Order No. 293740 and there is marked for identification and received in evidence as Exhibit M-9 a one-page modification of Order No. 296501. Exhibit M-8 modifies Order No. 293740 to Citation No. 293740 issued under section 104(d)(1) of the Act. Exhibit M-9 modifies Order No. 296501 to show that the order is based on Citation No. 293740 instead of Citation No. 293731 which, of course, has already been modified to be a citation issued under section 104(a).

Inasmuch as Order No. 293740 has now been modified to Citation No. 293740 issued under section 104(d)(1) of the Act, it is necessary to examine the allegations made in the citation to determine whether it was validly issued under the provisions of section 104(d)(1). Most of the prerequisites for issuance of a citation under section 104(d)(1) have already been reviewed and need little additional discussion. The first requirement for issuance of a citation under section 104(d)(1) is that the inspector must find that a violation occurred. I have already found above under the heading of "Occurrence of Violations" that the violation of section 55.9-1 alleged in Citation No. 293740 occurred and that the violation of section 55.9-2 occurred as alleged in Order No. 296501.

The next prerequisite for issuance of Citation No. 293740 is that the inspector must determine whether the violation constitutes an imminent danger. I have already shown in my discussion under the heading "Defect Affecting Safety" that the violations of sections 55.9-1 and 55.9-2 did

not constitute imminent dangers because Kaivola, the driver of the truck which rolled over, thought it could be driven on January 21, 1981, out of the pit to the repair shop if it were driven in a careful manner. It is true that the shifted rear end caused an imminent danger on January 22 just before the truck's left rear spring disintegrated and caused the truck to roll over. The truck's rolling over on January 22, however, occurred after Roivanen had failed to record the defective rear end or have the defect repaired. The truck was again driven on the afternoon shift without having had the shifted rear end repaired. Therefore, at the time the violation of section 55.9-1 occurred, there was not an imminent danger.

Having ruled out the existence of an imminent danger, the next step in issuing a citation under section 104(d)(1) is determining whether the violation of section 55.9-1 "* * * could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard". The Commission has recently redefined the question of what constitutes a violation which may be considered to be "significant and substantial" in its decision in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). In that case the Commission noted that the word "hazard" connotes a "danger" or "peril" and that both "significant" and "substantial" mean "important" and "notable". With those terms in mind, the Commission then stated that a violation may be considered to be significant and substantial under section 104(d)(1) if the violation involves at least a remote possibility of injury and, additionally, that there should exist a reasonable likelihood of occurrence of an injury or illness of a reasonably serious nature.

I have also shown in my discussion under the heading of "Defect Affecting Safety" that USS's personnel had sufficient knowledge from occurrence of shifts in rear ends of vehicles before the one reported by Kaivola on January 21, 1981, that such shifts were associated with a remote possibility of an injury which would have a reasonable likelihood of occurrence and be of a reasonably serious nature. The driver of the truck, Kaivola, the foreman, Roivanen, and the foreman of the repair shops, Primozich, all testified that shifted rear ends cause wheels to rub in the wheel wells so that they smoke and stall out trucks' engines and that shifted rear ends cause excessive wear of tires and blowouts. Additionally, at least Primozich knew before the truck rolled over that shifted rear ends cause drive shafts to fall out and brake lines to rupture. All the aforementioned hazards were known by USS's personnel to be associated with shifted rear ends before No. 856 truck rolled over on January 22, 1981, as a result of the foreman's failure to record the shifted rear end so that the truck could be taken out of service and repaired before it was continued to be used. Failure to take the truck out of service caused it to roll over with the result that the truck became a total loss and the three men riding in it miraculously suffered only minor back injuries and a chipped elbow (Finding Nos. 4-6, supra).

The discussion under "Defect Affecting Safety" shows beyond any doubt that the violation of section 55.9-1 and the violation of section 55.9-2 were significant and substantial when those terms are considered in light

of the facts in this proceeding and under the definition given by the Commission in its National Gypsum decision, supra.

The final step in determining whether Citation No. 293740 was properly issued under section 104(d)(1) is whether the violation of section 104(d)(1) was caused by an unwarrantable failure of USS's personnel. My discussion above under the heading "The Violations Were Unwarrantable Failures" shows that Roivanen, under the pressure of his other duties, forgot about Kaivola's having reported the shifted rear end to him and forgot that Kaivola was leaving early so that someone other than Kaivola would have to take the truck to the repair shop for correction of the rear-end problem. The facts also show that Roivanen and the other foremen in his department had allowed the reporting of defects in equipment to deteriorate to the point that the employees were simply not inspecting their trucks (Finding Nos. 17 and 18, supra). There can be no doubt but that the violation of section 55.9-1 and the violation of section 55.9-2 were the result of unwarrantable failures by USS personnel.

My review of the criteria governing issuance of unwarrantable-failure citations supports a conclusion that Order No. 293740 was properly modified to Citation No. 293740 and that Order No. 296501 was properly modified to show its issuance after the inspector had found that another violation had occurred which was the result of an unwarrantable failure. Although I have already found that the violation of section 55.9-2 alleged in Order No. 296501 meets the test of a significant and substantial violation, the court held in International Union, UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. den., 429 U.S. 585 (1976), that the violation which causes an inspector to issue his first unwarrantable-failure order following issuance of an unwarrantable-failure citation, need not be found to be significant and substantial. I have shown above that the violation of section 55.9-2, which triggered the issuance of Order No. 296501, was significant and substantial. I have considered the issue of whether the violation of section 55.9-2 was significant and substantial because the inspector made such a finding in Order No. 296501 and because USS has argued in its brief (p. 19) that the violations of sections 55.9-1 and 55.9-2 were not correctly found to be significant and substantial.

I find that the modification of Order No. 293740 to unwarrantable-failure Citation No. 293740 was properly done because the evidence shows that Citation No. 293740 meets all the criteria for issuance of an unwarrantable-failure citation under section 104(d)(1) of the Act. I also find that Order No. 296501 was properly modified to provide that Citation No. 293740 is the underlying citation which now supports the valid issuance of Order No. 296501. For the foregoing reasons, I further find that Citation No. 293740 and Order No. 296501 were properly issued under section 104(d)(1) of the Act and should be affirmed.

Assessment of Penalties

I have already found that violations of sections 55.9-1 and 55.9-2 occurred. It is necessary that civil penalties be assessed under section

110(i) of the Act. In my discussion of the six criteria with respect to the first violation of section 103(a) alleged in Citation No. 293736, I made findings as to two of the six criteria and the findings as to those two criteria continue to be applicable to the two violations here under consideration. Specifically, it has already been found that USS is a large operator and that payment of penalties will not cause USS to discontinue in business.

History of Previous Violations

I have already explained in assessing the penalty for the first violation of section 103(a) that Exhibit M-1, the exhibit pertaining to history of previous violations in this proceeding, does not show which specific sections of the Act or regulations have previously been violated by USS. Inasmuch as I cannot use my normal methods of evaluating the criterion of history of previous violations because of lack of sufficient information in the record, I shall employ the same method with respect to the violations of sections 55.9-1 and 55.9-2 which I used with respect to the first violation of section 103(a) and shall assess an amount of $10 for each violation under the assessment formula in paragraph (1) of section 100.3(c) because USS has an average of more than 50 prior violations per year. As I have already explained, the lack of evidence in the record prevents me from making any determination under paragraph (2) of section 100.3(c).

Negligence

The criterion of negligence has already been discussed above in considerable detail under the heading of "The Violations Were Unwarrantable Failures". I there noted that both violations occurred because USS's foremen had allowed the reporting of defects in equipment to deteriorate to oral reports and Roivanen expressed a belief that the men were not even making inspections of their equipment before using it. Roivanen was particularly negligent in forgetting to follow up on an oral report by the driver of the truck. Roivanen's failure to record the defect and to see that the shifted rear end was repaired was the cause of the truck's continued use on the afternoon shift after the defect was first reported, and was also the cause of the truck's further continued use on the next day up to the time that it flipped over.

While USS's brief (p. 17) tries to minimize the foreman's negligence, his own testimony shows that he was simply not assuring that defects were recorded and corrected. The mere fact that Roivanen immediately authorized Kaivola to have a tire worn down to the cords replaced is not an especially redeeming factor because anyone who has been around trucks or cars for even a few months knows that tires worn to the cords are a blowout hazard. A foreman in Roivanen's capacity should also have been interested in determining why a tire would be worn down to the cords without such extreme wear having been noted and its replacement having been done in the usual course of maintenance. Roivanen should have known, as Primozich knew, that shifted rear ends cause excessive tire wear. Therefore, when Kaivola orally reported to Roivanen that the rear end of his vehicle had shifted,

Roivanen should have realized that the shift in the No. 856 truck was extreme and hazardous or the right front tire would not have been worn down to the cords.

I believe that Roivanen's lack of care constituted at least ordinary negligence. His own testimony shows that he was so concerned about finding the locations of shovels which needed repairing that he completely forgot about Kaivola's report pertaining to the conditions of the No. 856 truck. In short, Roivanen's negligence brought about both violations. Therefore, under the criterion of negligence, USS should pay a penalty of $400 for each violation.

Gravity

The criterion of gravity has been discussed in considerable detail above under the heading of "Defect Affecting Safety". As I have already shown, shifts in vehicles' rear ends cause excessive tire wear and both Kaivola and Roivanen were aware that shifted rear ends prior to January 21, 1981, had caused the rear tires to bind in the wheel wells to the point that the vehicles could not be driven. Primozich knew that shifts in rear ends could lead to excessive tire wear, to the rubbing and smoking of tires in the wheel wells, to the stalling out of the engines, to the dropping out of drive shafts, to the rupturing of brake lines, and to the disintegration of the springs through failure of U-bolts. While the evidence does not show that Kaivola and Roivanen were aware of the hazards which are associated with shifted rear ends to the extent that Primozich was, the evidence clearly shows that Roivanen knew enough about the hazards of shifts in vehicles' rear ends to make him realize that such repairs cannot be delayed to some future point in time when the trucks are taken to the shop for routine maintenance, such as lubrication of the chassis and change of engine oil. In view of the hazards which are associated with the violations, I find that USS should be assessed $100 for each violation under the criterion of gravity.

Good-Faith Effort To Achieve Rapid Compliance

As I have previously indicated, an operator is considered to have shown a normal good-faith effort to achieve rapid compliance if he corrects an alleged violation within the time provided for abatement in the inspector's citation. It must be recalled that the inspector originally cited the violations here involved in orders of withdrawal which do not establish a time for abatement because normally the operator's personnel have been withdrawn from the area of danger, except for those employees who must remain at the place where the hazards exist for the purpose of correcting the violation. Since a withdrawal order disrupts production, it is generally assumed that an operator will correct the violation as soon as possible in order to obtain a termination of the order so that production can be resumed.

Inasmuch as the orders were written on March 9, 1981, after an investigation which was completed sometime after February 13, 1981, and

inasmuch as the investigation pertained to a truck which rolled over on January 22, 1981, the criterion of good-faith abatement is difficult to evaluate. Nevertheless, there are some factors which ought to be taken into consideration under the criterion of good-faith abatement. First, it must be recalled that USS investigated the truck's rollover on January 22, 1981, the day that it flipped over. The results of USS's investigation of the incident were recorded in a report which has been received in evidence as Exhibit M-7 in this proceeding. The report is a model of brevity and lists the following six steps to prevent recurrence of a truck's rolling over:

1. Small truck garage will check rear springs by wire brushing and visual inspection.
2. Contact operators on checking undercarriage on trucks.
3. Use vehicle inspection sheets.
4. Red tag trucks with questionable alignment.
5. Contact operators to check weight of items being carried on the shovel trucks.
6. Publicize.

Although USS's brief has sought to deny that its formen were in any way at fault in contributing to the rollover of the No. 856 truck, the list of steps which USS adopted to prevent a recurrence of the rollover reveal that USS had recognized, long before MSHA investigated the incident or wrote the citation and order here involved, that its procedures needed to be improved and greater care needed to be taken in reporting defects in equipment. If the inspections cited in the first two steps above had been taken prior to or on January 21, 1981, the shift in the rear end of No. 856 truck would have been detected and corrected before the shift became serious. If the first two steps had not resulted in detection of the shifted rear end, steps 3 and 4 would have brought about a recording of the fact that the defect existed and would have prevented the truck from being used until the defect was corrected. Steps 5 and 6 would also have had a salutary effect in making the employees aware of their responsibilities in the area of reporting defects before those defects result in accidents.

When the inspector terminated Order No. 293740 (now Citation No. 293740) and Order No. 296501, he indicated that USS had procedures for carrying out the provisions of sections 55.9-1 and 55.9-2. The inspector did not recommend any corrective action which USS should take which it had not already taken. Moreover, it must be recognized that USS had completed its investigation and had adopted the six remedial steps described above before the inspector had even begun his investigation in response to the complaint which MSHA had received under section 103(g)(1) requesting that the accident be investigated.

The purpose of assessing penalties under the Act is to deter companies from future violations of the mandatory safety and health standards. When a company has written proof of the fact that it had already recognized the shortcomings of its supervisory personnel in allowing the truck to get into a condition which could cause it to roll over and has taken steps to correct

those shortcomings before MSHA ever cites it for the violations, it is obvious that assessing large penalties would be unwarranted and would not accomplish the purpose for which they were placed in the Act. Therefore, I believe the facts in this proceeding warrant a finding under the criterion of good-faith abatement that any penalties assessed under the other five criteria should be reduced by 50 percent under the criterion of good-faith abatement.

By way of summary, I have found above that for each violation, USS should be assessed a penalty of $10 under the criterion of history of previous violations, $400 under the criterion of negligence, and $100 under the criterion of gravity, or a total penalty of $510 for each violation. Reduction of the penalty by 50 percent under the criterion of good-faith abatement means that USS should be assessed a penalty of $255 for the violation of section 55.9-1 and $255 for the violation of section 55.9-2.

It should be noted that the parties' stipulation with respect to the criterion of good-faith abatement stated: "U. S. Steel demonstrated good faith in abating the citations at issue within the time given for abatement" (Tr. 12). As I have explained above, the stipulation is inapplicable as to the violations of sections 55.9-1 and 55.9-2 because both violations were originally cited by the inspector in orders of withdrawal which do not specify a time within which the violations are required to be abated. While it is true that Order No. 293740 has been modified to Citation No. 293740, the modification did not include an abatement period (Exh. M-8).

It can be argued, of course, that the criterion of good-faith abatement is inapplicable to violations cited in orders of withdrawal, but there is nothing in section 110(i) which provides that the criterion of good-faith abatement should be ignored in assessing any civil penalty. Moreover, the criterion of good-faith abatement can hardly be ignored in this instance when it is considered that USS abated both violations before they were cited by adopting procedures which should assure that the violations do not again occur. Since USS had abated the violations before they were cited, it cannot be shown that USS was under any coercion to act swiftly because its plant was under any kind of closure order.

I am aware that MSHA's brief (p. 13) recommends that USS be assessed a civil penalty of $1,000 for the violation of section 55.9-1 and a penalty of $1,500 for the violation of section 55.9-2, but MSHA's brief does not discuss any of the six criteria other than negligence and gravity and does not discuss any of the ameliorating aspects of the violations which warrant the assessment of the moderate penalties which I have determined should be imposed.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The notice of contest filed on February 23, 1981, in Docket No. LAKE 81-102-RM is denied and Citation No. 293736 issued January 22, 1981, is affirmed.

(B) The notice of contest filed on February 23, 1981, in Docket No. LAKE 81-103-RM is denied and Citation No. 293739 issued February 9, 1981, is affirmed.

(C) The notice of contest filed on March 27, 1981, in Docket No. LAKE 81-114-RM is denied and Citation No. 293740 issued March 9, 1981, as modified, is affirmed.

(D) The notice of contest filed on March 27, 1981, in Docket No. LAKE 81-115-RM is denied and Order No. 296501 issued March 9, 1981, is affirmed.

(E) Within 30 days from the date of this decision, United States Steel Corporation shall pay civil penalties totaling $2,100.00 which are allocated to the respective violations as follows:

Docket No. LAKE 81-152-M

Citation No. 293740 3/9/81 § 55.9-1	$ 255.00
Order No. 296501 3/9/81 § 55.9-2	255.00
Total Penalties Assessed in Docket No. LAKE 81-152-M ...	$ 510.00

Docket No. LAKE 81-167-M

Citation No. 293736 1/22/81 § 103(a) of Act	$1,510.00

Docket No. LAKE 81-168-M

Citation No. 293739 2/9/81 § 103(a) of the Act	$ 80.00
Total Penalties Assessed in This Proceeding	$2,100.00

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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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 15 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 82-18
Petitioner	:	A.C. No. 11-00598-03105
v.	:	
	:	Eagle No. 2 Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Thomas R. Gallagher, Esq., St. Louis, Missouri, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

This case was commenced by the filing of a Petition for the assessment of a civil penalty for an alleged violation of the mandatory safety standard contained in 30 C.F.R. § 75.304, requiring an on-shift examination of each working section for hazardous conditions and the immediate correction of any such conditions. Pursuant to notice, the case was heard in St. Louis, Missouri on February 17, 1982. Federal Mine Inspector Harold Gulley, Thomas Dobbs, and Federal Mine Inspector Supervisor Mike Wolfe testified on behalf of Petitioner. Foremen Marvin Rash and Bill Chubb, Mine Manager Bob McPeak, Superintendent Forrest Younker and Environmental Technician Marty McDonald testified on behalf of Respondent.

Respondent waived its right to submit a posthearing brief and made a closing argument on the record. Petitioner filed a posthearing brief. Based upon the entire record including the testimony and exhibits introduced at the hearing, and the contentions of the parties, I make the following findings of fact and conclusions of law.

APPLICABLE REGULATORY PROVISIONS

30 C.F.R. § 75.200 provides as follows:

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.

30 C.F.R. § 75.202 provides as follows:

The operator, in accordance with the approved plan, shall provide at or near each working face and at such other locations in the coal mines as the Secretary may prescribe an ample supply of suitable materials of proper size with which to secure the roof of all working places in a safe manner. Safety posts, jacks, or other approved devices shall be used to protect the workmen when roof material is being taken down, crossbars are being installed, roof bolt holes are being drilled, roof bolts are being installed, and in such other circumstances as may be appropriate. Loose roof and overhanging or loose faces and ribs shall be taken down or supported. Except in the case of recovery work, supports knocked out shall be replaced promptly.

30 C.F.R. § 75.304 provides as follows:

> At least once during each coal-producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so. Any such conditions shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such conditions to a safe area, except those persons referred to in section 104(d) of the Act, until the danger is abated. Such examination shall include tests for methane with a means approved by the Secretary for detecting methane and for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary.

30 C.F.R. § 75.1722 provides as follows:

> (a) 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.
>
> (b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.
>
> (c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Findings of Fact

1. At all times relevant to this proceeding, Respondent was the operator of an underground coal mine in Gallatin County, Illinois, known as the Eagle No. 2 Mine.

2. Respondent is a large mine operator. The subject mine is a medium sized mine. Its products enter interstate commerce.

3. From August 13, 1979 to August 24, 1981, Respondent had 551 paid violations of mandatory health and safety standards. Thirty-two of these violations involved 30 C.F.R. § 75.200; 18 involved 30 C.F.R. § 75.202; 6 involved 30 C.F.R. § 75.304 and 14 involved 30 C.F.R. § 75.1722(a).

4. On August 13, 1981, the conveyor chain and sprocket on the ratio feeder in the 5 South off 3 Main East section of the subject mine had an exposed area measuring approximately 3-1/2 inches by 16 inches not protected by a guard. The feeder was energized and in service.

5. Inspector Gulley issued a citation charging a violation of 30 C.F.R. § 75.1722 because of the condition described in Finding of Fact No. 4.

6. The condition described in Finding No. 4 had been present for more than one shift and Respondent should have known of it.

7. The condition was moderately hazardous. A number of miners would be expected to travel between the feeder and the ribs. Although they would be unlikely to put their hands in the unguarded area, a slip or fall could result in their doing so unintentionally and injuring a finger, hand or arm.

8. Inspector Gulley issued a citation on August 13, 1981, charging a violation of 30 C.F.R. § 75.202 because of overhanging ribs and face in four different entries in the 5 South off the 3 East Section of the subject mine.

Discussion

There is little question but that there were overhanging faces and ribs in the entries as cited. Respondent's positions concerning the overhangs are (1) in conventional mining using air docks rather than explosives, overhangs at the face are unavoidable; (2) the mining conditions were such with numerous sulpher balls present in the coal seam as to make straight cutting difficult; (3) the overhanging faces and ribs in question were not hazardous; (4) the area in question was "dangered off" and the overhanging areas would have been taken down in the normal mining cycle. The standard is clear and requires overhangs to be taken down or supported, regardless of whether they occur unavoidably (as Respondent contends) or could be avoided or minimized by better mining practices (as MSHA contends).

I accept the opinion of Inspector Gulley that these conditions were hazardous. There is a sharp dispute as to whether there was a danger sign warning miners to stay out of the area. Inspector Gulley and Miner's representative Thomas Dobbs testified that there were no danger signs; Foreman Marvin Rash and Environmental Technician Marty McDonald testified that there were danger signs. I accept the testimony of Gulley and Dobbs in part because I find it difficult to believe that danger signs were present and company representatives did not point them out when told of an impending citation. I note also that Foreman Rash was not present at the crosscut where the conditions were cited at the time the citation was issued.

9. I find that there were overhanging ribs and faces in four different entries in the 5 South off the 3 East section of the subject mine on August 13, 1981, and that these conditions were hazardous to miners.

10. The conditions described in Finding No. 9 were known to Respondent.

11. Inspector Gulley issued a citation on August 13, 1981, charging a violation of 30 C.F.R. § 75.200 because of a violation of the roof control plan: (1) the face of No. 5 entry was not bolted to within 6 feet of the face and it was cut, drilled, and shells were put in holes; (2) an area in the crosscut between entries 2 and 3 measured was not bolted although it measured 18 feet 9 inches.

Discussion

Once again there is a conflict in the testimony as to whether the area in question was dangered off. For the reasons given with respect to the cited violation of 30 C.F.R. § 75.202, I accept the testimony of Inspector Gulley and Mr. Dobbs, and find that there were not danger signs in the area at the time the citation was issued.

12. I find that the conditions in the face of No. 5 entry and in the crosscut between entries 2 and 3 in the 5 South off 3 East Section in the subject mine were as described in the citation referred to in Finding No. 11.

13. The conditions described in the citation referred to immediately above were hazardous. They could have resulted in serious injuries to miners. They were obvious and were known or should have been known, to Respondent.

14. On August 13, 1981, Inspector Gulley issued another citation alleging a violation of 30 C.F.R. § 75.304 because he concluded, based on the conditions for which the three previous citations were issued, that Respondent did not perform a proper on-shift examination.

15. Inspector Gulley returned to the mine on August 24, 1981. He issued two citations. One citation charged a violation of the roof control plan because an entry was driven 26-1/2 feet wide when the plan limited it to 20 feet wide and two crosscuts were wider than permitted by the plan. The area was not "dangered out" and timbers were not set as required by the plan. I find that the conditions were as charged, that they created a hazard and that they were known to Respondent. The second citation charged a violation of 30 C.F.R. § 75.202 because of overhanging ribs from 48 inches to 60 inches in all the faces in entries 1 to 6 and in the last open crosscut. I find that the conditions were as charged, that they created a hazard, and that they were known to Respondent.

16. Because he concluded that the conditions he found demonstrated that Respondent had again not conducted a proper on-shift examination, Inspector Gulley issued an order of withdrawal on August 24, 1981, charging a failure to abate the citation alleging a violation of 30 C.F.R. § 75.304 issued on August 13, 1981.

Issues

1. Whether the evidence establishes that Respondent failed on August 13, 1981, during the coal producing shift, to examine each working section for hazardous conditions, and to immediately correct any such conditions?

2. If a violation was established, what is the appropriate penalty?

(a) Does the evidence establish a failure to abate the violation charged?

Conclusions of Law

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Respondent is a large operator, and this conclusion will be reflected in any penalty assessed.

3. Respondent has a moderately serious history of prior violations, and this conclusion will be reflected in any penalty assessed.

4. The Violation

The basic issue in this case is whether a violation of 30 C.F.R. § 75.304 can be established by inference. The only direct evidence is the testimony of Respondent's foreman that he did in fact conduct an on-shift examination. The inspector's conclusion that Respondent failed to conduct such an examination, or failed to conduct it properly, is based on what he observed after the fact. The terms of the mandatory standard require (1) an examination for hazardous conditions and (2) an immediate correction of such conditions. I conclude that a violation of these requirements may be established by evidence of uncorrected hazardous conditions existing during a coal producing shift. I conclude further that the evidence in this record establishes that Respondent failed to conduct the required examination on August 13, 1981, and failed to immediately correct hazardous conditions. A violation of 30 C.F.R. § 75.304 was established.

5. The Penalty

The inspector cited three violations of mandatory safety standards on August 13, 1981, prior to citing the violation involved herein. I have found that they all involved hazardous conditions. The violations of 30 C.F.R. §§ 75.200 and 75.202 were serious; the violation of 30 C.F.R. § 75.1722(a) was less serious. In any event failure to conduct proper on-shift examinations for hazardous conditions is itself serious. The conditions cited had been found on many previous occasions. MSHA supervisory Inspector Wolfe testified that the subject mine had been guilty of poor mining practices for many months, especially with respect to overhanging ribs and faces. I conclude that the violation was the result of Respondent's negligence.

The conditions found by Inspector Gulley on August 24, 1981, establish that Respondent (the fact that different foreman were involved is irrelevant) continued its poor mining practices and failed to sufficiently concern itself with proper on-shift examinations. A closure order was required before the practice was corrected. I conclude that Respondent did not attempt in good faith to achieve rapid compliance after notification of a violation.

Based on these findings and conclusions, an appropriate penalty for the violation is $500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision, the sum of $500 as a civil penalty for the violation of 30 C.F.R. § 75.304 found herein to have occurred on August 13, 1981.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5205 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 15 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-244-M
Petitioner	:	A.O. No. 48-00155-05072-A
	:	
v.	:	Docket No. WEST 81-245-M
	:	A.O. No. 48-00155-05073-A
J. D. MILLER,	:	
WILBUR VANDERPOOL,	:	Alchem Trona Mine
Respondents	:	

DECISIONS

Appeareances: J. Philip Smith, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; John A. Snow, Esquire, Salt Lake City, Utah, for the respondents.

Before: Judge Koutras

Statement of the proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the individually named respondents pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c). The respondents were charged with "knowingly" authorizing, ordering or carrying out three alleged violations which are detailed in an imminent danger order issued by an MSHA inspector on November 12, 1979, pursuant to sections 107(a) and 104(a) of the Act.

The respondents filed timely answers to the proposals, and pursuant to notice, hearings were conducted in Green River, Wyoming, December 2-3, 1981, and the parties appeared by and through counsel and participated fully therein. Post-hearing proposed findings and conclusions, with supporting arguments, were filed by the parties and I have considered those arguments in the course of these decisions.

Issues

The principal issue raised in these proceedings is whether the individually named respondents knowingly authorized, ordered, or carried out the alleged violations. If they did, the next question presented is the appropriate civil penalty which should be assessed against them for the violations. Additional issues raised by the parties are discussed in the course of the decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(c) of the 1977 Act, 30 U.S.C. § 320(c).

3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

The section 107(a) and 104(a) Imminent Danger Order No. 0575918 was issued on November 12, 1979, and the conditions or practices are described as follows on the face of the citation:

> (57.20-3, 57.20-9) An imminent danger in the 200 belt tunnel existed in that a large quantity of coal, and coal dust had spilled from the area conveyor belt. A quantity of diesel fuel was floating on the ground water in the area. This created an imminent fire hazard. (57.17-1) The stairway to the area was not lighted, so that during this shift, 1545 to 2345 hours, personnel could not safely use this stairway. Only personnel that are needed to correct these deficiencies are to enter this area.

The citation was abated on November 11, 1979, at 3:00 p.m., and the inspector's notice in this regard states as follows:

> The imminent danger in the 200 belt tunnel was abated (57.20-3, 57.20-9). The coal and coal dust in the area had been properly cleaned. (57.17-1). The area had been properly lighted.

Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Gerry Ferrin testified as to his background and experience and confirmed that he conducted an inspection at the mine in question on November 12, 1979. He was accompanied by fellow inspector David Ainsbach, and he stated that the inspection was conducted as a result of a safety complaint made by miners at the mine and communicated through union President Terral Smith. The mine produces trona, which is a sodium carbonate compound. The citation which he issued concerned certain conditions at the mine coal handling facility used to unload and transport coal to certain storage areas and to the boilers which are used to operate the mine power plant. Coal was unloaded onto belts in two underground tunnels identified as the 200 and 201 tunnels, and the coal was transported on the tunnel conveyor belt system to either the storage areas or directly to the plant boilers (Tr. 7-20).

Upon inspection of the 201 tunnel area in question, he observed that the belt was running, that diesel fuel was present on top of water which had accumulated in the trenches along the belt areas, there was a

strong odor of diesel fuel, visibility was poor due to leaky steam, the lights on the tunnel stairway were out, and the belt idlers were running in the coal and coal dust which had accumulated along the belt. He issued an imminent danger order because he considered all of the conditions which he found and which are described on the face of the citation to be imminently dangerous. He identified six pictures (exhibit P-4), which he took at the time of his inspection as representative of the conditions which he observed. While there was some illumination in the area along the tunnel, visibility was poor due to the steam leak and he stated that he did not sample the coal accumulations which he observed. The area was not posted or dangered off and he measured the accumulations as ranging from zero to 10 inches. He observed no rock dust applied to the coal accumulations, and some of the accumulations were deposited on dry surfaces. The belt conveyor was at "table height" level off the floor and he observed "explosive coal dust" in the areas cited (Tr. 20-33).

Inspector Ferrin described the coal handling facility as including both the 200-201 tunnels and he described the area where the two belt tunnels came together as the coal transfer point where the coal being transported dumps from the 200 belt onto the 201 belt. He stated that he observed possible ignition sources in or near the coal accumulations, and these included the belt rollers and idlers, power cables which were present in the adjacent 200 tunnel, and a "faulty" electrical light circuit. However, he conceded that he did not trace the circuit out or otherwise determine what the problem was. His concern was over a possible explosion hazard due to the coal dust accumulations running in the belt idlers. He indicated that two maintenance men, Douglas Malone and Gary Dotson, were assigned to do some welding work on the steam leak in the area but that they did not do the work because they believed the conditions were dangerous and they refused to work there. It was their complaint that prompted the safety complaint to the union president, who in turn reported the conditions to MSHA. Inspector Ferrin stated that his investigation determined that the lighting conditions had existed for two days prior to his arrival on the scene. Although the mine is classified as gassy, his methane readings detected no presence of methane and the area cited was a "working place" within the meaning of the regulations. (Tr. 60-74).

With regard to the lack of lighting on the stairway leading to the 201 tunnel, Inspector Ferrin stated that the condition presented a slipping or falling hazard, and with the presence of steam in the area, a drop in temperature would have resulted in moisture freezing on the stairway, thus adding to the hazard. He indicated that Mr. J. D. Miller was the power house superintendent in charge of the entire coal handling facility, which was part of the power plant, and that the particular shift foreman in charge was Mr. J. W. Vanderpool. Mr. Ferrin was of the opinion that the shift foreman was responsible for dangering off or posting any area that is hazardous and not known to other employees. He saw no barricades or danger sign in any of the areas in question, and he detailed what he believed to be the area which would be affected by any fire from the accumulations of materials which he cited (Tr. 74-88).

Mr. Ferrin could not estimate the time required to correct the illumination problems which the respondent was having, and he described the abatement efforts made after the order issued (Tr. 90). The diesel fuel problem has not been totally abated and he detailed the problems connected with the original fuel spill in the area, and indicated that the problems connected with the spill had been lessened to a great extent, and with the removal of the ignition sources which he observed the mere presence of any remaining fuel from the spill would not be an imminent danger since he was more concerned with the build-up of coal accumulations. He also indicated that the diesel fuel problem is a long term problem and that company management has diligently applied itself to solving it (Tr. 89-98).

On cross-examination, Mr. Ferrin reiterated the procedures connected with the coal handling tunnels, and indicated that the coal handling areas are not part of the gassy portion of the mine in question. He defined "float" coal dust as "airborne" dust, and while such airborne dust was in the 200 tunnel, that was not his immediate concern at the time of his November 12th inspection. Mr. Ferrin referred to his previous deposition of November 20, 1981, and conceded that he stated that he did not believe that the airborne or float dust in question was an explosion hazard, but that it was a fire hazard (Tr. 114-119). He went on the describe what he believed were ignition sources, and stated that because of the dust present any dust control or collection devices were not working, but he conceded he made no effort to determine the presence of any such dust collecting devices (Tr. 123).

Mr. Ferrin testified that the welders who were sent in to the tunnel to do some work were not under the supervision of Mr. Miller or Mr. Vanderpool, but that they would have requested welders to work on and repair any steam leaks. However, he saw no work orders for such work which may have been signed by these individuals, and he had no knowledge as to whether the welders consulted or advised them they were going into the tunnel (Tr. 126-127). He also described the responsibilities of the powerhouse and section foremen (Tr. 129-133).

In response to questions from the bench, Mr. Ferrin confirmed that he would not have issued an imminent danger order had the belt been shut down and the area dangered off. His citation for a violation of 57.20-3, would normally be a "housekeeping" situation for failure to clean up accumulations which presented a falling, slipping, or tripping hazard. However, on the day in question, he was concerned with a combination of conditions which he believed presented a possible disaster and that is why he issued an imminent danger withdrawal order (Tr. 139-143).

Mr. Ferrin described the extent of the coal accumulations which he found along the entire length of the 200 belt tunnel and stated that they were a combination of spillage and accumulations (Tr. 144). He based his opinion that Mr. Vanderpool knew of the conditions on the fact that he had admitted to him that the cited area needed clean up but he

refused to send anyone there because of the lighting situation. He did not consider Mr. Vanderpool's refusal to send men to the area as unreasonable, but did consider the fact that he was not "thorough enough" (Tr. 147). As for Mr. Miller, he believed that he should have known about the conditions cited because the problems had existed for more than one shift and the area was not so large as to preclude periodic inspections (Tr. 148).

Mr. Ferrin testified that the illumination problem had existed for at least two days prior to the issuance of the citation and that Mr. Miller admitted to an MSHA conference officer that he and Mr. Vanderpool had discussed the problem just prior to beginning of the shift (Tr. 149). Mr. Ferrin had no knowledge as to the specific circuit problems connected with the lack of illumination (Tr. 151).

Inspector Ferrin's Deposition

In his deposition of November 30, 1981, (pg. 9), Inspector Ferrin stated that he observed coal and coal dust built up on the belt conveyor table so that the belt and idlers were actually running in the coal. He considered this condition to be a fire hazard and a hazard to personnel entering the area due to a possibly "slick or occluded or blocked stairway" (pg. 10). He also observed large quantities lying on the floor, spilled or in unconsolidated piles in the walkway at the foot of the drop shoot, and at other unconsolidated areas through the 200 tunnel. The walkways going from the 200 to the 201 tunnel areas were working areas where men would be working (pgs. 12-14). The accumulations in the walkways ranged from zero to eight inches (p. 14). He considered the accumulations of coal and coal dust to be hazardous because they constituted a fire and ignition hazard and a possible slip and fall injury (p. 15). Methane readings indicated zero (p. 16).

Nowhere in his deposition does Mr. Ferrin refer to float coal dust. However, at pg. 16, when asked whether he made any determination that the coal dust was at an explosive level, the matter of float dust was first introduced by respondent's counsel snow, and Mr. Ferrin made the following responses:

> Q. Did you make any determinations as to whether the coal was at an explosive level?
>
> A. Would you please define "dust". You're talking about float dust? lying dust? what?
>
> Q. Let's go with the dust in the air, float dust.
>
> A. Okay. It was very hard to make a determination because of steam and other--it was a pretty blind area to walk into.

Q. Do you have an opinion whether or not that was an explosive area?

A. I don't believe the aerial borne, or float dust, was a hazard.

Q. For explosive purposes?

A. I don't believe for explosive purposes, right.

Q. What about the dust on the ground? I forgot what you called it.

A. On the conveyor table.

Q. What about that dust?

A. Yes, I did consider that as a very serious hazard.

Q. A fire hazard?

A. Yes.

Q. How come?

A. It burns.

Q. Well, what's the--

A. It's very easily ignitable.

Q. Very easily ignitable?

A. Yes.

Q. What is the ignition source?

A. Conveyor idlers, conveyor belts, hot bearings. Virtually anything. People working in the area.

Inspector Ferrin went on to state that at the time of his inspection he had a "quick discussion" with Mr. Vanderpool, but he could recall no discussion with Mr. Miller. Mr. Vanderpool told him that he had instructed two of his people to stay out of the tunnel area because of the lighting problem. The track mobile operator and belt operator confirmed the fact that Mr. Vanderpool had instructed them to stay out of the area because of the lighting problems and that they were advised not to clean up the area because of the lighting problem (pgs. 22-23).

Mr. Ferrin confirmed that he inspected the tunnel upon abatement of the order. The tunnel had been cleaned up, the lights were working, but he did not know whether the diesel fuel problem has been taken care of since he has not been back to the mine for over a year. However, as of the time the abatement took place, the ground water and diesel had subsided to a "lesser degree" and the diesel odor was not as strong (pg. 25).

Douglas Malone testified that in November 1979, he was employed at the mine as a maintenance mechanic. On November 12, 1979, at approximately 5:00 p.m. at the start of his shift Foreman Larry Youngbird assigned him and Gary Datson to go to the area of the 201 tunnel to weld a leak in the steam system. This leak was in the transfer point where the 200 and 201 tunnels come together. Mr. Malone had been in the area for two days prior to November 12 working on revisions in the heating system. He proceeded to the stairway leading to the 200 belt. The stairway lights were out, and after going down two or three steps his glasses fogged up from the steam which was present in the area and he observed airborne coal dust mixed with the steam. He also observed large accumulations of coal and oil at the bottom of the stairwell, and the belt was running (Tr. 156-160).

Mr. Malone testified that after observing the conditions in the area of the 200 tunnel stairwell he concluded that had he proceeded to weld at the area of the steam break an explosion or fire would have occurred due to the presence of the coal accumulations and dust and he immediately left the area and informed Mr. Youngbird that he believed the conditions were hazardous and that he would not work there until such time as the area was cleaned up. Mr. Youngbird said nothing about the conditions and Mr. Malone did not believe that Mr. Youngbird would have sent him to the area to weld had he known about the hazardous conditions in the area. (Tr. 160-164).

Mr. Malone stated that due to the extent of the coal accumulations, the conditions probably existed for five days prior to November 12. He also indicated that the area had not been barricaded or dangered off. He also believed that the area cited was the responsibility of the power house superintendent, Mr. Miller and that Mr. Vanderpool was the shift supervisor. Mr. Vanderpool supervised seven to nine men and that Mr. Miller had approximately 30 men under his supervision (Tr. 164-168).

Mr. Malone stated that he complained about the conditions which he found to Mr. Gary Datson who was his union shop steward at the time and that Mr. Datson in turn reported the matter to Mr. Terral Smith, the local union president, and Mr. Smith went to the area to inspect the conditions. Mr. Malone believed that Mr. Vanderpool and Mr. Miller should have been aware of the conditions present in the 200 tunnel because they were responsibile for the area. Mr. Malone also alluded to several fires which had occurred in the area a year or so earlier, but he indicated that they were quickly extinguished. He also believed that a new wire was installed to correct the illumination violation. (Tr. 168-177).

On cross-examination, Mr. Malone explained the process for obtaining a "welding permit", and stated that it is issued after the process and maintenance foreman had examined the area where the work was to be performed. On the day in question, he had such a permit "for outside the 200 area" (Tr. 177). He stated that Mr. Vanderpool would normally issue such a permit, but on the day in question he had no such permit for the 200 tunnel and he admitted that he went to the tunnel in question without a permit. He further admitted that he went there "to look" and not to weld (Tr. 179). He also admitted that he would not have welded without such a permit and that normal procedures would have required Mr. Vanderpool to inspect the area before issuing a permit (Tr. 179).

Mr. Malone stated that some of the lights in the 201 tunnel were on, some were out, and two light globes were covered with coal dust. He had no knowledge that Mr. Miller or Mr. Vanderpool issued any work orders for the repair of the steam leak, but did say that Mr. Youngbird asked him to weld the steam leak since he would be in the area anyway (Tr. 181). Mr. Malone described the fire sprinkler deluge system installed in the tunnels and indicated that it was a good system (Tr. 182). He did allude to two past minor fires in the tunnels caused by a rag and some insulation burned by a welding torch (Tr. 183). He also indicated that welding is often done without permits and that it was not unusual for any number of workmen to be in the 200 and 201 tunnels (Tr. 185).

Mr. Malone stated that he believed Mr. Vanderpool to be a good safety foreman, but that he should have dangered the cited area off and was neglectful for not doing so (Tr. 186). Mr. Malone believed that a fire would have occurred had he lit his welding torch in the areas in question (Tr. 186). He also believed that Mr. Miller had been relieved of his duties at one time for not insuring that the tunnel areas were kept clean (Tr. 197). He also alluded to past complaints made to MSHA for failure to clean up the tunnels and stated that citations had been issued for these conditions in the past (Tr. 199).

Terral J. Smith, employed by Allied Chemical, testified that he has been president of the local union for three years, and was in that capacity on November 12, 1979. He confirmed that he had received a complaint from Gary Datson, the union steward, by telephone call to his house, concerning the conditions in the 200 belt tunnel. Mr. Datson informed him that he and another man had been assigned to do some maintenance work in the tunnel, and when they went there they had no lighting and had to use their flashlights. They found steam and coal dust all around the area and felt it was an unsafe imminent hazard and asked Mr. Smith, for some help. Mr. Smith stated that he then called MSHA that same evening and asked for an investigation of the tunnel conditions in the coal handling area, which he described as encompassing both the 200 and 201 tunnels. He described the 200 tunnel as the unloading area and the 201 tunnel as the transfer tower. As the result of his complaint, Insepctor Ferrin came to the area to conduct an inspection, and he (Smith) went to the plant and proceeded to the 200 tunnel area. After proceeding down the stairs, he observed a great deal of steam in the tunnel, went back up the stairs, and proceeded to the top of the 201 tunnel where he observed coal dust "stacked up" and "peaked

on the handrails". Dust was on the lights and under the belt, and the sump was full of water and coal dust, and he believed the belt was running. Although he observed lights at the 200 belt line tail pulley, and he saw none on the stairway. The light at the top of the stairs was not working, and he observed float coal dust in the air as well as coal dust piled in the area (Tr. 210-216).

Mr. Smith testified that the tunnel areas he visited were not dangered off, and that the responsibility for dangering the area off was with Mr. Miller and Mr. Vanderpool. He was of the opinion that the area should have been dangered off, and he believed the conditions he observed constituted an imminent danger and that is why he lodged a complaint with MSHA (Tr. 217-220). He examined a copy of the citation issued by Inspector Ferrin and agreed with his findings. He also believed that the coal accumulations presented a fire and explosion hazard and described the ignition sources which were present in both tunnels (Tr. 222). He confirmed that similar citations had been issued for similar coal build-ups in the tunnel and believed that Mr. Miller and Mr. Vanderpool were responsible for seeing to it that such conditions did not occur again (Tr. 223). Mr. Vanderpool admitted to him that he was aware of the coal and coal dust build-up as well as the fact that there was no lighting on the stairway in question. As for Mr. Miller, Mr. Smith stated that there was no way he could not have known about the conditions cited since he is responsible for everything in the area as well as for the work of his supervisors (Tr. 226). Mr. Smith referred to several "Labor-Management Safety Inspection Reports", exhibit P-10, to support his contention that mine management was aware of the conditions concerning the coal build-ups and lack of lighting (Tr. 226-247).

Mr. Smith testified that Mr. Malone told him that he (Malone) and Gary Datson had gone to the 200 and 201 belt tunnels on November 12, 1979, to do some welding work on a steam leak. Mr. Smith reiterated that he too went there that same day and found the light on the entry to the 200 stairway leading into the 200 tunnel was out. The purpose of the light is to illuminate the stairway, and he did not believe that the lack of light would have prevented anyone from going down the stairway to clean the area because they could use cap lamps and flash lights to find their way down the stairway (Tr. 261-264). Further, when he went to the area of the 200 tunnel during the inspection the lights along the belt where the coal piles were located were all on, and Mr. Smith's concern was that "they sent machanics down there to fix something, to do welding, in an area that had coal dust and piles of it all around, where they could have set off the whole damn place" (Tr. 268). The belt was running at that time, and only Mr. Vanderpool and Mr. Miller had the authority to shut it down (Tr. 270). It was also their responsibility to danger the area off (Tr. 274).

On cross-examination, Mr. Smith conceded that the conditions in the 200 tunnel which are the subject of the instant case have been a continuing problem spanning several years, and he alluded to several of the inspection reports which he previously identified and testified to

(Tr. 292-303). Mr. Smith indicated that he had been to the 201 tunnel three or four times during the period June 1, 1979 and November, 1979, and he confirmed that the tunnel should be cleaned up daily or small quantities of coal will accumulate over a couple of shifts. If left unattended, larger build-ups will occur (Tr. 306). He also indicated that with the belt running, coal will be dispersed into the air, but if the belt is operating properly not too much will disperse (Tr. 310).

In response to further questions, Mr. Smith stated that the coal moved along the belt tunnels in question is used to run the plant boilers and electrical generators, and he explained the coal dumping and transfer procedures to accomplish this task (Tr. 311-315). He believed that the accumulations of coal in the tunnel areas in question probably accumulated over a period of three or more shifts (Tr. 316). He also identified exhibit P-4 as a photograph of the 200 belt coal handling area and described the coal and coal dust accumulations on and about the belt rollers (Tr. 317-318).

Inspector Ferrin was recalled and confirmed that on the day of his inspection on November 12, 1979, the belt was running and this would contribute to the worsening of the build-up of coal and coal dust. He also believed that if the foreman or powerhouse superintendent were aware of the accumulations, the belt should have been shut down. He also confirmed that the stairway light was out and since someone could have fallen down the stairs, that condition was an imminent danger in and out of itself. Since the light was intended to light the access way, this was no excuse for not cleaning up the accumulations which were present in the tunnel. He identified several ignition sources which were present as portable lights, cap lamps, miner's lights, and belt rollers. The shift supervisor, Mr. Vanderpool and the plant superintendent, Mr. Miller had the authority to shut the belt down, and he confirmed that all of the violations were abated in less than 24 hours (Tr. 320-328). He also confirmed that when he first went to the 200 tunnel at 6:00 p.m., and discovered the conditions which he believed were an imminent danger the lights were on and the belt was running (Tr. 341).

Testimony and Evidence Adduced by the Respondent

Robert Gary Datson testified that he is presently employed by Allied Chemical Company as a maintenance foreman and on November 12, 1979, he was employed as a mechanic and also served as a union steward. He stated that he visited the 200 tunnel coal handling facility area on November 12 at approximately 4:30 p.m. after receiving a complaint that the tunnel area was dirty. He asked Doug Malone, his working partner and also a union steward to check the area out since he and Mr. Malone had been there the day before, November 11, and Mr. Malone reported that the area was "just as bad" on the 12th of November as it was on the 11th. Mr. Datson stated further that he walked into the tunnel area with the MSHA inspectors when they were there and he confirmed that there was oil and

water present, coal accumulations built up along the belt rollers, and a "tremendous amount of steam" in the area. He also stated that all of the tunnel lights were out except for those at the top of the tunnel stairway. In his opinion, the conditions in the tunnel coal handling area were a fire hazard, and had any welding work been done in that area the cutting torch would have been an ignition source (Tr. 342-348).

On cross-examination, Mr. Datson stated that he and Mr. Malone had worked in the 201 tunnel on November 11, and as he walked through the 200 tunnel to get to the 201 tunnel he observed the conditions which MSHA's inspectors had cited and considered hazardous. He confirmed that he has heard of sparks being generated along the belt line, that welding could cause sparks, and he indicated that he had in the past ignited a fire while working in a similar coal load-out area. He also testified that Mr. Youngbird did not assign him to do any welding work on November 12, but did assign him some work in the 201 tunnel on November 11, in order to fix a steam leak in the area. Mr. Datson stated that he would not perform any work in the 200 tunnel because he considered the conditions there to be hazardous. He also stated that on November 11, the 201 tunnel belt was running and that the area had not been barricaded. After his crew complained to him, he in turn complained to union president Terral Smith on December 12, 1979. He also indicated that Mr. Malone was not one of the people who complained to him.

Mr. Datson stated that shift foreman Vanderpool would have been directly responsible for the tunnel coal handling area at the time in question, and that Mr. Miller, as the power house superintendent, would have had the overall responsibility for the tunnel areas in question since they are considered part of the power house operations.

Mr. Datson testified that the stairway light leading to the 200 tunnel was working and lit on both the 11th and 12th of November, but that the lights used to illuminate the tunnel area were not operating on those days. In addition, he believed that the coal accumulations which were cited by inspector Ferrin had to have existed for at least two days prior to the inspection, that the conditions were present on both November 11 and 12th and that on the 12th they were getting worse rather than better. He also believed that the accumulations were present for at least one full shift prior to November 11. He observed no airborne coal dust, has no idea what float coal dust is, and as far as he is concerned the conditions cited posed a fire hazard rather than an explosion hazard (Tr. 348-370).

Wilbur Vanderpool testified that he is employed by Allied Chemical as the power house operations foreman and that he had been in this position since ths spring of 1974. He confirmed that he was the shift foreman for the 4 p.m. to midnight shift on November 12, 1979, and indicated that his duties as foreman were to oversee the power house and coal handling facility operation. He identified Mr. J. D. Miller as his immediate supervisor,

and he stated that his shift is normally used to unload coal at the coal handling facility in question and the morning or day shift is normally used for clean up. Mr. Vanderpool described the coal unloading operation and stated that company policy dictates that no one is to be in the tunnel areas while coal is being unloaded, and no one is to be there for clean up while the belt is running. He was not sure whether the policy he alluded to is in writing, but indicated that it is his normal operating procedure (Tr. 370-374).

Mr. Vanderpool stated that he arrived at the mine on Monday, November 12, 1979, at approximately 3:20 p.m. and went to the foreman's office where he spoke with the previous shift foreman, Stan Daniels. He discussed the coal handling situation with Mr. Daniels and Mr. Miller, and in particular they discussed the fact that the coal handling tunnel areas had not been cleaned up. Mr. Vanderpool explained that they were experiencing problems with the lights and illumination in the tunnel areas in question and stated that he did not barricade the areas because he was trying to get the lights repaired and had specifically instructed the coal handler and track mobile operator not to go into the tunnel areas in question. These two men were normally assigned to the tunnel, and since the decision had been made to run coal on his shift, and since his men were under instructions to stay out of the area, he saw no need to barricade the areas (Tr. 375-387).

Mr. Vanderpool confirmed that he went to the tunnel area cited at approximately 4:00 or 4:15 p.m., after his discussion with Mr. Daniels, and observed the accumulations of coal and coal fines touching the belt rollers. He conceded the fact that coal is a combustible product and that a hazard was present in the areas in question. He also believed that in such an operation there was always a fire hazard present, but he did not believe that the conditions "were that bad", and that a water deluge system along the belt line would help in a fire situation. He also alluded to the fact that weather conditions will affect the coal handling process and that a chute plug which malfunctions may cause the tunnel areas to be literally buried in coal which is being dumped on the belts (Tr. 387-392).

On cross-examination, Mr. Vanderpool confirmed that the foreman's book entries for November 10, 1979, reflect that work was done on the coal spills in the coal handling facility. He also confirmed that he was required to inspect the area in question at least once during his shift, and that he was in fact the shift foreman during the period in question and that while he was not generally aware of the provisions of 30 CFR 57.18-2, requiring on-shift inspections, he acknowledged that his supervisors have told him that he is to inspect his area and to "watch out for the safety of my people" (Tr. 394-398).

Mr. Vanderpool stated that he and the previous shift foreman discussed te tunnel lighting problems on November 10, and that the problems were intermittent, at least through the swing shift of November 11, and that he inspected the 200 belt area that day as well as at 4:00 p.m. on November 12th,

and that coal and coal dust were found that day (Tr. 399-410). He stated that company policy dictated that mechanics, laborers, or electricians were not to go to the coal handling areas for clean-up or maintenance while the belts were running, and that if welding work was to be done in the area a permit was required to be obtained from him or another operating foreman (Tr. 414).

Mr. Vanderpool stated that he visited the area cited by the inspector at least once at the start of his shift at 4:00 p.m., and at least once thereafter before 6:00 p.m., and that he was concerned with any existence of float coal dust. He observed that the dust-collecting system was not operating, and after finding that it had been shut off ordered his people to turn it back on (Tr. 419). He did not know whether the fire deluge system was on or off during the time in question (Tr. 420). In his opinion, during the time he examined the 200 tunnel between 4 and 6 p.m. on November 12, 1979, the conditions which he found did not present a fire hazard which is "not any more than usual (Tr.423). He confirmed the fact that his principal concern on the day the citation issued was to insure that coal was loaded into the storage bunkers because they were getting low (Tr. 429).

Mr. Vanderpool testified that any operator in the belt area in question had the authority to shut the belt down in the coal handling facility if they encountered any trouble, and that while his permission was not required to do this he would ordinarily be informed of the fact that the belts were shut down (Tr. 431). He explained the decision to run coal on his shift during the day in question as follows (Tr. 433-434):

> Q. -- what was the criteria used in deciding to go forward with unloading coal cars, on your shift?
>
> A. We decided to, because of the lighting situation, to go ahead and unload coal, keep the people out of the area, because we felt because of this intermittent problem with the lights at this time that we did not want people in the area cleaning up -- I personally felt that I didn't want my people to go down in that area with the light situation the way it was, be working in that area, and in those conditions, and have the lights go out.
>
> Q. Were the electricians at that time working on the lights?
>
> A. I was told that they would be working on my shift until dark, by the electrical foreman. I did not observe, personally observe any electricians in the area of the tunnels when I went down there.
>
> Q. Was that a factor that was used in the decision to unload coal?

A. Yes, sir. I would say that would be one of the factors we made the decision to go ahead and unload coal, yes, sir.

Q. I'm trying to say what -- was that discussed at your meeting with Mr. Daniels and Mr. Miller?

A. That the electricians would be working on the lights? Yes, sir.

And, at pages 435-436:

A. I'm not saying that just because we have to produce that plant that I'm going to produce it come hell or high water. What I'm saying is, I felt that the coal spillage problem was not a real big hazard.

It was dirty, it was filthy, it was a tripping hazard, yes. Any coal spillage, whether it's that one or one on top of the mine, is a tripping hazard, if you have people going into that area.

I felt that the thing to do at the time -- J. D. Miller felt the same way -- was for that particular shift, because of the lighting problem, to keep the people -- my people, now, the operating people, to stay out of the problem. If they had a problem they were to call me and we would go ahead and unload coal that shift, hopefully, because we were told that there would be electricians down there working on the circuit. We were told this --

I don't personally view electricians down there. I was told that they'd be in the area.

In response to bench questions, Mr. Vanderpool testified that on the evening the order issued he was in the cited tunnel areas on two occasions and observed the accumulations of coal in question (Tr. 446). He conceded that he failed to barricade the area, and in hindsight candidly admitted that he should have barricaded the area to keep people out and then proceeded to unload coal (Tr. 450).

J. D. Miller testified that he is presently employed by Allied Chemical as engineering superintendent and has held that position since October 1, 1981. He was power plant superintendent from February, 1973 to February, 1978, a maintenance engineer from February 1, 1978 to June 28, 1979, and was temporarily assigned as power plant superintendent from June 28, 1979 to December 1, 1979, filling in for the regular superintendent who was sick. Mr. Miller stated that he holds a B.S. degree in mechanical engineering from Texas Tech and prior to being employed by Allied was employed by Texas Utilities for 19 years and his experience includes the operation of coal handling areas, boilers, dryers, and coal sampling.

With regard to the citation and order which was issued by Inspector Ferrin on November 12, 1979, Mr. Miller stated that he arrived at the mine on Monday, November 12, at approximately 7:45 a.m. He met with shift foreman Dan Daniels who informed him that the lights were out in the coal handling areas, and that the areas were dirty and had not been cleaned up since Saturday. Mr. Miller stated that he called for an electrician to check the lights but was advised that none would be available until the afternoon 4 p.m. shift. Under the circumstances, the men assigned to Mr. Daniel's coal handling shift were assigned to clean the tripper room and other areas and no coal was unloaded during that shift.

Mr. Miller states that sometime between one and three p.m. he proceeded to the 201 tunnel area with a flash light. He then climbed up a ladder looked into the 200 tunnel area with the aid of his flash-light and also observed coal accumulations in that tunnel. The lights in both tunnels were out and he decided that it would be hazardous for men to clean-up the accumulations without any tunnel lights. He discussed the situation with Mr. Daniels, and the decision was made to unload and run coal on Mr. Vanderpool's 5 p.m. shift. He believed this would not be hazardous because the two men normally assigned to the tunnels would not be working there and normal company operating procedures required that men not work in the tunnels while the belts were running.

Mr. Miller stated that at the time he initially viewed the coal accumulations, he was not concerned with any explosion hazard because the belts were not running and therefore there were no ignition sources present, and the belt idlers were made of rubber. Mr. Miller stated further that he did not work on Saturday and Sunday, November 10 and 11, and was not aware of the conditions in the tunnel. He was aware of the leaking steam problem but did not consider that hazardous and stated that it aided in keeping the coal accumulations moist and wet. He believed that it would have been unsafe for men to clean-up the coal accumulations while the tunnel lights were out (Tr. 45-1467).

On cross-examination, Mr. Miller confirmed that he went into the coal handling area on the afternoon of November 12, 1979, sometime between one and three-thrity in the afternoon. The belt was not running while he was there since no coal was run that day. He stayed in the area for about 20 minutes and could not say whether the belt was running at other times during the day. However, he did indicate that even though coal was not run, the belt could still be running, and the decision not to run coal was made by him and Mr. Daniels at 8:15 that morning. He also indicated that when Mr. Vanderpool's shift began that day, the decision was made to run coal (Tr. 467-472).

Mr. Miller confirmed that during the day shift on November 12 when he went to the coal handling area he observed coal and coal dust accumulations and he described the area as "dirty". He also observed "quite a bit of steam in the atmosphere", and saw no float coal dust because the belt was not running. He gave the order to run coal on Mr. Vanderpool's shift, and normal procedure is to run coal until the coal storage

bunkers are filled and then the belt is shut down. He confirmed that the accululations of coal and dust he observed were "more than normal", four to five inches in places, and that it was possible that once the belt started up again the accumulations would increase because of possible spillage (Tr. 473-475).

Mr. Miller stated that it was his understanding that men would work on the tunnel lights during the 4:00 to 12:00 shift on November 12, when he told Mr. Vanderpool to run coal during that same shift, and that the belt would be running (Tr. 477). He also indicated that when he visited the area he saw no lights at all and "the whole thing was dark" (Tr. 481). He could not see the stairway entry of the 200 tunnel from where he was positioned and did not know whether that light was out (Tr. 483). He confirmed that he last visited the 200 and 201 coal handling tunnel areas on the Friday afternoon of November 9, and the area was clean. He specifically went there to check the area out because of coal unloading difficulties which were encountered all week and he wanted to see if the area had been cleaned. He indicated that normal procedures call for daily clean-up, but that intermittent problems which began with the lighting on the evening of November 9 and continuing to November 12, prevented clean up (Tr. 484-487). Once the order issued, extra people were put on the clean-up detail and he believed the conditions cited were corrected during the next shift and possibly into the one after that (Tr. 488). He was not at the mine during the intervening Saturday and Sunday and was informed of no problems on those days. He and Mr. Vanderpool decided to run coal on November 12 because they believed the lighting problems in the tunnel areas precluded clean-up and he did not want people in there cleaning up with no lights (Tr. 489-490). No coal was run on Monday during the day shift because the bunkers were full (Tr. 492).

Douglas Malone was recalled in rebuttal by the petitioner and testified as to where he performed work in the coal handling facility on November 11, 1979. He stated that he did some work on the steam leak and he drew a diagram of the areas where he was at (exhibit ALJ-1). He described the area as the "tail end of the 201 belt way", within three feet of the 200 belt way. He confirmed that Mr. Datson was with him at that time and they finished the welding work, and that the lights in both areas were on at that time (Tr. 495-496). He stated that he was assigned to go back to the same area on November 12, and when he returned to the area between four and six-thirty he observed coal and coal dust accumulations, as well as float dust and the belt was running. Some of the lights were on and others were convered with coal dust. He entered the area from the entryway into the 200 tunnel and the stairway light was off, but the 201 tunnel lights were on. Although he could recall no coal on the belt, the belt was running, and he could not recall coal unloaded on either day (Tr. 501). After viewing the conditions he complained to Mr. Datson, and made no attempts to do any welding due to the conditions which were present (Tr. 503), and he was concerned that the entire 200 and 201 tunnel areas were a fire hazard (Tr. 505).

Findings and Conclusions

These civil penalty proceedings were instituted by MSHA against both named respondents pursuant to section 110(c) of the Act, which provides as follows:

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

An "agent" is defined in Section 3(e) of the Act (30 U.S.C. § 820(e)) to mean "any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

In order for civil penalties to be assessed against the named respondents, MSHA must first establish that the violations which have been cited and charged against the respondents in fact took place, and that the respondents "knowingly authorized, ordered or carried out such violation(s)". In these cases, both respondents are charged with violations of mandatory safety standards 30 CFR 57.20-3, 57.20-9, and 57.17-1, which provide as follows:

> 57.20-3 Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.
>
> 57.20-9 Mandatory. Dusts suspected of being explosive shall be tested for explosibility. If tests prove positive, appropriate control measures shall be taken.
>
> 57.17-1 Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

The interpretation and application of the term "knowingly" as used in both the 1969 and 1977 Acts has been the subject of litigation and interpretation by the Commission. In MSHA v. Kenny Richardson, BARB 78-600-P, a case arising under section 109(c) of the 1969 law, the Commission, in its decision of January 19, 1981, held that the term "knowingly" means "knowing or having reason to know". The Commission rejected the respondent's assertion that the term requires a showing of actual knowledge and willfulness on the part of the respondent to violate a mandatory standard. Further, the Commission adopted the following test as set forth in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (D.S.C. 1950), to section 109(c) of the 1969 Act:

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

In Richardson, the Commission held that the aforesaid interpretation of the term "knowingly" was consistent with both the statutory language and the remedial intent of the 1969 Coal Act, and expressly stated that "if a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." On February 24, 1981, the Commission issued its decision in a second section 109(c) case and following its rationale in the Richardson case, reaffirmed its "knowingly" test; see: MSHA v. Everett Propst and Robert Stemple, MORG 76-28-P.

In its post-hearing brief, petitioner argues that the respondents knowingly authorized, ordered, or carried out the corporate violations of mandatory standards 57.20-3 and 57.20-9, within the meaning and scope of the Richardson case, supra. In support of this conclusion, petitioner asserts that both respondents knew or had reason to know about the accumulations of coal and coal dust in the cited areas at the start of Respondent Vanderpool's shift on November 12, 1979. However, rather than seeing to it that the accumulations were cleaned up, petitioner argues that respondents decided to run coal during the shift, knowing that, with the belt running, said accumulations would get worse, and that they used the lighting problems as an "excuse" for not sending men into the area to clean up. Further, petitioner argues that both respondents knew or had reason to know that the accumulations were a tripping hazard and an imminent fire hazard, and that in view of the extensive accumulations present in the cited areas knew or had reason to know that proper control measures were not being maintained to control a potential coal dust explosion which could have been ignited by a fire. Since both respondents were in a position of authority, petitioner maintains that they had the responsibility to abate the continuance of the violative conditions, and that their failure to take proper corrective action to abate the cited conditions establishes that they knowingly violated the cited standards.

Although respondents' post-hearing brief does not address the issue of the "Corporate Operator Violations" as any condition precedent to the filing of charges against individual agents, petitioner points out that Allied Chemical has already paid a civil penalty for each of the subject violations. Citing the Richardson decision, petitioner asserts that due process does not require a determination of the corporate mine operator's violation in a proceeding separate from or prior to a section 110(c) proceeding involving an agent. Further, petitioner cites additional case precedents holding that a mine operator is absolutely liable for a violation occurring at its mine regardless of fault, and that an agent's violation is imputable to the mine operator under the Act.

Fact of violations

30 CFR 57.17-1 - Illumination

By motion filed simultaneously with its brief, petitioner moves to dismiss the charges against both respondents regarding the alleged violations of mandatory safety standard section 57.17-1 on the ground that the evidence adduced at the hearing does not support the conclusion that respondents knowingly authorized, ordered, or carried out the violation. The motion is GRANTED, and this charge IS DISMISSED as to both named respondents.

30 CFR 57.20-3

Section 57.20-3 requires that all workplaces and passageways be kept clean and orderly, and that the floors in such areas be kept clean and, so far as possible, dry. It seems clear to me that the coal tunnel load-out areas in question are "working places" within the meaning of the standard. After the coal is unloaded, it is transported along a network of tunnels on conveyor belts for storage and subsequent use as fuel for the boilers at the plant, and maintenance and other work requiring the presence of men and materials takes place in those tunnel areas.

The "conditions or practices" referred to on the face of the citation issued by Inspector Ferrin makes reference to mandatory standards 57.20-3 and 57.20-9, and they are bracketed together. After describing the conditions concerning the coal and coal dust which "had spilled from the area conveyor belt", the inspector concludes that "this created an imminent fire hazard". There is nothing in the citation to suggest that the inspector was concerned with a tripping or slipping hazard for failure to keep the tunnel floors free and clear of coal and coal dust accumulations. However, in his deposition taken November 30, 1981, Mr. Ferrin testified that in addition to a fire hazard, he considered the accumulations he found to be a hazard to personnel entering the area "on a possibly slick or occluded or blocked stairway" and that they presented "a possible slip and fall" injury. In his inspector's "narrative statement" made at or near the time he issued the citation, Mr. Ferrin's noted concern is with a possible "slip or fall" incident. At the hearing, he conceded that any citation for a violation of section 57.20-9 would "normally" be issued for "housekeeping" situations for failure to maintain workplace floors free and clean of coal accumulations which presented "slip and fall" possibilities. However, he maintained that

aside from any "housekeeping" concerns, at the time he issued the citation he was concerned with a "possible disaster" and that it was prompted him to issue the imminent danger order of withdrawal. In short, while Mr. Ferrin separated the conditions he found into three specific violations, it seems clear to me that his overall concerns centered on the fact that he believed that all of the conditions he observed, taken as a whole, presented a situation which he obviously believed amounted to an imminent danger calling for a withdrawal order isolating the area until it could be cleaned up.

Aside from the question as to whether the conditions cited presented an "explosion" hazard, I believe it is clear from the record in this case that the reason Mr. Ferrin cited a violation of section 57.20-3, was his belief that the accumulations presented a slipping and falling hazard, that someone could possibly trip on the accumulations while attempting to make their way along the beltway and possible catch their hand or clothing in the moving belt, and that the accumulations would contribute to the propagation or spread of a fire in the event one occurred. I conclude that the preponderance of the evidence adduced in this case supports a conclusion that this is the principal reason why he included a reference to section 57.20-3 in his order. Further, there is a strong inference in this case that since the Part 57 health and safety standards contain no specific provision for the clean up of coal and coal dust accumulations which may occur in a metal and nonmetallic mine, similar to the mandatory standards applicable to coal mines, the inspector did the best that he could by relying on a so-called "housekeeping" provision to cover such a situation.

In their post-hearing brief, respondents do not dispute the existence of the coal spillage and accumulations cited by Mr. Ferrin, nor do they dispute the fact that a hazard existed. Their defense to the citation of a violation of section 57.20-3, rests on an assertion that respondents could not send employees into the tunnels to clean without lights, "especially with the conditions as bad as they were", and that they decided not to risk unnecessary injury and opted to run coal until such time as the lighting problem could be corrected. Given these circumstances, and relying on Secretary of Labor v. Alabama By-Products Corp., SE 80-121, 2 MSHRC 1399 (1981), respondents argue that sending men into the tunnel areas to clean up without sufficient illumination would have endangered them further. In these circumstances, they suggest that this fact is a defense to the citation, and by sending men into the area to clean with insufficient illumination would have subjected the respondents to violations of section 57.17-1, which requires sufficient illumination to provide safe working conditions in loading, dumping and work areas. As for the suggestion by petitioner that flashlights and cap lamps could have been used to facilitate clean-up, respondents rejects this notion out of hand, and quite frankly, I agree with this position. I fail to understand how MSHA can expect a miner to shovel and clean an area while holding a flashlight in his hand. Further, I fail to comprehend how this could be accomplished efficiently and safely simply with the illumination from a cap lamp. I believe that the illumination requirements of section 57.17-1, are intended for just such chores, and if fully complied with, should provide the full measure of illumination for cleaning up coal accumulations along a belt line.

Respondents concede, in hindsight, that they should have barricaded the area and taken care of the accumulations problems. They also concede that they were aware of the conditions of the tunnel and the need for it to be cleaned. They nonetheless assert that they "wisely" elected not to risk injury to men cleaning the tunnel in the dark. Of course, what they do not concede is that this course of action would have resulted in an interruption to the coal handling production run requiring that the belt system be shut down. In my view, had the decision been made to shut down the belt and immediately correct the illumination problem, the coal accumulations could have been cleaned up, the problem would have been resolved, and the possibility of subjecting miners to hazards of cleaning up in the dark would never have been presented.

After careful consideration of all of the evidence adduced in this case, I conclude and find that petitioner has the better part of the argument with regard to the alleged violation of section 57.20-3. Respondents reliance on the Alabama By-Products Corp., supra, holding as an absolute defense is rejected. I find that petitioner has established by a preponderance of the evidence presented that the accumulations of coal and coal dust cited by the inspector constitutes a violation of section 57.20-3, in that the tunnel floor was not clean, that respondents knew or had reason to know that the conditions existed, and that their failure to take corrective action in the circumstances constituted a knowing violation. The citation, insofar as this violation is concerned, IS AFFIRMED.

30 CFR 57.20-9 Explosive dust

Section 57.20-9, requires that appropriate control measures be taken in the event explosive dusts are encountered in the mine. The language of the standard requires that (1) dusts suspected of being explosive be tested. Once tested, if they prove positive, then appropriate control measures must be taken. Aside from the ventilation and radiation requirements found in Part 57, I can find nothing in the standards which specifically address the "appropriate control measures" required to be taken when accumulations of coal or coal dust are encountered in a coal handling facility such as the one in question. Although petitioner argues that coal dust is one of the many dusts covered by section 57.20-9, (Brief pg. 21), that conclusion is based on the inspector's testimony that "dust is dust" (Tr. 40). In any event, it seems clear to me that petitioner's position is that the corrective action that should have been taken by the respondents was the cessation of production and the clean-up of the accumulations.

Respondents Arguments

In their post-hearing brief, respondents argue that any evidence concerning any explosive conditions in the tunnel area in question should be excluded because the Order issued by Inspector Ferrin makes no reference to any explosion hazard and is limited to an alleged fire hazard. Further, respondents point out that in his deposition taken prior to hearing, Mr. Ferrin testified that any float coal dust which may have been present at the time

of his inspection was not an explosive hazard. Respondents maintain that the Order issued by the inspector as well as the pleadings led them to believe that the issue presented was whether or not the coal accumulations were a fire hazard (not an explosive hazard) in the tunnel. They contend that not until after the deposition of Mr. Ferrin, and in fact at the hearing, were they informed that Mr. Ferrin was concerned with the possibility of an explosion in the tunnel, and they maintain that their mistaken belief in this regard is demonstrated in their Answers to the charges where they deny the existence of a fire hazard, and make no reference to explosive conditions.

Respondents argue further that were they appraised of the concern of an explosive hazard, they could have conducted and produced tests of the environment in the tunnel. However, because of the failure of MSHA and the Order issued by Mr. Ferrin to appraise them of the true conditions which gave rise to the Order, respondents maintain they were barred from fully developing a defense. Accordingly, respondents assert that MSHA should have been excluded from producing any evidence as to explosion potential in the tunnels, and if that evidence is excluded, MSHA will not have proved a violation of section 57.20-9.

Aside from their due-process and lack of notice defense, respondents maintain that petitioner simply has not established by a preponderance of any credible evidence or testimony that an explosion hazard existed in the 200 tunnel. In support of this conclusion, respondents point to the fact that MSHA did not sample the subject coal or coal dust which was actually in the tunnel to determine if the dust was explosive, and that Mr. Ferrin stated he did not need to take any samples because he basically knew what the explosivility of the coal was, based upon a test which had been conducted previously. Respondents also point out that Mr. Ferrin's knowledge as to the explosibility of the coal accumulations is based on a letter dated January 8, 1976, which refers to explosive coal conditions at the coal stock pile at Allied (as opposed to the 200 tunnel), and a group of documents, one of which is an Analysis of Dust Samples prepared in March of 1979 (exhibits P-5 and P-6).

With regard to the aforementioned documents, respondents assert that no weight should be afforded to these exhibits because the letter (P-5) was prepared three years before the subject Order, and concerned dusty coal conditions at the transfer points at the storage pile. Accordingly, the document is not material to the conditions which existed in the 200 tunnel on November 12, 1979.

As to the Analysis, respondents assert that it was issued in connection with Citations No. 336487 and 336488. (Part of Ex. No. P-6). Citation 336488 concerns coal at the transfer house, which is not in the same area as the tunnels. (Tr. p. 392). Citation No. 336487 concerns coal and fuel oil accumulation in the sump in the 201 tunnel. Respondents argue that the sample of coal which was taken for the Analysis is not identified by Mr. Ferrin, nor does the record in fact show that the coal or coal conditions were the same. Although Mr. Ferrin testified it was the same coal, respondents maintain this conclusion is based upon the

speculative belief that the coal was from the same mine. (Tr. p. 45). However, nowhere in the record does Mr. Ferrin demonstrate or lay the foundation for his conclusion that the coal was the same. Furthermore, since Mr. Ferrin testified that the coal could have come from two different mine locations of the same company (Tr. p. 21), which contradicts his testimony that the coal was from the same mine, respondents conclude that he clearly did not know where the prior sample was obtained or whether the coal in the 200 tunnel was the same as the coal subject to the Analysis.

With regard to the Analysis in question, respondents point out that there is no evidence of any nature which shows what it means, either in the abstract or in relationship to the specific environment in the 200 tunnel. Conceding that coal dust is explosive, respondents nonetheless maintain that it is so only in the proper environment, and the fact that the Analysis stated the coal tested in the past was 17.1% incombustible, there is no evidence that the environment in the 200 tunnel was in fact explosive. If it was not, then there was no violation of the cited standard because "appropriate controls" would have been achieved.

Petitioner's arguments

In response to respondents arguments concerning any lack of notice regarding Inspector Ferrin's concern for an explosive hazard connected with the coal accumulations which he observed, petitioner notes that since he cited section 57.20-9 it is obvious that this was one of his concerns because that safety standard deals exclusively with a dust explosive hazard. Conceding the fact that the order issued by Mr. Ferrin makes no mention of an explosion hazard, and that his testimony and prior statements indicated his concern for a fire hazard, petitioner cites his testimony during the hearing which indicates that while his primary concern was the possibility of a fire, his secondary concern was the potential for an explosion (Tr. 119-120; 135-136). Petitioner concludes from this that Mr. Ferrin believed the fire hazard was imminent and that the coal dust explosion hazard was potentially there because of the fire hazard. Petitioner concludes further that since it is well known that coal dust will enter into and propogate an explosion when placed in suspension, the specific reference to the fire hazard in Inspector Ferrin's order of withdrawal was in effect an implicit reference to the coal dust explosive hazard since a fire could have served as a definite ignition source for a potential coal dust explosion.

Petitioner asserts that Allied Chemical obviously had no problem with the specificity of the charges since it paid the civil penalty for the violation of 57.20-9, and that respondents had to be aware of this fact. Finally, petitioner points out that the proposal for assessment of civil penalty specifically charges the respondents with violations of section 57.20-9, and since this standard deals exclusively with a dust explosive hazard, theywere clearly put on notice as to this charge.

In response to the arguments that petitioner has failed to establish that any explosive hazard existed in the cited tunnel, petitioner states that "it has long been well known in the mining industry that coal dust will enter into and propogate an explosion when placed in suspension". In support of this conclusion petitioner cites the legislative history of the 1969 Coal Act, which states in pertinent part as follows:

> Tests, as well as experience, have proved that inadequately inerted coal dust, loose coal, and any combustible material when placed in suspension will enter into and propogate an explosion. The presence of such coal dust and loose coal must be kept to a minimum through a regular program of cleaning up such dust and coal . . . . Tests and experience have shown that an incombustible content of 65% is necessary to prevent dust from entering into an explosion (with the exception of anthracite coal dust, which will not propogate an explosion when dispersed in the air due to its low volatile ratio). [S. Rep. 91-141, 65-66; Legis. Hist. at 191-192].

Petitioner concedes that MSHA took no samples of the coal dust in the tunnel loadout area at the time the order of November 12, 1979, was issued. In explanation, petitioner states that a previous test taken of the same coal source in March 1979 to support two previous citations for violations of section 57.20-9, showed that the tested coal dust was combustible and explosive and Inspector Ferrin believed it would have been superflous to conduct another test on November 12 for the purposes of section 57.20-9.

With regard to the coal sample of March 1979, petitioner maintains that it was not even necessary to have taken that sample because everyone knows that coal dust placed in suspension will propogate an explosion. Further, petitioner states that coal dust is one of the many dusts covered by section 57.20-9 and because of the long standing tests and experiments conducted on this type of dust, no new specific tests were necessary to determine the explosibility of the coal dust in the coal loadout area of the Alchem Trona Mine. In this connection, petitioner points out that Inspector Ferrin testified that the only reason that the Green River, Wyoming Office of MSHA's Metal/Nonmetal Mine Division took a coal dust sample from the coal loadout area and had it tested in March 1979, was to familiarize their inspectors with the combustibility and explosibility of coal dust since the 1977 Act was relatively new to the MSHA metal/nonmetal mine inspectors. Otherwise, it is not and was not normal practice for MSHA to test coal dust in a coal handling facility of a trona mine for the purposes of 30 CFR § 57.20-9.

Lack of adequate notice

While it may be true that prior to the hearing in this case Inspector Ferrin failed to specifically articulate his concern for any explosive hazard connected with the coal accumulations which he cited, I conclude and find that on the facts presented here respondents have not been prejudiced. As correctly argued by the petitioner, both the order and proposal for assessment of civil penalty filed in this case make specific reference to section 57.20-9, and if respondents had any doubts in this regard they could have been resolved through the discovery process by means of a specific interrogatory. I agree with respondents assertion that Inspector Ferrin's pretrial deposition reflects no direct concern about any explosive hazard and that the matter was initially brought up at the hearing by petitioner's counsel as part of his case. Leaving aside for the moment the question as to whether petitioner has established that the coal dust in question was in fact explosive within the meaning of the cited standard, I conclude and find that the interjection of the issue as to whether the coal dust conditions found by the inspector when he issued the order were in fact explosive during the hearing did not adversely affect respondents ability to defend themselves. If the evidence adduced supports a conclusion that the coal accumulations were explosive, petitioner will prevail on this issue. If they do not, then the respondents will. Further, I can deal with any credibility questions which may arise as a result of this issue. Since the petitioner bears the burden of proof in this case, it also bears the risk of raising issues for the first time at a hearing two years after the fact.

Explosibility of the coal dust accumulations.

I take note of the fact that the withdrawal order issued by Inspector Ferrin was based on the fact that he believed that all of the conditions which he observed on November 12, 1979, in combination presented a situation which constituted an imminent danger. In addition, when viewed in perspective, and taking into account the prior problems concerning the diesel oil spill, prior dust problems at the coal transfer point, prior union complaints concerning failure to clean up coal accumulations, all of which are a matter of record in this case, I am persuaded that Mr. Ferrin was not oblivious to all of these prior events at the time he issued the order. This is not to say that an imminent danger did not exist. However, this is an issue that Allied Chemical could have challenged in a contest proceeding pursuant to section 107(a) of the Act. The question of any imminent danger is separate and apart from the question of whether MSHA can establish the specific violations noted in this civil penalty proceeding. In this regard, faced with the prospect of either proving or defending each alleged violation at an evidentiary hearing held two years after the fact, counsel for both sides are prone to indulge in what I have often characterized as "back-filling" to support their respective positions.

Petitioner's assertion that the March 1979 coal sampling and test made at the coal handling facility in question was for the purpose of familiarizing metal and nonmetal mine inspectors with the combustibility and explosivility of coal dust is simply without foundation. The sample analysis (exhibit P-6) on its face states that it was taken to substantiate

the two citations for violations of section 57.20-9. Therefore, while it may be true that MSHA's normal practice is not to test coal dust in a coal handling facility of a trona mine for the purpose of section 57.20-9, it seems obvious to me that in this case the March 1979 sample was taken to specifically establish violations of this particular mandatory standard. Further, it is also obvious to me that once a sample of coal dust is tested at this facility, MSHA believes they may rely on that particular sample, not only to establish that the coal dust is explosive, but to support citations for any violations of section 57.20-9 at any time.

I take official notice of a 1976 publication apparently used at MSHA's National Mine Health and Safety Academy during the training of its inspectors, Volume I, Work Book, Coal Dust, NMHSA-CE-009. Page 11 of that instructional booklet contains a discussion dealing with the explosive nature of coal dust, and it highlights the fact that explosiveness depends upon several factors which are itemized as follows:

1. The size of the dust particles.
2. The composition of the dust (how much of the dust is coal dust).
3. The amount of gas (including both oxygen and combustible gas) in the air.
4. The source of ignition.
5. The concentration of dust.
6. Surrounding conditions.

In the case at hand, it is clear that no one sampled the coal dust accumulations in the 200 tunnel on the day the order issued, even though the standard clearly states that samples are to be taken of "suspected" explosive dusts. Inspector Ferrin confirmed that prior to the inspection in question he had never inspected a coal mine (deposition, pg. 18). His knowledge concerning the explosive nature of coal dust was based on his belief that its "fairly common knowledge throughout the population", a course at MSHA's training academy, and a review of an MSHA report concerning the coal used by Allied Chemical (deposition, pg. 18).

Inspector Ferrin confirmed that the coal handling facility in question is not underground, is not part of any "gassy" portion of the mine, and the fact that the mine itself may be classified as "gassy", this did not concern the coal handling facility (Tr. 116-117). He also confirmed that he tested for methane in the cited tunnel area at the time of the inspection and found no methane present.

With regard to the presence of diesel fuel in the tunnel, Mr. Ferrin conceded that this has been a long-standing problem in the area and Allied Chemical and MSHA were jointly addressing the problem and that this problem was not his principal concern at the time the order issued. As for the presence of any "float" coal dust, Mr. Ferrin described it as "airborne" dust, and testified in his deposition that while this condition presented a fire hazard, he did not believe that it presented an explosion hazard.

Although Mr. Ferrin made references to several inoperable dust collecting devices, he conceded that he made no determination as to where they may have been located in the area. And, while he alluded to several

dry floor areas, he also conceded that some of the coal accumulations were wet and that the tunnel area in general was wet and damp. Mr. Vanderpool testified that when he inspected the tunnel area he found a dust-collecing device turned off, but he had it turned back on, and although he testified that he did not know whether the fire deluge system was on or off during the period November 10 through 12, 1979, petitioner introduced no credible testimony or evidence to establish that this system was not operating during the time of Mr. Ferrin's inspection. Further, Mr. Miller testified that the steam and moisture present in the tunnel area contributed to keeping the coal accumulations moist and wet. Mr. Ferrin's concern that a drop in temperature in the tunnel area could have resulted in the stairways freezing due to the moisture and steam which was present, thus added to any tripping or slipping hazard, supports a conclusion that the conditions in the tunnel area where the coal accumulations were found were far from dry.

When asked whether a potential explosion hazard was present, Inspector Ferrin answered "if we had an ignition source, yes sir" (Tr. 71). Although he alluded to the presence of several potential ignition ignition sources, it seems clear to me from the record that Inspector Ferrin made no detailed examination of such sources and his cursory conclusions in this regard as tesfieid to during the hearing reflect a subjective after-the-fact attempt to justify a conclusion that the coal dust accumulations, as well as the 200 tunnel environment, presented an explosion hazard. For example, although Mr. Ferrin states that the problems with the illumination in the tunnel were due to a "faulty" electrical circuit, characterized by petitioner's counsel as a source of ignition, Mr. Ferrin admitted that he did not trace the circuit out, nor did he make any attempt to ascertain what the problem was. When asked to describe the presence of any ignition possibility with regard to the purported faulty circuit, he responded that he didn't "trouble shoot" (Tr. 89) and "I didn't take the time to finish tracing out, because of the imminency of this situation" (Tr. 71). As for the presence of "various and sundry electric lines" lying on the floors in adjacent tunnels leading into the 200 tunnel, Mr. Ferrin testified that they were not bushed or properly supported and in the event they became damaged this could have created an ignition source.

Among the documents of record (exhibit P-2), are copies of additional section 104(a) citations issued at the time of the inspection of November 12, 1979. Citation 0575919 was for a violation of section 57.12-38, for a defective take-up reel for a trailing cable on a tripper car. Citation 0575920 was for a violation of section 57.11-1, for two hoses or wires lying on a walkway along the 201 tunnel. Citation 337399 was for a violation of section 57.20-3, for accumulations of coal dust at the 201 belt tail pulley. Citation 337398 was for a violation of 57.4-10 for an inadequately insulated cable passing through an opening in the 201 belt pit area. Aside from the fact that the citations reflect that they were issued after the withdrawal order in question, in each of the instances cited the "conditions or practices" noted in the citations reflect fire or tripping hazards.

I have carefully considered the testimony of maintenance mechanic Douglas Malone and Terral J. Smith and cannot conclude from their testimony that it supports a finding the the prevailing conditions in the cited tunnel area constituted an explosion hazard. I am mindfull of Mr. Malone's concern for his safety and recognize his right to withdraw from the area and not to do any work in an area which he considered to be hazardous. However, there is no evidence in this case that the named respondents in this proceeding authorized Mr. Malone to do any work in the cited areas or that Mr. Malone had a work permit to do the welding work in question. Mr. Malone's testimony is that shift foreman Youngbird dispatched him to the area to perform some work. However, upon observing the conditions present, Mr. Malone left the area and reported the conditions to Mr. Youngbird, and Mr. Malone admitted on cross-examination that he had no permit to perform any welding work in the 200 tunnel area, that he went there "to look" and not to weld, that any welding work would have required a permit from Mr. Vanderpool, and that any concern that he may have had was the possibility of a fire.

With regard to Mr. Smith's testimony, I find nothing to support a conclusion that the coal accumulations presented any explosion hazard. I recognize Mr. Smith's concern for the health and safety of the miners who he represents as President of the local, and I also recognize his concern over the accumulations and conditions in the tunnel in question on the day the order issued. I also take note of the fact that Mr. Smith indicated that he had visited the tunnel area on four occasions during the period June 1 and November 1979, and believed that the tunnel should be cleaned on a daily basis so as to preclude the build-up of accumulations. However, this is a matter that Mr. Smith is free to continue to pursue with the MSHA's inspectors who are assigned to inspect the mine in question. He is also free to continue to pursue with mine management any compliance problems connected with any safety standards found in MSHA's regulations, including a review of the procedures dealing with the issuance of work permits, as well as the question of miners performing unauthorized work in hazardous areas of the mine.

After a close scrutiny of Mr. Ferrin's testimony, the only credible ignition source which may have been present in the 200 tunnel were the belt idlers running in the coal accumulations. There is no evidence that the belt rollers or idlers were defective or hot. Although I can accept the notion that belt idlers running in accumulations of coal present a potential fire hazard, the question presented here is whether such a condition constituted an explosion hazard. Based on the record in this case, I find respondent has the better part of the argument, and I conclude and find that petitioner has failed to establish by a preponderance of any credible evidence that the conditions which prevailed at the time the order issued presented an explosive hazard in the cited 200 tunnel area, and that portion of the citation-order which alleges a violation of section 57.20-9 IS VACATED.

I believe that MSHA should seriously consider amending Part 57 to specifically and directly deal with hazardous accumulations of coal and coal dust at a surface coal handling facility which is part of a metal and nonmetallic mine. Only in this way will an inspector be able to effectively and consistently deal with such problems in those mines. In the case at hand I am convinced that Inspector Ferrin honestly believed

that, faced with the cumulative conditions which he observed in the tunnel on the day in question, swift action on his part required the issuance of an imminent danger withdrawal order. I am also convinced that Mr. Ferrin was not oblivious to the fact that miners had complained about the tunnel conditions in the past, that the diesel fuel spill was a long-standing problem being worked on collectively by MSHA and the mine operator, and that his very presence at the mine on the day in question resulted from a complaint filed by the representative of miners. Given these circumstances, Mr. Ferrin cited certain available safety standards which he believed addressed the perceived problems. However, faced with the prospect of proving the specific cited standards at a hearing two years after they were issued in a civil penalty proceeding brought by MSHA against two individual respondents, the inspector is exposed to much second-guessing by counsel for the parties, and I might add, by the presiding Judge.

The instant case is not the first time that an inspector has cited the so-called "housekeeping" section 57.20-3 to support a conclusion that accumulations of coal and coal dust present a fire hazard as well as a "slip and fall" hazard. As indicated earlier I have affirmed that portion of the order which cited this standard. However, with regard to the citation of section 57.20-9, I hold MSHA to strict proof of the specific language of this standard, and this includes the requirement that MSHA sample the coal and coal dust accumulations to establish with some degree of certainty that they are in fact explosive. On the record adduced in this case I reject the notion that such tests are simply made to assist in the training of inspectors who are unfamiliar with the nature of coal and coal dust. In my view, the fault lies not with the inspector, but with standards which all too often leave much to the imagination, and leave the inspector in the untenable position of trying to decide which standard comes "close to" a given situation.

Civil Penalty Assessment

I am in agreement with the petitioner's position that the following criteria should be considered in assessing a civil penalty against the two named respondents in this case for the section 57.20-3 violation which I have affirmed: (1) his history of previous violations under the Act, (2) his negligence, (3) the gravity of the violation, (4) his effort to abate the violation after the citation, and (5) his financial ability to pay a civil penalty. This complies in substance with section 110(i) of the Act, 30 U.S.C. 820(i). Daniel Hensler, 5 IBMA 115, 121 (1975). A § 110(c) respondent's financial ability to pay is the equivalent of the two civil penalty criteria under § 110(i) of the Act of the mine operator's size of business and its ability to continue in business.

History of Prior Violations

It was stipulated at the hearing that neither of the respondents herein has a prior record of individual violations under the Act. (Tr. 113-114). I adopt this as my finding in this regard and have taken it into account in assessing the penalties for this violation.

Gravity

I conclude and find that the accumulations of coal and coal dust cited by the inspector in this case constituted a serious violation. In addition to a possible fire hazard, the accumulations along the belt line and at or near the stairway where there was little or no illumination presented a serious tripping or slipping hazard, particularly in light of the proximity of the accumulations near a moving belt line.

Good Faith Compliance

As correctly pointed out by the petitioner, Inspector Ferrin testified that both respondents participated in the abatement of the violation in question, and that their efforts in this regard were "very adequate after the fact," i.e., after Inspector Ferrin had issued his imminent danger order of withdrawal citing said violation. (Tr. 102-103). This fact has been taken into account by me in assessing civil penalties for the violation.

Respondent's Ability to Pay Civil Penalties

Petitioner submits that in view of the annual salaries of respondents Miller and Vanderpool of $50,000 and $34,500, respectively, both have the ability to withstand a substantial civil penalty in these proceedings, Miller more so than Vanderpool. I agree with the petitioner in this regard and conclude that the civil penalties assessed by me for the violation which I have affirmed will not adversely or unduly affect the respondents finaicially. Taking into account the circumstances presented in these proceedings, I conclude further that the penalties are reasonable and appropriate.

Negligence

Petitioner argues that both respondents were grossly negligent in allowing the violation in question. Further, petitioner submits that that this negligence was exacerbated by the fact that despite the dangerous accumulation of coal and coal dust which was building up in the cited areas, neither respondent took action to barricade or danger off the area to prevent persons from wandering into the area. Moreover, petitioner asserts that both respondents were specifically aware that electricians were scheduled to work on the lighting problem in the 200 and 201 belt tunnels during Mr. Vanderpool's shift and that both respondents had reason to know that welders might be working on the steam leak at the intersection of the two tunnels.

Respondents do not dispute that fact that they were aware of the conditions cited by the insector, nor do they dispute the fact that they probably should have barricaded the area to keep everyone out. Although it is true that there is no evidence to indicate that they were aware that welders were sent to the area in question and that the fact that the welders did not have a work permit remains unrebutted by the petitioner, the fact is that both respondents were aware of the existence of hazardous accumulations of coal and coal dust, discussed the conditions between shifts, but opted to continue running coal rather than shutting down the belt line and correcting the immediate and obvious coal accumulations which were present. In these circumstances, I conclude and find that this

constitutes a reckless disregard of the mandatory safety standard in question. Under the circumstances, I find that the violation is the result of gross negligence on the part of both respondents and this is reflected in the civil penalties assessed by me for the violation in question.

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 that the following civil penalty assessments are reasonable and appropriate for the citation which I have affirmed, and respondents ARE ORDERED to pay the assessed penalties within thirty (30) days of the date of this decision and order.

Docket No. WEST 81-244-M
Respondent J. D. Miller

$800 for violation of 30 CFR 57.20-3

Docket No. WEST 81-245-M
Respondent Wilbur Vanderpool

$500 for violation of 30 CFR 57.20-3

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 20 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. KENT 80-145-D
On behalf of BOBBY GOOSLIN, Complainant	:	Calloway No. 1 Mine
v.	:	
KENTUCKY CARBON CORPORATION, Respondent	:	

ORDER APPROVING SETTLEMENT AGREEMENT
AND DISMISSING PROCEEDING

This proceeding was remanded by the Commission to determine the monetary relief to which Complainant Bobby Gooslin is entitled because of his discriminatory discharge by Respondent. Following an order to the parties issued on February 5, 1982, a joint motion was filed by the Secretary, Bobby Gooslin and Respondent to dismiss the proceeding and approve a settlement. Respondent has agreed to pay Mr. Gooslin the sum of $10,000 in full settlement of his claim to back pay, interest and other monetary benefits arising from his discharge on October 1, 1979. Mr. Gooslin was represented in this proceeding by Mary Lu Jordan, Esq., Attorney for the United Mine Workers of America, who represents that she explained the nature and amount of the settlement and that he agreed to accept the same. Each party agreed to bear its own fees and expenses.

Having duly considered the matter, I conclude that the settlement is in Mr. Gooslin's best interest and should be approved.

Therefore, IT IS ORDERED that the settlement agreement filed herein on April 15, 1982, is APPROVED.

IT IS FURTHER ORDERED that subject to the payment by Respondent to Bobby Gooslin of $10,000 this proceeding is DISMISSED with prejudice.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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APR 21 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. DiCAMILLO BROTHERS MINING COMPANY, A Corporation Respondent.	)	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-210-M MSHA CASE No. 05-02730-05002 FFG5 Mine: Cross Mine

Appearances:

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For the Respondent

Before: John A. Carlson, Judge

DECISION

This civil penalty case arose out of a fatal accident at the Cross Mine near Nederland, Colorado on September 19, 1980. The Secretary of Labor, in three citations, charges that respondent violated mandatory safety standards relating to ventilation practices. He also alleges that the violations were "significant and substantial" and seeks a civil penalty of $3,000 for each citation. Respondent resisted the Secretary's petition, and the issues were tried under the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq, the "Act") in Denver, Colorado beginning on January 27, 1982. Counsel agreed to submit no post-hearing briefs.

REVIEW AND DISCUSSION OF THE EVIDENCE

The undisputed evidence shows that at the time of the accident and the Secretary's subsequent investigation the Cross Mine was operated by a closely-held family corporation, DiCamillo Brothers Mining Company. This company, whose principals are David, Henry, Paul, and Jay DiCamillo, worked the mine under an operating contract with Tom Hendricks, who in turn leased it from out-of-state owners.

This small underground gold and silver mine was first worked in the late Ninteenth Century and was reopened by Hendricks in 1974. DiCamillo Brothers took over active operation under a series of short-term contracts beginning in 1979. At one time or another ore had been mined from four separate drift levels. The deepest of these was level four, some 200 feet below the surface. A two-compartment shaft, encompassing ladderways and a skip hoist, reached all levels.

In September, 1980, the DiCamillos and their crews were actively mining the third and fourth levels. Prior to the summer of 1980 the mine had no mechanical ventilation system. Natural surface winds moving over the raise were believed sufficient to ventilate the mine. Before regular work began in the fourth level drift, however, a fan capable of moving air at 12,000 cubic feet per minute was installed to provide adequate ventilation at all active workplaces within the mine. As a part of this new system, the DiCamillos (or Henderson) installed air doors at various strategic locations to insure the proper flows of intake and return air, and to prevent dissipation or short circuiting of flows.

On September 19, 1980, David DiCamillo removed the plywood air door which blocked off the large mined-out drift at level two. He did so to show a prospective employee where he proposed to drive a new raise to the tunnel level above. DiCamillo did not replace the door when he left.

Sometime between 7:00 and 7:30 a.m., two miners, Jerry Miller and Paul Ouellet, had descended to the fourth level to begin to pull ore shot the previous night. Eventually, David and Henry DiCamillo learned that the hoistman had brought up no muck from the fourth level, checked, and found that both Miller and Ouellet were unconscious in the skip. The rescuers were able to revive Ouellet, but Miller was dead. The parties stipulate that Miller died and Ouellet was rendered unconscious because of exposure to excessive levels of carbon monoxide. The DiCamillos closed down the mine as soon as the victims were removed.

We now consider the individual citations.

Citation No. 333981

This citation, coupled at the time of issuance with a withdrawal order, charges that DiCamillo Brothers violated the mandatory standard published at 30 CFR § 57.5-5. As pertinent here, that standard provides:

> 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. [The remainder of the standard governs the use of respirators where engineering controls of contamination have not been developed, or in other special circumstances not present in this case.].

The specific threshold limit values for contaminants are set out in 30 CFR § 57.5-1, which adopts by reference the exposure limits set out in the 1973 edition of the American Conference of Governmental Industrial Hygienists publication "TLV's Threshold Limit Values for Chemical Substances in Workroom Air."

Inspector Edward Machesky, acting on behalf of the Secretary, descended to the fourth level in the early afternoon on the day of the accident and took a number of air samples in the area where the two victims had been sent to work. His immediate readings, and subsequent laboratory analyses of sealed samples, showed carbon monoxide concentrations of between 550 and 600 parts per million. The air appeared quite clear despite these potentially lethal concentrations, and tested normal for oxygen and methane.

On September 22, 1980, James Atwood, a supervisory mine inspector for the Secretary, used a smoke tube to test for air flow at the fourth level. With the second level air door down, and the fan running, he found no perceptible air movement in the fourth level. During this inspector's visit David DiCamillo nailed the door back in place. Inspector Atwood concluded that removal of the door had "short circuited" the ventilation flow, depriving the fourth level of moving air.

This conclusion was ratified by William Bruce, Chief of the Ventilation Division at the Denver Safety and Health Technology Center of the Mine Safety and Health Administration, who made a ventilation study at the mine on September 24, 1980. Mr. Bruce, a graduate mining engineer with ten years of specialization in ventilation, measured the fourth level air flow at 1,400 cubic feet per minute with the second level door in place. Such a flow, he testified, was "minimal" for miner safety.

Respondent did not seriously dispute any of these findings. It also agreed with the Secretary's witnesses that carbon monoxide is one of the gases released by blasting; and that the muck pile created by the blast the night before the accident was the only possible source for the carbon monoxide which caused the death of Jerry Miller.

Uncontested evidence adduced by respondent's witnesses shows that Miller and Ouellet had loaded charges in both sides of the fourth level drift on the day before the accident. This "slab" round was not detonated at the end of their shift, however, because Paul DiCamillo, the brother in charge of the entire Cross Mine operation, was working a crew on the third level and wished no blasting below until his shift ended at 11:00 p.m. At that time he discharged the round so that the gases would have cleared and Miller and Ouellet could begin mucking at 7:00 the next morning.

In their defense, the DiCamillos first contend that at the time of the accident they were wholly without knowledge of any factors which could account for the excess buildup of carbon monoxide. Thus, they argue, they cannot reasonably be held responsible under the Act for violation of the mandatory airborne contaminant control standard.

Before examining the particulars of this defense, I should observe that an absence of operator negligence is not a defense to a charge of violation of a mandatory safety standard unless the standard itself declares it so. United States Steel Corp., 1 FMSHRC 1306 (1979); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (1981).

The full sense of 57.5-5 is gained by reading it with its sister standards, particularly 57.5-1 and 57.5-2. In 57.5-1 the Secretary requires absolute adherence to the limits of exposure set out in the 1973 tables of the American Conference of Governmental Industrial Hygienists. The only exception is under 57.5-5 itself where removal by ventilation or dilution by uncontaminated air is not feasible from an engineering standpoint. In that instance respirators may be used. In this case, of course, no one suggests that that exception came into play. The pertinent Hygienists' publication establishes the threshold limit value for carbon monoxide at 50 parts per million. Because of the extremely high concentrations measured by Inspector Machesky, however, the more relevant figure in this case is the 15 minute "excursion limit" of 400 parts per million. 1/ The readings obtained on the afternoon of September 19, 1980, coupled with the fate of Miller and Ouellet, demonstrate conclusively that this excursion value was exceeded. The absolute obligation of the mine operator to insure that contamination limits are not exceeded is underscored in 57.5-2, which provides:

> Dust, gas, mist and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures. (Emphasis added.)

I therefore hold that respondent violated the cited standard.

Operator negligence is relevant, though, on the issue of appropriate penalty. Respondent's argument of lack of fault has many facets. Central however, is a claim that the principal means of removing contaminants from the fourth level was compressed air, not the mechanical ventilating system. Undisputed evidence does show that after every blast the resulting muck pile was flushed with compressed air supplied through a central system. On the fourth level the air hose was attached to the mucking machine. Paul DiCamillo testified that after shooting the fourth level round on the night of September 18, he turned on the fourth level compressed air and that it remained on throughout the night. Respondent maintains that even with the

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1/ See "Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," page 51.

central ventilation short circuited on the morning of the 19th, the combination of compressed air and the large flows of fan-driven air during the night should have cleared any accumulations of carbon monoxide many times over. According to respondent's witnesses, universal practice in such mines is to wait no longer than 45 minutes after a blast before re-entering the area.

Respondent's witnesses also emphasized their belief that the compressed air flushing process should have adequately cleared the air of contaminants whether or not the fan system was working at all. Frequent references were made to the fact that until a year before the accident the entire mine had operated successfully with no fan system (Tr. 180, 205, 232).

Finally, Henry DiCamillo asserted at one point that Miller himself was responsible for the accident because he failed to turn on the compressed air valve on the morning of the accident (Tr. 173).

For these reasons the DiCamillos suggest, in essence, that the hazard on the fourth level was unforeseen and unforeseeable. I agree that it was in fact unforeseen, but not that it was unforeseeable. On the contrary, respondent's evidence showed a clear recognition that mechanical ventilation was necessary before mining was begun on the fourth level (Tr. 190). It follows that any known interruptions of fan-induced air flows through the fourth level drift should have alerted the operator to possible danger. David DiCamillo, who removed the air door, granted that he knew removal of the door would "slow down" the flow (Tr. 35). Paul DiCamillo conceded that "any prudent operator" would have known that removing the door would have short circuited the fourth level air (Tr. 182).

There is a patent inconsistency, of course, in admitting the necessity for a fan to insure safety at the fourth level, while maintaining that fan ventilation was superfluous because of the availability of compressed air. The compressed air argument is further weakened by the testimony of William Bruce, the Secretary's ventilation expert, who denied that compressed air alone should have been relied upon for adequate ventilation under the circumstances present in respondent's mine. Compressed air, he asserted, was not "meant to provide the primary source of ventilation" (Tr. 120). According to Bruce, when a muck pile is present it provides a continuing source for carbon monoxide; disturbing the pile through mucking can stimulate the release of the contaminants; and compressed air can free carbon monoxide from a muck pile but will not necessarily vent it from the drift as would a steady flow of intake and return air from a fan (Tr. 113, 119-129). I find this testimony credible.

Nor can the operator's neglect be shifted to the dead and injured miners on the theory that they ignored established procedures by failure to turn on the compressed air valve. There is some confusion as the whether the valve was on or off when Miller and Ouellet were brought to the surface (Tr. 240-241). That the valve may have been off, however, shows no departure from accepted practice in the mine. Toward the end of the

hearing Henry DiCamillo acknowledged that had Miller and Ouellet found the air on when they arrived in the drift (after it was presumably on all night) they would have been following policy to turn it off before proceeding into the drift.

Upon the entire record, then, I conclude that there was significant operator neglect. I also conclude that the character and consequences of the violation show it to be "significant and substantial" as that term is used in Section 104(d) and 104(e) of the Act. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

Aside from the elements of neglect and the gravity of the violation, evidence as to the remainder of the statutory penalty criteria 2/ tends to favor respondent. The gravity, of course, was high, as illustrated by the fatal results. It is undisputed, however, that the DiCamillos showed good faith in rapid abatement (Tr. 10). The mine was small, having never employed more than 18 miners. Of particular significance is the fiscal condition of the DiCamillo corporation. The four brothers formed it with the expectation of working several mines on a contract basis. It has few physical assets (Tr. 224), and at the time of hearing held approximately $900 in its corporate account (Tr. 224). David DiCamillo was "off the payroll" and working for another employer because of the corporation's lack of funds (Tr. 243-244). The Cross Mine, where the violation occurred, was closed on December 21, 1981 (Tr. 192), and the DiCamillo corporation has no other current contracts (Tr. 227).

Owing to the virtual collapse of the corporation, I cannot in good conscience assess the $3,000 penalty which the Secretary seeks. On the other hand, I cannot pass off this essentially grave violation with a token penalty. To do so would be to signal all financially distressed operators that safety short-cuts may be undertaken without fear of hurtful sanctions under the Act. (One must also recognize that an operating company which owns no minerals in place and few physical assets may be formed with minimum capital and may operate successfully over long periods without accumulating any substantial net worth. Choice of this mechanism for conducting business cannot serve as an absolute shield against penalty under the Act.)

2/ Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance.

Giving due consideration to all the penalty criteria, I conclude that a civil penalty of $1,500 is warranted to deter future violations. That sum is therefore assessed.

Citation No. 333581

The Secretary bases this citation upon the same facts as those in citation no. 333981, but alleges violation of a different mandatory standard. As modified before the hearing, the citation claims respondent violated 30 CFR § 57.5-28, which reads:

> Unventilated areas shall be sealed, or barricaded and posted against entry.

The Secretary argues that the standard applies because the DiCamillos did not immediately evacuate miners from the fourth level 3/ and seal it off when David DiCamillo interrupted the ventilation by removing the second level door. 4/

Counsel for respondent protests that this citing of a second standard for the very acts or omissions which serve as the foundation for another charge is unfair. He brands it an attempt to multiply civil penalties by citing the same underlying facts twice.

The Commission considered a similar argument in El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981), and held that the Act "imposes a duty on operators to comply with all mandatory safety and health standards", and permits no escape from liability "simply because the operator violated a different, but related mandatory standard."

I have difficulty with the cited standard, however, simply because I believe it is misapplied under the circumstances of this case. All standards must be construed in the light of the drafter's intent. Here, the cited standard must be read in association with the other standards in 30 CFR § 20, all of which deal with requirements for a comprehensive ventilation plan and system. Those standards recognize that in most mines, the plan will provide no ventilation for certain areas which are mined out or not frequented for other reasons. Thus, for example, 57.5-20(b)(2) provides that maps shall show "[l]ocation of seals used to isolate abandoned workings." I read the standard cited in this instance, when requiring "unventilated areas to be sealed barricaded or posted against entry," to comtemplate those areas which were intended under the operator's plan to be unventilated. I do not read it to embrace those areas which are

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3/ The Secretary did not see fit to charge this violation with respect to level two where the ventilation door was actually removed.

4/ After the two carbon monoxide victims were discovered, of course, miners were forbidden to enter the fourth level by management, and shortly thereafter a formal withdrawal order was issued by the MSHA inspector.

ventilated, but where ventilation is somehow interrupted on an unplanned basis due either to mechanical failure or human error. Most particularly, I do not read it to require that the barricading, sealing, or posting be done before the operator has actual knowledge of the failure, whatever its cause. Where an unplanned failure of ventilation occurs, one would expect that the operator, upon learning of it, would withdraw miners until air flows were restored. That is what occurred here. The DiCamillos closed the entire mine upon discovery of the accident, and that action was formalized by the inspector later in the day by issuance of what appears to be a mine-wide withdrawal order. In summary, I do not understand the Secretary to contend that respondent was obliged to comply with 57.5-28 after the mine was closed; and I do not understand the standard to require posting, sealing or barricading before respondent had actual knowledge of a ventilation failure. Consequently, no violation is found. The petition proposing penalty is vacated.

Citation No. 567048

This citation relates specifically to the air or ventilation door which David DiCamillo removed at the second level. It charges that the door "was not substantially constructed, nor was it maintained in good condition as required in 30 CFR § 5-31." The pertinent portion of the standard provides:

> Ventilation doors shall be:
>
> (a) Substantially constructed.
> (b) Covered of fire retardant material if constructed of wood.
> (c) Maintained in good condition.
> (d) Self-closing, if manually operated.

The undisputed evidence shows that the operators had made the door of plywood with no attempt to apply any fire retardant. Hence, a violation of the cited standard is clear. Witnesses for the Secretary also maintained without contradiction that the door, which did not conform well to the irregular shape of the bulkhead, was haphazardly held in place by a few common nails. I agree that this condition, too, violated the standard. 5/

5/ At trial, counsel for the Secretary also suggested violation occurred because the door was not self-closing. I note the citation speaks to no such defect. No basis exists for permitting an amendment under Rule 15(b) of the Federal Rules of Civil Procedure since I cannot find that the issue was tried by consent. The character of the door was obvious from the time of inspection, and the Secretary had ample time to amend before trial. With notice, respondent may well have been able to prepare a defense concerning, for example, the lack of need for a self-closing door leading to a seldom-used area.

Counsel for the respondent notes that door construction defects were not the proximate cause of the accident. This is so, but no causal connection to an accident is necessary to establish violation of a mandatory standard. I do agree that the door defects were considerably less grave than the removal of the door. Also, on the record presented, I am unable to conclude that the "violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" under sections 104(d) and 104(e) of the Act. In Cement Division, National Gypsum Co. (supra) the Commission held that such a conclusion must be based upon a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." The cited door violations were not shown to have contributed to the ventilation failure on the fourth level; ventilation ceased because of the complete removal of the door. One may infer that the insubstantial construction, haphazard mounting, and lack of fireproofing of the door would be dangerous in the event of a fire or explosion in the mine. No evidence was given, however, as to the likelihood, reasonable or otherwise, of such events in this particular metals mine. Without such evidence, a finding of "significant and substantial" cannot be made.

Giving consideration to all the penalty factors discussed in connection with citation 333981, I conclude that $100 is an appropriate penalty for the defects.

CONCLUSIONS OF LAW

Based upon the findings incorporated in the narrative portion of this decision, the following conclusions of law are made:

(1) Respondent violated the mandatory standard published at 30 CFR § 57.5-5 as alleged in citation 333981.

(2) The violation was "significant and substantial" within the meaning of the Act.

(3) The appropriate penalty for the violation is $1,500.

(4) Respondent did not violate the mandatory standard published at 30 CFR § 57.5-28 as charged in citation 333581.

(5) Respondent violated the mandatory standard published at 30 CFR § 5-31 as charged in citation 567048.

(6) The violation was not proved "significant and substantial" within the meaning of the Act.

(7) The appropriate penalty for the violation is $100.

ORDER

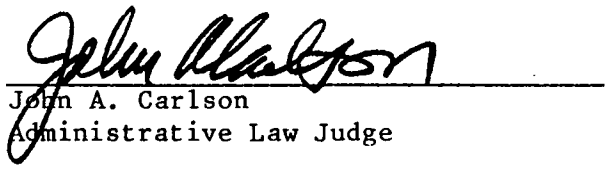
Accordingly, it is ORDERED that:

(1) Citation 333981 is affirmed and a civil penalty of $1,500 is assessed.

(2) Citation 333581 is vacated together with the penalty proposed in connection therewith.

(3) Citation 567048 is affirmed and a civil penalty of $100 is assessed.

(4) The total penalties of $1,600 shall be paid within 30 days of the date of this decision.



John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RAID QUARRIES, DIVISION OF MEDUSA AGGREGATES COMPANY, Respondent and JAMES ANDERSON, Respondent and ROBERT ORR, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET NO. CENT 80-66-M A/O No. 13-00183-05002 F DOCKET NO. CENT 80-199-M A/O No. 13-00183-05003 A DOCKET NO. CENT 80-200-M A/O No. 13-00183-05004 A DOCKET NO. CENT 80-378-M A/O No. 13-00183-05006 A MINE: Heinold Quarry

DECISION

Appearances:

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For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The above four cases, which were consolidated for hearing, involve alleged violations of section 110(a) and 110(c), respectively, of the

Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 820(a) and 820(c)(Supp. III, 1979). 1/

Docket No. CENT 80-66-M involves a petition by the Secretary of Labor, (Secretary), under section 110(a) of the Act, for assessment of civil penalties against Raid Quarries, a division of Medusa Aggregates Company, (Medusa) for alleged violations of mandatory safety standards 30 C.F.R. § 56.9-22 and 56.9-2. 2/

Docket Nos. CENT 80-199-M and CENT 80-200-M involves petitions by the Secretary under section 110(c) of the Act, for assessment of civil penalties against James Anderson, (Anderson), superintendent of the Heinold Quarry for Medusa, with knowingly authorizing, ordering, or carrying out, violations of 30 C.F.R. § 56.9-22 and 56.9-2.

Docket No. CENT 80-378-M, involves a petition by the Secretary under section 110(c) of the Act, for assessment of a civil penalty against Robert Orr, as vice president and general manager of Raid Quarries, a division of Medusa, with knowingly authorizing, ordering or carrying out violation of 30 C.F.R. § 56.9-22.

A hearing was held in Burlington, Iowa, where all parties were represented by counsel. Post hearing briefs were filed.

At the conclusion of the hearing, petitioner moved to dismiss the petition against respondent Robert Orr (Docket No. CENT 80-378-M) due to

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1/ Section 110(a) of the Act provides as follows: "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(c) of the Act provides as follows: "Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)."

2/ 30 CFR § 56.9-22 provides as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

30 CFR § 56.9-2 provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

insufficient evidence to prove this case. The petitioner's motion is hereby AFFIRMED.

STIPULATION

The parties stipulated to the following:

1. Raid Quarries, a division of Medusa Aggregates Company, and the mine, Heinold Quarry, is engaged in an activity covered under the Federal Mine Safety and Health Act of 1977.

2. James Anderson and Robert Orr were employees of Raid Quarries, a division of Medusa Aggregates Company.

3. Medusa Aggregates Company is a large mine operator under the Act.

4. That if the penalties proposed were assessed against Medusa Aggregates Company, it would not be forced to go out of business.

5. Medusa Aggregates Company is a corporate entity.

6. In the event violations are found in Docket No. CENT 80-66-M the previous history of violations of respondent Medusa is such that it should neither increase nor decrease the civil penalties.

ISSUES

1. Whether respondent Medusa violated 30 CFR § 56.9-22 and 56.9-2 as the corporate mine operator, and, if so, the appropriate amount of civil penalty which should be assessed against it for each such violation pursuant to section 110(a) of the Act?

2. Whether respondent James Anderson knowingly authorized, ordered, or carried out the aforesaid violations as an agent of the corporate operator, and, if so, the appropriate amount of civil penalty which should be assessed against him individually for each such violation pursuant to section 110(c) of the Act?

FINDINGS OF FACT

1. On May 21, 1979, a fatal accident occurred at the Heinold Quarry owned and operated by Raid Quarries, a division of Medusa Aggregates Company.

2. Heinold Quarry is a limestone mine located in Danville, Des Moines County, Iowa.

3. Respondent Medusa is a large mine operator under the Act, presently owning and operating some 31 mines.

4. Respondent James Anderson was superintendent of the J. Plant for Raid Quarries division of Medusa at the Heinold Quarry at all pertinent

times herein. As superintendent he had approximately 16 to 17 miners and the equipment used at the quarry under his supervision. Anderson has considerable experience in the operation and maintenance of heavy equipment including the Michigan Clark 275B end loader involved in the accident which occurred on May 21, 1979.

5. Heinold Quarry was reopened for production with the J Plant, a portable plant, arriving about April 30, 1979. After the machinery for the plant was set up, work was started on widening and resurfacing the haul road. This road had been used in 1978 but had suffered damage caused by heavy rains to the surface.

6. Material used for widening and resurfacing the haul road was secured from a stockpile left over from the prior year and waste material from the mining process commenced in 1979. The mining process involved first removing eleven feet of merchantable stone exposing five feet of shale which was considered waste and to be used on the haul road. The road had been widened to provide two lanes of travel for a distance of approximately 175 feet during the week prior to May 21, 1979. In widening the road, the surface had been built up approximately 12 to 18 inches. This eliminated the berm that had existed on this haul road during the previous year.

7. There was production of merchantable material from Heinold Quarry during the week prior to May 21, 1979. During this period of time, the haul road was also being widened and resurfaced. Respondent Anderson intended to build a berm on the outer edge of the road when it was completed which was estimated would take two weeks.

8. On May 15, 1979, respondent Anderson, while performing maintenance on the Michigan Clark 275B end loader, discovered that the right rear brake cam shaft was broken. Anderson unhooked the airline to the brake chamber and blocked off the line (Tr. 244 and 277). Greg Hensley was generally assigned to operate the 275B end loader, and used the machine for three days after the broken airline was plugged (Tr. 245). Replacement parts were ordered for this machine on May 15, 1979 (Tr. 277).

9. On May 21, 1979, Steven Knotts, age 19, reported to the Heinold Quarry to begin his regular work as an end loader operator. He was assigned to operate the 275B end load which was not the machine he usually ran. He usually operated the Caterpillar 980 which was similar to the 275B. Knotts initially operated the 275B end loader in the lower pit loading haul units. Respondent Anderson operated the end loader on May 21, 1979 to show Knotts how to use this machine on decline mucking (Tr. 279, 280). At approximately 4:30 p.m., Knotts drove the machine to the maintenance area of the quarry for greasing and fuel (Tr. 287). Knotts was to work an additional two hour shift after normal production hours on removing shale and rebuilding the haul road (Tr. 287).

10. Upon leaving the maintenance area Knotts drove the 275B end loader through the stockpile area, made a right turn to go down a ramp for

a distance of approximately 225 feet where he made a 90 degree turn on the main ramp or haul road. Knotts proceeded to travel down this haulage road approximately 110 feet when the end loader made a 35 degree turn to the right going over an embankment. The end loader traveled 80 feet down the bank from the edge of the haul road to its resting place. Knotts was thrown from the end loader and covered with loose material and expired due to asphyxiation.

11. The Michigan Clark Model 275B front-end loader involved in this fatal accident was equipped with a 7-cubic-yard capacity bucket and had tire protection chains on all four wheels. It was also equipped with seatbelts and a rollover protection type cab and weighed approximately 90,000 pounds gross weight with all of the above equipment installed. The brakes were four-wheel straight air, shoe type.

12. The haul road was 20 feet wide at the point where the accident occurred with approximately a ten percent grade. Weather was warm and visibility good at the time.

DISCUSSION

DOCKET NO. CENT 80-66-M

As a result of an investigation of the fatal accident occurring on May 21, 1979, two citations were issued to respondent Medusa. Citation No. 178555 charged a violation of mandatory safety standard 30 C.F.R. § 56.9-22 and stated as follows:

> A berm was not installed along the outer edge of the elevated haulages road for approximately 100 feet south and 50 feet north of the point where the end loader went over the edge. The absence of a berm could have been a contributing factor to the fatal accident.

Order No. 178558 cited a violation of the mandatory safety standard 30 C.F.R. § 56.9-2 and stated as follows:

> During the safety inspection of the Michigan end loader, Model 275B Serial No. 425C485, that was involved in the fatal accident on May 21, 1979, it was discovered that the right rear brake shaft was broken, the brake air line unhooked and plugged by Jim Anderson, superintendent.

Petitioner argues that the absence of a berm on the haul road had existed for several weeks prior to the accident and that during this time the road had been used for production purposes. 3/

Respondent argues that an adequate berm had been present on this haul road prior to April 30, 1979, but the height of the berm was decreased

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3/ Petitioner's Brief, page 14.

when the surface of the road was filled in and widened upon opening the quarry in 1979. Also, respondent argues that a berm did exist on May 21, 1979 which would restrain a vehicle traveling on the haul road and that further construction on said berm was to be part of rebuilding this road which was to be completed within two weeks. 4/

After careful consideration of the arguments presented by the parties, and particularly the facts presented in this case, I conclude that petitioner's position is correct and that respondent's arguments must be rejected. 5/ A preponderance of the evidence including a visual examination of the photographs taken on May 23, 1979, shows an absence of sufficient material to constitute a berm at the point on the road where the end loader went over the embankment (Exhibits P7 thru P12). MSHA inspector Lyle K. Marti testified that upon his arrival at the accident scene, he observed that the haul road ran from the plant area at the south end of the quarry down a 9 to 10 percent grade for approximately 220 feet where the end loader went over the embankment. For a distance of 50 feet to the south and 100 feet to the north, there was some material approximately eight to twelve inches high which he did not consider would constitute any berm whatsoever (Tr. 32, 38 and 122). Inspector Doyle Fink testified that no berm existed at the location where the end loader went over the embankment due to fill material being used to build up the road surface (Tr. 348).

The respondent's argument that the material existing on the edge of the haul road constitutes an adequate berm must be rejected. A berm is defined in 30 C.F.R. § 56.2 as follows:

> "Berm" means a pile or mound of material capable of restraining a vehicle.

Respondent did not contend, and rightly so, that the material along the outer edge of the haul road would restrain or prevent the end loader from going over the edge of the embankment. However, respondent proposes that because the roadway was under construction and repair, a berm was not required. I reject this argument for the reason that the haul road was being used on a daily basis for production of material from the quarry and had been so used for a period of time prior to the fatal accident.

The intent of the mandatory safety stand 56.9-22 is to provide protection for men and equipment when required to travel along elevated roadways while performing work connected with the mining process. I find the respondent knew that the berm was not adequate. The evidence shows

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4/ Respondent's Brief, page 12.

5/ I am aware of and considered the Judge's decision in Secretary of Labor, (MSHA) v. United States Steel Corp., KENT 81-136 (February 26, 1982) and I disagree with the decision he reached regarding the berm standard 56.9-22.

that superintendent Anderson had intended to use waste material from the production of marketable material at the quarry to repair and widen the haul road and that such work on the road would be done after the regular production of the day was concluded. That was what Knotts was on his way to do on the day of the accident. After the accident, respondent hired a contractor to finish the work on the haul road and install an adequate berm which took only three and a half days to complete (Tr. 304).

As to Order No. 178558, respondent admits that the right rear brake shaft was broken and that he plugged the air line on the 275B end loader involved in the fatal accident (Tr. 277). However, respondent argues that the brakes were adequate and that the end loader was otherwise in good mechanical condition. Further, that the evidence does not conclusively show that the broken brake shaft and plugged airline contributed in any way to the accident.

I find respondent's arguments unpersuasive. The standard 56.9-2 cited in this violation provides that equipment defects affecting safety shall be corrected before the equipment is used. The defect in this instance involved the brakes on the 275B end loader which respondent admitted were defective. That is, they were not mechanically the same as they were when the end loader was designed, manufactured, and sold. The question is whether the alterations to the braking system effected the safe use of this machine? The applicable law is stated in Ziegler Coal Company, 3 IMBA 336, 373 (1974) wherein the Interior Board held as follows:

> The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under repair, and had not been used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

The evidence shows that the end loader was placed in use after the brake was disconnected. No argument can be made that the brakes were not defective. However, respondent argues that the brakes were adequate. The 275B end loader with tire chains and additional equipment installed weighed approximately 90,000 pounds gross and was operated in the quarry on roadways used by other machines and employees of the respondent. Superintendent Anderson who disconnected and plugged the airline to the right rear brake testified that he felt the brakes were "adequate' but admitted that it would have "some" affect on the safe operation of the end loader (Tr. 308-310). I find that the preponderance of the evidence shows that the action taken by Anderson in plugging the airline to the right rear wheel brake on the end loader would affect its braking capacity and could affect safety as a result of its continued use at the quarry.

STATUTORY CRITERIA

Section 110(i) of the Act requires that the following criteria be considered in the assessment of a civil penalty:

> [t]he 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.

The parties offered stipulations regarding each of these criteria except for respondent Medusa's negligence and the gravity of the violation.

NEGLIGENCE

As to the violation of 56.9-22, the record shows that respondent Medusa failed to install a berm of adequate height on the outer edge of an elevated roadway. Further, respondent knew that a berm is required in this instance, but contends that the roadway was unfinished and therefore a berm could not be permanently installed.

MSHA inspector Marti testified that a "moving berm" could be used in cases such as this but respondent's witness denied knowledge of such a berm. Further, respondent argued that the fact that they fully intended to install a berm when the road was completed should be considered in assessing any penalties in this case.

The facts show that respondent Medusa had operated the quarry for several weeks without a berm on the elevated road, as it was to its advantage to resurface and widen the road from waste materials secured through the mining process. After the accident, the road was finished and the berm was built in a period of three and a half days indicating that this could be accomplished in a short period of time.

The evidence did not show that a lack of a berm was the direct cause of the fatal accident involved herein. However, it is reasonable to assume that an adequate berm could have stopped or deflected the end loader from going over the embankment as the evidence shows that the machine was traveling at a slow rate of speed when the accident occurred.

In view of the above, it is found that respondent Medusa was negligent in its failure to comply with the requirements of the standard 56.9-22.

As to the violation of 56.9-2, the record shows respondent Medusa, through its agents and employees, was aware of the defect in the braking system of the Michigan 275B end loader. The respondent's employee Greg Hensley operated the end loader for three days after the airline had been

disconnected and plugged and testified the brakes worked satisfactory. Anderson tested the brakes and operated the machine after the airline was plugged and encountered no loss of braking power. Based upon this, respondent contends that the disconnected airline did not affect safety at the mine.

Admittedly, there is no evidence to show that the condition of the brakes on the end loader was directly involved in this accident. However, the contrary is also true as no evidence was presented by the respondent to show that the brakes were not involved in this accident. The facts do establish that respondent's employees made temporary repairs on the braking system of a large piece of equipment to be used in a quarry on uneven and inclined roadways with dangerous embankments. Further, respondent Medusa knew or should have known this machine would be operated by other than the regular operator, in this case Knotts, who was not experienced with the operation of this particular machine. I conclude that this machine with less than full braking power could affect safety.

In view of the above, it is found that respondent Medusa was negligent in its failure to comply with the requirements of 56.9-2.

GRAVITY

As to the violation of 56.9-22, the petitioner does not allege that the accident in this case was caused directly by the lack of a berm. However, I am convinced that the lack of an adequate berm at the point on the haulage road, where the end loader went over the edge and down the embankment resulting in the operators death, points out the results that can be anticipated from the failure to comply with the requirements of the berm standard.

As to the violation of 56.9-2, by plugging the airline to one of the brakes on the 275B end loader, respondent Medusa could foresee that such actions on the part of its employees could affect the safety of the operator and other miners in the quarry. Admittedly, Anderson and Hensley testified that the end loader's brakes performed satisfactory after the airline was disconnected. However, Anderson admitted that the condition of the brakes could affect safety. The size of the end loader and the area where it was required to be operated requires that it have full performmance of its braking system. Anything less should be foreseen by respondent as inviting a possible accident, similar to the type that occurred on May 21, 1979.

Petitioner does not allege that the violation of 56.9-2 directly caused the accident involved herein. However, such a result can be anticipated from such a violation.

GOOD FAITH COMPLIANCE

As to the violation of 56.9-2, abatement was achieved in a timely manner by hiring an outside contractor to finish the roadway and install an adequate berm. As to the violation of 56.9-22, rapid abatement was

achieved by obtaining the replacement parts immediately and installing them to bring the end loader to a safe operating condition (Tr. 96).

The inspector testified and I concur that the respondent exercised good faith in achieving rapid compliance in this case.

PENALTY

The original proposal for assessment of penalties in Docket No. Cent 80-66-M was the maximum penalty of $10,000 for violation of 30 C.F.R. 56.9-22 and $10,000 for violation of 30 C.F.R. 56.9-2. The petitioner urges that these penalties be adopted in this case. 6/

Respondent Medusa argues that it was not in violation of the standards cited. However, assuming that the violations did occur, the proposal of maximum penalties is unreasonable considering the factors required by law to be applied in assessing a penalty. 7/

As stated before, I have determined that the preponderance of the evidence shows that respondent Medusa was in violation of the two mandatory safety standards cited. However, I find there are several mitigating circumstances that should be considered in arriving at a proper penalty for these violations. Although respondent Medusa would be considered a large company in this type of business in that it operated 54 active quarries at the time of the occurrence, it was agreed to in the stipulation between the parties that Medusa had incurred an unimposing number of violations which should neither increase or decrease the civil penalty to be imposed. Further, Medusa demonstrated good faith in achieving rapid abatement of these violations. I find that the above considerations should be given its proper weight in fixing the amount of these penalties. The Fifth Circuit Court of Appeals considered a similar question in the case of Allied Products Company v. Federal Mine Safety and Health Administration Review Commission, Court Docket No. 80-7935, ____ Fed 2d _____, (February 1, 1982) and opined that the $10,000 civil penalty provided for in 30 U.S.C. § 820(i) refers to the maximum that can be assessed for a violation and that penalties approaching that amount would be used only in the most severe situations. The court went on to state as follows:

> We do not doubt that these violations were serious ones, and the death of an employee is always a serious matter. The berm and ROPS rules, especially, are designed to protect employees regardless of, even in spite of, their fault or misconduct. ... However, the law does not authorize or suggest that maximum fines are to be imposed whenever a fatality occurs.

6/ Petitioner's Brief, page 21.

7/ Respondent's Brief, page 15.

In light of the mitigating circumstances referred to above and the Court's decision in Allied Products Company, I find that a proper penalty for the violation of 30 C.F.R. 56.9-22 is $1,000 and the proper penalty for the violation of 30 C.F.R. 56.9-2 is $1,000.

DOCKET NOS. CENT 80-199-M and CENT 80-200-M

BACKGROUND

On February 25, 1980, the Secretary of Labor filed a Petition for Assessment of Civil Penalty, pursuant to section 110(c) of the Act against James Anderson. The two citations were assigned docket number Cent 80-199-M and docket number Cent 80-200-M and were combined in one petition predicated on the claim that James Anderson (Anderson), acting as the statutory agent of the corporate operator, within the meaning and scope of section 3(e) and 110(c) of the Act, knowingly authorized, ordered, or carried out the corporate operator's violations of 30 C.F.R., section 56.9-22 cited in citation no. 178555 and section 56.9-2 cited in order no. 178558.

DISCUSSION

Respondent Anderson argues that there was no knowing violation on his part of the berm violation contained in citation no. 178555. Respondent Anderson contends that, while he was aware of the condition of the haul road, it was his belief that a new berm could be built as part of the project to resurface and widen the road. He insists he was taking steps to make the haul road safer for the miners who were to use it.

Respondent further contends that he did not knowingly violate the mandatory safety standard 56.9-2 as it was his honest belief that after he disconnected the right rear brake on the 275B end loader, it had adequate brakes and was safe to operate.

The question here is whether Anderson "knowingly" failed to have a berm placed on the outer edge of the elevated haul road and "knowingly" placed the 275B end loader back in service after discovering the broken brake cam.

The Review Commission considered the definition of the term "knowingly" in the case of Secretary of Labor, Mine Safety and Health Administration v. Kenny Richardson, Barb 78-600P, (January 19, 1981) and held that the term "knowingly" under this provision means "knowing or having reason to know", and stated:

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

The preponderance of the evidence in this case shows that Anderson knew that a berm was required on the elevated road in the mine. He had

worked as superintendent of a plant for Raid Quarries since 1967 (Tr. 261). He was required to hold at least a one-half hour safety meeting every month for his employees (Tr. 266). Anderson testified he was responsible for resurfacing the haul road as part of setting up the J Plant at the Heinold Quarry when it was opened in April 1979 (Tr. 269). I reject Anderson's argument that he thought he could build a berm on the haul road as production at the quarry continued and work could be done on the road using waste material that was left over. Anderson had the responsibility to protect his employees safety and health and based upon his experience and the fact that he taught safety classes, had the knowledge or reason to know that the absence of an adequate berm was a violation of the safety standard. The fact that the end loader went over the embankment where there was not an adequate berm points up to the danger that existed to employees using the elevated haul road during the production of stone. This possibility should have been forseen by the respondent based upon his experience and knowledge.

Respondent admits that he discovered the broken brake cam on the 275B end loader during his investigation of a complaint by the operator that the brakes were not working properly (Tr. 276). He admitted that he disconnected and plugged the airline to the right rear brake fully eliminating this one brake out of the four on the machine (Tr. 307). However, he argues that the remaining brakes were adequate. He states that he drove the machine after disconnecting the brake and did not find it defective (Tr. 281). On direct examination respondent testified that when he operated the 275B end loader on May 21, 1979, to show Knotts how to run it on an incline, there was no problem that affected safety (Tr. 281). However, under cross examination, respondent testified in the following manner:

> Q. Well, you told us here earlier that you didn't have any problem with the brakes at all with the condition they were in. I'm curious why you ordered the part.
>
> A. Well, even though I didn't experience a direct problem at that time, suppose I had broke another one. Then it could catepult into a more serious mess.
>
> Q. Did you order parts because you knew that the machine had lost some of its safety as a result of that right-rear brake assembly being completely eliminated from this 91,000 pound machine?
>
> A. I'd have to say, yes.
>
> Q. Isn't it a true statement, sir, that you wanted to keep that machine in production and in use at the plant?

A. Yes.

Q. That's what I'm asking. It is your statement, sir, that the broken cam on the right-rear assembly of the Michigan front-end loader, and the plugging of the air line, did not affect the safety of that machine at all?
A. I don't believe I stated that it wouldn't affect the safety of the machine at all.

Q. Do you feel that it did have some effect on the safety?

A. I'm sure it did.

Q. Do you feel this now in retrospect or did you feel this at the time prior to the accident?

A. Both. (Tr. 310).

I find the record shows that Anderson failed to remove the end loader from service on May 15, 1979, when he discovered the broken brake cam and he knew or should have known it was unsafe to operate it in this condition. Further, Anderson ordered Knotts to operate the machine on the day of the fatal accident when he knew or should have known the machine was unsafe.

STATUTORY CRITERIA

Section 110(c) of the Act regarding the assessment of a civil penalty states in part as follows:

> Whenever ... , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fines, ... that may be imposed upon a person under subsections (a) and (d). (Emphasis added).

Section 110(i) of the Act requires that the same six criteria be applied to the individual as was applied in determining a penalty against respondent Medusa.

NEGLIGENCE

The preponderance of the evidence shows that respondent Anderson was negligent in the acts that constituted the violations of both 56.9-22 and

56.9-2. He was in charge of both the opening and operating of the Heinold Quarry including the repair and construction of the haul road, production, employees and equipment. It was his decision that the road be worked on while mining and production of material continued. He cut the airline to the brake on the 275B end loader and ordered Knotts to operate the machine in this defective condition.

GRAVITY

The aforementioned action on the part of respondent Anderson was serious in nature for it exposed the miners to the possibility of a serious injury and even death to employees as occurred to Knotts on May 21, 1979.

The evidence in this case did not establish a direct cause between the lack of a berm on the haul road or faulty brakes on the end loader and the subsequent fatal accident. However, a reasonable man can conclude that the end loader would have stopped or had its direction changed by an adequate berm and that effective brakes may have stopped the machine from going over the edge of the embankment.

The record establishes that respondent Anderson cooperated fully in the investigation of the accident, and in the expeditious and rapid good faith abatement of these violations.

ABILITY TO PAY

Respondent Anderson's gross salary in 1979 was $21,800.00. At the time of the hearing his salary was $23,400.00. He supports a wife and six children, who presently live with him and pays $400.00 per month in support to an ex-wife and one child from a prior marriage. He owns his residence which is mortgaged but does not own other real estate.

PENALTY

The original proposal for assessment of penalty in this case was that respondent Anderson pay a sum of $400.00 for violation of section 56.9-22 and $1,000.00 for violation of section 56.9-2. The Secretary proposes that Anderson pay $2,000.00 for each violation or a total of $4,000.00.

The evidence which militates for very substantial penalties in this case is the seriousness of the two violations and the capability of the respondent Anderson as the supervisor of this plant and machine, in allowing two serious hazards to exist which jeopardized the life and health of his fellow miners. However, mitigating factors to be considered in this case is the fact that the evidence does not show any history on Anderson's part of previous violations and that he exhibited good faith in assisting the MSHA inspectors with their investigation following the fatal accident and in attempting to achieve rapid compliance with the standards after the

inspector notified him of the violations. Anderson was totally straight forward in his testimony that he thought the brakes on the end loader were adequate and that the berm was not necessary until after the road was widened and filled. Further, Anderson is in a relatively disadvantageous economic position due to the many members in his family subject to his support.

Respondent Anderson is assessed a penalty in Docket Cent 80-199-M for violation of 30 C.F.R. § 56.9-22 of $200.00 and a penalty in Docket No. 80-200-M for the alleged violation of 30 C.F.R. 56.9-2 of $200.00 or a total of $400.00.

ORDER

The petition filed in Docket Cent 80-378-M, Robert Orr, respondent is dismissed.

In Docket No. CENT 80-66-M, respondent Raid Quarries, a division of Medusa Aggregates Company is ordered to pay a penalty of $1,000 for violation of 30 C.F.R. 56.9-22 and a penalty of $1,000 for violation of 30 C.F.R. 56.9-2 for a total of $2,000.

In Docket No. Cent 80-199-M, respondent James Anderson is ordered to pay a penalty of $200 for violation of 30 C.F.R. 56.9-22 and a penalty of $200 for violation of 30 C.F.R. 56.9-2 for a total of $400.

The above penalty assessments are to be paid within 30 days of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-75-M
v.	)	A/C No. 45-01582-05005
BLACK RIVER SAND AND GRAVEL, INC.,	)	Mine: Black River Pit
Respondent.	)	

Appearances:

Faye vonWrangel, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, Seattle, Washington
For the Petitioner

James L. Hawk, President, Black River Sand and Gravel appearing Pro Se, Seattle, Washington
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent with violating various safety regulations adopted under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held on July 7, 1981 in Seattle, Washington.

ISSUES

The issues are whether the proposed penalties are excessive.

STIPULATION

The parties stipulated that the violations existed on the date of the inspection. Respondent further reserved the right to show that the violations were not serious (Tr. 7).

CITATION 354510

This citation proposes a civil penalty of $72 for the violation of 30 C.F.R. § 56.12-30. The cited standard provides as follows:

> 56.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

The evidence shows that the outer insulation on respondent's cable had pulled apart. This involved a possible electrical hazard. If the ground fault was interrupted the area could be energized with resulting shock or electrocution to a worker (Tr. 13, 14).

CITATION 354513

This citation proposes a civil penalty of $72 for the violation of the above cited electrical standard, 30 C.F.R. § 56.12-30.

The evidence shows that the cable to the jaw crusher was broken and within easy reach of ground level. The cable was located on a steel frame and workers could be electrocuted if the ground fault system failed (Tr. 14-16, R-7).

CITATION 354514

This citation proposes a penalty of $72 for the violation of the above cited electrical standard, 30 C.F.R. § 56.12-30.

The evidence shows that the wires of the cable going to the second material conveyor had separated from the outer insulation at the junction box. The cable was hanging down in large loops (Tr. 15-16).

CITATION 586007

This citation proposes a penalty of $52 for the alleged violation of 30 C.F.R. § 56.16-5. The cited standard provides as follows:

> 56.16-5 Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner.

The evidence shows that there was an unsupported and untied acetylene bottle located next to a parts trailer. The almost empty bottle was sitting atop a pile of rock. Workers as well as heavy equipment pass with seven or eight feet of the bottle (Tr. 16-19, 24).

CITATION 586008

This citation proposes a civil penalty of $140 for the violation of the previously cited standard, 30 C.F.R. § 56.12-30.

The evidence shows that the power cable from the crushing plant was exposed to falling boulders (Tr. 18, R-3). Respondent abated this condition by abandoning this particular cable and conveyor (Tr. 32)

CONTENTIONS

Respondent contends that the violations are not serious, that human error is the greatest cause of injuries at the worksite, and finally respondent contends that OSHA has jurisdiction over this worksite rather than MSHA.

I disagree. The evidence establishes that all of the electrical hazards were potentially dangerous. If the ground fault failed electrocution could result.

The unsecured acetylene bottle is less serious than the electrical violations but as indicated petitioner proposes a lesser penalty for that violation.

Respondent further contends that human error is the cause of most worksite accidents. I disagree with respondent's argument. In these citations all of the defects involved equipment problems which are clearly under managerial control as well as ownership. Respondent's reliance on "Fatalgrams" (R8) and respondent's later accident involving a fatality is not relevant in this case.

Respondent's final argument is that OSHA [1/] rather than MSHA has jurisdiction over its sand and gravel operation. This issue has been previously decided contrary to respondent's views. Cf Valley Rock Sand and Gravel WEST 80-3-M, 4 FMSHRC 113 (January 1982).

CIVIL PENALTIES

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. 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.

1/ Occupational Safety and Health Act, 29 U.S.C. 651 et seq.

In connection with the proposed penalties I note that Citation 586008 proposes a greater penalty that the other three violations of the same standard. In my view, petitioner has properly recognized the greater gravity that can be caused by the boulders falling on an extended cable. The penalty as proposed is, accordingly, a proper analysis of that violation compared with the other violations of the same standard. Considering the statutory criteria I am unwilling to disturb the petitioner's proposed penalties.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citations 354510, 354513, 354514, 586007 and 586008 and the proposed penalties therefore are AFFIRMED.

2. Respondent is ordered to pay the total sum of $408 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

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APR 28 1982

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Orders and Citation Docket No. WEVA 80-116-R
v.	:	Order No. 808596; 10/29/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 80-117-R Citation No. 808599; 10/30/79 Docket No. WEVA 80-118-R Order No. 808606; 11/5/79 Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-659 Shoemaker Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISIONS

Appearances: Anthony J. Polito, Esquire, Pittsburgh, Pennsylvania, for contestant-respondent Consolidation Coal Company; David Street, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for respondent-petitioner MSHA.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern three contests filed Consolidation Coal Company (hereinafter Consol) challenging the validity of the captioned orders and citation issued pursuant to the Federal Mine Safety and Health Act of 1977. The civil penalty proceeding concerns a proposal for assessment of civil penalty filed by MSHA seeking a civil penalty assessment for the citation issued in Docket WEVA 80-117-R. The three contests were originally adjudicated by former Commission Judge James A. Laurenson, and he issued

his decision in those cases on October 7, 1980. Consol's petition for discretionary review by the Commission was denied, and Judge Laurenson's decision became the final Commission decision in this matter. Subsequently, on December 11, 1980, Consol filed a petition for review in the United States Court of Appeals for the Fourth Circuit, Consolidation Coal Company v. Secretary of Labor, No. 80-1862. The civil penalty case was stayed pending court review. On October 13, 1981, the Court vacated the decision and remanded the matter for further proceedings consistent with its opinion. The cases were subsequently assigned to me for further consideration and adjudication.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and in particular sections 104(a) and (b), and 104(d)(1).

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (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.

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

Issues

Counsel for the parties are in agreement that the following issues remain to be decided on remand:

1. In light of all the evidence of record, including but not limited to all hearsay testimony excluded or not considered by the trier of fact, was Order No. 0808596 properly issued on October 29, 1979.

2. In light of the recent decision by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), was the violation described in Citation No. 0808599 (issued on October 30, 1979) of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard within the meaning of Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977.

3. The appropriate penalty, if any, to be assessed.

Discussion

Docket No. WEVA 80-116-R

On October 26, 1979, at approximately 6:15 p.m., a section 104(a) citation no. 0808594, was served on Consol charging a violation of mandatory safety standard 30 CFR 75.200. The "condition or practice" cited by the inspector is described on the face of the citation as follows:

> The approved mine roof control plan was not being followed in 4 Right, 5 North (087) section in that roof bolts were spaced 4 feet 7 inches to 6 feet 2 inches apart and from the coal rib in approximately 150 different locations in the coal conveyor belt entry from the tailpiece to 18+00 SS and from the belt entry to the face of No. 30 room for a total of approximately 300 feet in length. C. Causey and T. Thomas, Section Foremen. 4 feet 6 inch centers are maximum required in flat face mining in the plan.

The inspector who issued the citation made a finding that the alleged violation of section 75.200, was "significant and substantial", and he directed that the cited conditions be abated by 8:00 a.m., Monday, October 29, 1979. Thereafter, at approximately 8:55 a.m., October 29, 1979 the inspector refused to extend the time for abatement and issued a section 104(b) withdrawal order no. 0808596 covering the same area of the mine covered by the underlying citation, namely, the belt entry from the tailpiece to 18+00 SS and from the belt entry to the face of No. 30 room in the 5 North, 4 Right section of the Shoemaker Mine. The order stated as follows:

> Little effort had been made to abate Citation 0808594 in that only approximately 15 roof bolts had been installed to support the roof in the area that was cited. The condition was reported six straight shifts and worked on only on 10/29/79, 12:00 to 8:00 a.m. shift according to the preshift record book.

WEVA 80-117-R and WEVA 80-659

These consolidated proceedings concern a section 104(d)(1) "unwarrantable failure" citation issued to Consolidation Coal Company (hereinafter Consol) by an MSHA inspector on October 30, 1979, during the course of his mine inspection. Docket WEVA 80-117-R is a contest proceeding filed by Consol challenging the legality and propriety of the citation. In his decision of October 7, 1980, Judge Laurenson held that the citation was properly issued and denied Consol's contest. Docket WEVA 80-659, concerns a civil penalty proposal filed by MSHA on October 1, 1980, seeking a civil penalty assessment for the alleged violation set out in the citation, and both dockets have been consolidated for adjudication.

The section 104(d)(1) unwarrantable failure citation no. 0808599, was issued at approximately 11:55 a.m., on October 30, 1979. The citation alleged a violation of 30 CFR 75.200, and the "condition or practice" described by the inspector on the face of the citation is as follows:

> The approved mine roof control plan was not being followed in 4 Right, 5 North section (087) and on the section supply track in that roof bolts were spaced from 4 feet 7 inches to 7 feet 6 inches apart and from bolt to coal rib in approximately 350 different locations that were measured in the (intake air) No. 1 entry from 30 to 33 room and from 31, 32 and 33 rooms, and in the track from 6 to 18 stopping for a total of approximately 1500 feet in length and more bolts may be spaced wide. 4 feet 6 inches maximum in plan. William Zamski Mine Foreman.

In addition to his "unwarrantable failure" finding, the inspector determined that the cited violation of section 75.200 was a "significant and substantial" violation, and he fixed the abatement time as 8:00 a.m., Friday, November 2, 1979. On Monday, November 5, 1979, the inspector refused to extend the time for abatement and at approximately 9:45 a.m. that same day issued a section 104(b) withdrawal order no. 0808606.

Findings and Conclusions

Docket No. WEVA 80-116-R

The record adduced in this case reflects that at approximately 6:15 p.m. on Friday, October 26, 1979, MSHA Inspector Charles Coffield issued a section 104(a) citation no. 0808594 for a condition he observed in the 5 North, 4 Right section of the mine. The citation indicated that the approved roof control plan was not being followed at approximately 150 different locations in that approximately 150 roof bolts were spaced from four feet-seven inches to six feet-two inches apart. The approved plan required the bolts to be on four feet-six inch centers. Inspector Coffield fixed the abatement time as 8:00 a.m., Monday, October 29, 1979.

On Monday morning, October 29, 1979, shortly before 8:00 a.m., Inspector Coffield went back into the 5 North, 4 Right section, and after refusing to extend the time for abatement of the citation issued the section 104(b) withdrawal order no. 0808596. Contestant contends that Inspector Coffield unreasonably exercised his power and that he acted arbitrarily and capriciously in failing to extend the time for abatement and in issuing the withdrawal order.

Contestant does not challenge the validity of the underlying section 104(a) citation no. 0808594, charging a violation of mandatory safety standard 30 CFR 75.200, for a violation of the approved roof control plan dealing with the proper spacing of roof bolts. Contestant's challenge in this proceeding concerns the inspector's decision to refuse an extension of the abatement time and his decision to issue a section 104(b) withdrawal order on October 29, 1979. In this regard, section 104(b) of the Act 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 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.

Respondent MSHA's Arguments

In support of its argument that order of Withdrawal No. 0808596 was properly issued, respondent MSHA relies on the previous decision issued by Judge Laurenson as well as its post-trial brief filed with him. Respondent takes the position that even if I were to conclude from the record that supply and mechanical problems during the midnight shift of October 29, 1979, prevented the timely abatement of citation 0808596, the order should still stand. In support of this position respondent relies on Judge Laurenson's conclusion that Inspector Coffield was not advised of any such difficulties, and at 8:00 a.m., October 29, 1979, was confronted with the fact that --

> "only 15 roof bolts had been installed to correct 150 wide spaced bolts and that abatement work had only been performed during one shift after issuance of the citation."

In its brief filed with Judge Laurenson, MSHA points to the fact that Inspector Coffield discussed the abatement time with company walk-around representative Peter J. Domenick, but that Mr. Domenick could not provide an estimate of how long the job would take. Further, MSHA states that at the hearing it made an offer of proof that one of the roof bolters in the area told Mr. Coffield that he would be able to bolt the cited room on the evening of October 30, but that Judge Laurenson ruled that this was hearsay. Further, MSHA argues that in fixing the abatement time, Mr. Coffield took into account his own experience as a roof bolter which he had obtained at the Shoemaker mine (Tr. 300), and that he felt that the company could well have corrected the conditions within two shifts. In establishing his abatement date, he did not count on the operator calling in roof bolters to work on the weekend, although he knew it was possible for it to do so (Tr. 301, 399). At the time the citation was issued, Mr. Domenick did not ask for more time for abatement (Tr. 43), and mine foreman William Zamski and General Superintendent Ronald Stovash believed that the entire bolting job could have been performed during the midnight shift on October 29 (Tr. 62).

MSHA argues that when Mr. Coffield returned to the mine on the morning of October 29, Inspector Coffield found that only 15 bolts had been installed in the cited area in a very small section near the tail piece (Tr. 302). He also noted that the violation had been reported by preshift examiners on six shifts and had been worked on only on the 29th (Tr. 302). Although he remembered that the company pulled the roof bolters out of the section after he issued the citation on the 26th, he still believed that the company could have left bolters in the section on that shift and accomplished a great deal towards abating the violation (Tr. 302-303). Another factor which weighed in his decision was that management personnel did not seem to know on the 29th what work had been done to abate (Tr. 66, 302-303, 308). In sum, he found that the company had not made an honest, all out effort to correct the violation (Tr. 433-434).

Citing the applicable case law, MSHA asserts that the two general criteria addressed by the Commission's Judges in dealing with cases of this kind are the reasonableness of the original abatement period and the reasonableness of the inspector's decision not to extend that period. Itmann Coal Company v. Secretary of Labor, 1 BNA MSHC 2350 (FMSHRC Docket No. HOPE 79-307, February 26, 1980), U.S. Steel Corporation v. Secretary of Labor, 1 BNA MSHC 2407 (FMSHRC Docket Nos. WEVA 80-54-R and 80-55-R, April 8, 1980). The latter criteria depends on the facts confronting the inspector when he wrote his section 104(b) order. U.S. Steel Corporation v. Secretary of Labor, FMSHRC Docket No. WEVA 79-172-R (June 19, 1980), citing U.S. Steel Corporation v. Secretary of Interior, 7 IBMA 109, 116 (1976). Facts to be considered include the diligence of the operator's effort to abate, the extent of mechanical or other difficulties encountered in abatement, and the seriousness of the unabated hazard.

MSHA argues that on the facts presented in this case Inspector Coffield acted reasonably when he initially fixed the abatement time as 8:00 a.m., Monday, October 29, 1979. Given the fact that he received no answer from walkaround representative Dominick to his inquiry as to how long abatement would take, taking into account his own experience and information he received from roof bolters in the area, and taking into account the fact that mine foreman Zamski testified that he hoped to fully accomplish abatement on the first (midnight) shift early in the morning of October 29, MSHA concludes that the initial abatement deadline was clearly a realistic one.

With regard to the events which transpired over the intervening weekend, MSHA argues that contestant made practically no effort to abate the violation until the early morning of October 29th in spite of the fact that about one-third of the violation could have been abated by mechanical bolters on October 26th, without resort to transferring any resin bolters to the cited section. Failing progress on Friday night, MSHA suggests that contestant could have called in extra bolters for Saturday work and for at least one shift of work on Sunday. Likewise, it could have asked bolters to double over into Saturday morning. Nevertheless, applicant waited until

the early hours of Monday, October 29, to begin work, and MSHA dsmisses as hearsay Mr. Zamski's testimony that problems with power and supplies, as well as a malfunctioning bolting machine, impeded the contestant's abatement progress. Further, MSHA contends that no information was provided as to how long it took to correct those problems, and Inspector Coffield was not advised as to the problems on October 29, nor did contestant demonstrate that the problems were sufficient to excuse its failure to install more than 15 roof bolts.

Finally, MSHA argues that contestant's failure to mount a diligent effort to abate the citation was aggravated by the serious nature of the violation cited and that taken as a whole the situation which confronted Inspector Coffield on Monday morning, October 29, 1979, was a half-hearted effort by the contestant to correct a serious violation, which by the admission of its own mine foreman, could have been abated in the time allowed. Conceding that contestant voluntarily closed the section down, MSHA still argues that mechanics were in the area and were exposed to the hazards there, and points to the fact that Inspector Coffield had no guarantee that contestant would not reactivate the section as soon as he had granted an extension. In the circumstances, MSHA concludes that Mr. Coffield had no viable option other than to issue the section 104(b) withdrawal order.

Contestant Consolidation Coal Company Arguments

Contestant argues that in concluding that it had failed to establish that the period of time for abatement should have been extended, Judge Laurenson relied upon several facts which were not only not supported by substantial evidence but which were in some instances contrary to the undisputed evidence introduced at the hearing in this case. Moreover, contestant states that Judge Laurenson rejected as hearsay certain of its evidence and concluded that contestant had failed to prove that supply and mechanical problems prevented its abatement efforts during the midnight shift on Monday, October 29, 1979.

Contestant asserts that when Inspector Coffield informed Mr. Dominick on the evening of October 26 that there were roof bolt spacing violations in the area covered by the citation, Mr. Dominick suspected that similar violations might also exist in other areas of the section (Tr. p. 18, 20). Thus, after consulting by phone with Ron Stovash, the General Superintendent, and Bill Zamski, the General Mine Foreman, Mr. Dominick decided to shut the section down so that it could be checked out further (Tr. p. 20-21). Originally, Mr. Dominick had told section foreman causey to leave the center bolters in the 5 North, 4 Right section and to take the rest of his crew to another section (Tr. p. 18). However, when Mr. Dominick learned that resin bolts were needed in the conveyor belt entry and that no resin bolts were available in the section at the time, he than told Mr. Causey to take his bolters out of the section with the rest of the crew (Tr. p. 18-19). The entire section had been shut down and all the employees had left when Mr. Dominick and Inspector Coffield left the section (Tr. p. 20).

Contestant takes issue with Judge Laurenson's previous finding that it offered no explanation or justification for its actions in sending the mechanical roof bolting crew out of the section after the citation was issued on Friday evening, October 26, 1979. Contestant states that General Mine Foreman Bill Zamski who participated in the decision to close the section offered the following explanation:

> Q. Why was no bolting done in the 30 room or in any part of the area covered by the citation during that evening shift [October 26], during the balance of that shift?
>
> A. I didn't want to start up in the rooms. What I wanted to do was start the center bolting from the tailpiece in and correct the violation as we were coming in, make sure that we had all the bolts on our four and a half foot centers from the tailpiece in on our haul roads and in the cross cuts that lead into the rooms instead of going up in the room leaving the violation back behind us.
>
> Q. Why did you not start in the tailpiece [that evening]?
>
> A. Because we didn't have the resin bolt materials to do this. (Tr. 58-9.)

Contestant asserts that it is clear from the undisputed testimony of Mr. Zamski that he felt that it was safer to abate the roof bolt spacing violations in the cross cut and the conveyor belt entry before employees were asked to do abatement work inby in the rooms. The evidence was that all the entries in this section had been bolted with resin bolts (Tr. 19; GX-1). However, because the resin bolts were not available in the section at that particular time, no abatement work could be started that shift (Tr. 19).

On the basis of the foregoing, contestant argues that it did offer a reasonable explanation for its decision not to perform any abatement work during the balance of the afternoon shift on Friday, October 26. The entries needed resin bolts, which were not available in the section at that time, and mine management determined that it was safer to work inby and do the entries before the rooms. Since this explanation was not contradicted, and there is nothing in the record which would justify rejecting it, contestant submits that a full and complete explanation was offered with respect to its activities during the remainder of the period prior to the issuance of the withdrawal order on Monday, October 29.

Contestant points out further that other necessary work had already been scheduled for Saturday and the bolters were unable to do any bolting that day in the 5 North, 4 Right section of the mine (Tr. p. 59-61). Moreover, an equipment move had been scheduled for Sunday and since no employees can be inby equipment that is being moved, no bolters were scheduled to work in the 5 North, 4 Right section on Sunday (Tr. p. 62). In addition, both Mr. Zamski and Mr. Stovash explained that they had decided on Friday evening that the entire section was going to remain idle until the roof bolt spacings in the entire section could be checked out and, where necessary, corrected (Tr. p. 61-62, 151-52). Mr. Stovash further explained that his decision to close the section and to check it our further was based on Inspector Coffield's statement to him, on the evening of the 26th, that the same problem (i.e., roof bolt spacings) existed in the supply track entry (Tr. p. 151). Under these circumstances, mine management felt it would be sufficient and reasonable to try to have some bolting done in the section on Staurday and then to schedule bolters to work in the area covered by the citation during the midnight shift on October 29 and to continue bolting in that area while the section remained idle and was being checked (Tr. pp. 59-62).

With regard to Judge Laurenson's previous finding that contestant could have called in additional roof bolters to abate the citation on Saturday, October 27, or Sunday, October 28, but elected not to do so because management determined that the citation could be abated during the midnight to 8:00 a.m. shift on Monday, October 29, contestant submits that this conclusion is contrary to the evidence adduced in this case.

With respect to Sunday, October 28, contestant argues that the undisputed evidence was that an equipment move had been scheduled for that day and since no employees can be inby equipment that is being moved, no bolters were scheduled to do abatement work in the 5 North, 4 Right section on Sunday (Tr. p. 62). Agreeing with Judge Laurenson's finding that roof bolters were scheduled to work and did work at the mine on Saturday, October 27, contestant points out that those roof bolters had been instructed to begin abatement of the citation upon completion of their other bolting work. The bolters were required to bolt the areas that had been mined on Friday or contestant would have been in violation of the law. However, they were unable to complete their other work in time and did not therefore perform any abatement work in the 5 North, 4 Right section on Saturday, October 27 (Tr. p. 59-61). Although contestant agrees with Judge Laurenson's finding that some bolters were scheduled to work on Saturday, it disagrees with his additional finding that mine management could or should have called in additional roof bolters to abate the citation on Saturday, October 27, and contends that Judge Laurenson ignored the undisputed evidence that Saturday work schedules are made up on Wednesday of each week and posted on Thursday, advising the men who are to work and what their work assignments will be (Tr. p. 60). Thus, contestant asserts that it is difficult, if not impossible, to schedule on Friday evening additional men to work on a Saturday (Tr. p. 76-77). Further, contestant argues that Judge Laurenson's finding also ignores and is inconsistent with Inspector Coffield's statement that he really was not considering that period of time (i.e., Saturday and Sunday) for abatement but instead felt that the citation could have been abated during

the midnight shift on the 29th. It was impossible to abate the violation in one or one and one-half shifts. Instead, contestant closed down the section as soon as the citation was issued, tried to abate what it could on Saturday and also during the midnight shift on the 29th and felt that under all the circumstances (including particularly the fact that the entire section was closed and being checked), the inspector would surely extend the time for abatement. In that regard, both Mr. Stovash and Mr. Zamski reasonably believed that the citation would be extended if the section was voluntarily closed because other inspectors had done so (Tr. p. 81-82, 155-6). However, Inspector Coffield refused to do so.

Conceding the evidence that only 14 bolts were installed on the midnight shift on Monday, October 29, contestant nonetheless argues that power problems made it difficult to get the bolting supplies into the section and the bolting machine then had mechanical problems. These problems were testified to be General Foreman Bill Zamski, General Superintendent Ron Stovash, and underground Superintendent Matt Matkovich. Although this evidence was rejected as hearsay by Judge Laurenson, contestant notes that that Court of Appeals has indicated that such evidence was probative and should be considered, and when so considered, submits that it offers a reasonable explanation for contestant's failure to do additional abatement work during the midnight shift on Monday, October 29.

Regarding Judge Laurenson's finding that mine management did not inform Inspector Coffield of any alleged problems with supplies or equipment on Monday, October 29, contestant asserts that the uncontradicted testimony is that Mr. Matkovich talked to Inspector Coffield on the morning of October 29, asked him for an extension of time to abate the citation and also explained to him the problems the Company had encountered, including the problem "we had getting supplies in there" (Tr. p. 131). However, as Mr. Matkovich further testified, Inspector Coffield nevertheless refused to extend the time for abatement (Tr. p. 131-2). Further, contestant maintains that in considering the request for an extension of the time for abatement, the inspector and Judge Laurenson should have but did not give any consideration to the fact that mine management had voluntarily closed the 5 North, 4 Right section prior to issuance of the withdrawal order on October 29. In support of this contention, contestant states that it is undisputed that immediately after issuance of Citation No. 0808594 on Friday evening, October 26, mine management closed the 5 North, 4 Right section of the mine and that section was still closed on Monday morning, October 29, when Inspector Coffield issued his withdrawal order in that section (Tr. pp. 18, 353).

Contestant submits that Inspector Coffield failed to give any weight to its voluntary closure of the section and instead issued a withdrawal order on October 29 simply to penalize it for not having done exactly what he ordered them to do, i.e., install approximately 150 new bolts in the area covered by the citation, regardless of the reason or explanation for their failure to do so. Contestant submits that voluntarily closing the entire section for the purpose of determining and correcting all

possible roof spacing violations in the entire section was more than the Company was required to do in response to the original citation and that Mr. Coffield's refusal to give that fact due consideration in determining whether to extend the time for abatement or issue a withdrawal order on Monday, October 29, was completely unreasonable and arbitrary on his part.

Conceding that it did not insert 150 new bolts by 8:00 a.m. on Monday, October 29, contestant points to the fact that neither did it ignore the citation. Instead, it made a good faith effort to comply by inserting as many new bolts as possible under the circumstances, and by closing down the section and committing itself to a plan which would determine the extent of violations in the entire section, contestant states it had volunatrily given up its right to produce coal during the balance of the afternoon shift on the 26th, the mindight shift on the 29th and thereafter, and maintains that such action on the part of mine management expressed and evidenced a sincere concern for the safety of the employees and its obligations under the 1977 Act and warranted an extension of the time for abatement by the inspector.

Contestant notes that the voluntary closure of a section eliminates exposure to possible health and safety hazards, and maintains that it is equally clear that its voluntary closure of the section under the circumstances of this case was for the purpose of determining and correcting roof bolt spacing violations in the entire section, rather than delaying abatement in any particular area of the section (Tr. p. 61-62, 151-152). Under these circumstances, contestant maintains that considerable weight should have been given to its voluntary closure of the section. Further, contestant points to the fact that in this case, there were no observed roof or rib falls in the 5 North, 4 Right section and no history of roof falls in the section. Also, all of the management witnesses who testified on the matter described the roof conditions in the section as being excellent (Tr. p. 26, 55-56, 110-11, 133-34, 165). Mr. Blevins, the Union Safety Committeeman who testified for the Secretary, as well as Inspector Coffield, described the roof conditions as being good (Tr. pp.202-3, 227, 374). Mr. Coffield also acknowledged that he saw no condition with respect to the roof or ribs on October 29 that was different from the conditions that he had observed on October 26 (Tr. p. 357). If anything, contestant maintains the section was safer inasmuch as 15 new bolts had been added since the afternoon shift on the 26th and the production crew had not been working since the citation was issued (Tr. p. 357). Finally, contestant emphasizes that Judge Laurenson himself found that the condition of the roof was good when he stated as follows:

> At all times and places relevant herein, the condition of the roof was good in that there was no evidence of recent falls of supported roof and no evidence of cracks, splits, or loose bolts. At all times and places relevant herein, there was only minimal sloughage of the ribs. (D. 3.)

At pages six and seven of his decision, Judge Laurenson comments that "Consol failed to establish that supply and mechanical problems prevents its timely abatement because it presented only hearsay evidence of such purported problems without documentation" (emphasis added).

In its remand of these proceedings, the Court made the following observation:

> In his opinion, the administrative law judge excluded, as hearsay, testimony of Consolidation's general mine foreman, superintendent, and underground superintendent that supply and mechanical problems prevented timely abatement. We conclude that this evidentiary ruling was erroneous. The testimony was niether irrelevant nor repetitious, and in every respect it satisfied the requirements for admission of hearsay evidence in an administrative hearing. 5 U.S.C. § 556(d); Carter-Wallace, Inc. v. Gardner, 417 F.2d 1086, 1095-96 (4th Cir. 1969). Forther, no objection was made to its introduction. Fair appraisal of Consolidation's defense required the administrative law judge to consider this probative evidence.

In support of its assertion that the bolting machine had mechanical problems, contestant cites pgs. 62, 131, and 154-155 of the trial transcript. The only reference that I can find to any inoperative bolting machine is at pg. 155 where mine superintendent Stovash alludes to "problems with the bolting machine breaking down", and "power problems which prevented supplies from being transported to the section." Mr. Stovash further testified that he was first made aware of these problems on Monday morning. In view of the fact that the section was closed down, a reasonable effort was made to start bolting on the afternoon of the 26th, and some bolting was in fact accomplished on the midnight shift on October 29th, and he fully expected Inspector Coffield to extend the abatement time.

General mine foreman Zamski testified that 13 or 14 bolts were installed during the midnight shift on October 29th, and when asked why additional bolts were not installed, he replied as follows (Tr. 63):

> A. Well, we had power trouble and we had trouble getting the DC power. We had supply men bring the resin bolting material into the section. They got there late with it. Also, the center bolter, after they got it there, the center bolter was malfunctioning. It was down. It took them a while to get that fixed.
>
> Q. I am not sure what effect the power has on the roof bolting. Coule you explain that, please?
>
> A. Yes. Motors run on DC power. Jeeps, porter buses, and that is how we transported the resin material into the section.

As for the trial testimony of underground foreman Matkovich, aside from an off-hand remark at pg. 131 dealing with some unspecified "problems we had getting supplies in there", Mr. Matkovich's testimony makes no reference to any mechanical problems. In addition, Mr. Matkovich testified that when he spoke with Inspector Coffield over the telephone, he specifically explained to him the problems with abating a citation received at the end of the last shift on a Friday and the problems with getting necessary supplies on the section. Mr. Matkovich also testified that he specifically told Mr. Coffield that he needed "a little more time" for abatement, and that since mine management had voluntarily shut the section down a little more time would not matter. However, Inspector Coffield simply indicated that he could not do it (Tr. 131-132). Further, it is clear that this conversation took place after Mr. Coffield issued his closure order (Tr. 131).

Inspector Coffield testified that when he initially established the abatement time as 8:00 a.m., Monday, October 29, 1979, Mr. Dominick did not protest (Tr. 301). When asked why he issued the order and refused to extend the abatement time, Mr. Coffield respondent as follows (Tr. 302-303):

> Q. Why did you issue the withdrawal order on the 29th?
>
> A. I found that little effort had been made to abate the conditions cited. Only 15 roof bolts had been installed to support the roof in these areas. Before going underground I checked the record books of the mine and the particular record book of this section. The conditions had been reported six shifts, and according to the books it was booked only on 10/29/79, 12:00 to 8:00 a.m. shifts. Also, I asked mine management at the mine what work had been done. They didn't seem to know what work had been done. Also, something, the fact that they pulled the roof bolters out of the section when I was there on 10/26 after I issued the citation -- did not care to leave roof bolters in there to abate the citation or didn't do it -- and they could have started work on it and put in a lot of bolts or do whatever they wanted to do -- there was no reason given that they couldn't. I had reason to believe they could. I weighed heavily on it. Therefore, seeing in that period of time that only 15 roof bolts had been installed in a very small area near the tail piece, I would say that little effort to correct the citation had been made.

Inspector Coffield also testified that while in the section each day after he issued the citation he observed mechanics and roof bolters there and assumed they were working on the abatement or to check out the section (Tr. 303). He also testified that on the morning of October 29, no one advised him of any equipment breakdowns that may have occurred on the

midnight shift, nor did anyone advise him of any problems that may have existed concerning the supply of resin bolt materials (Tr. 306). He confirmed that he had a telephone conversation with Mr. Matkovich that morning, and when Mr. Matkovich advised him that the section was closed so that the roof bolts could be installed, Mr. Coffield responded "Okay." Mr. Coffield confirmed that Mr. Matkovich wanted an extension of time but could not recall that he gave any reasons for this request (Tr. 306).

With regard to his inquiry of mine management as to what work had been done on the abatement when he arrived at the mine on October 29, Inspector Coffield stated that he spoke to a Mr. Behrens when he entered the damp house to change his clothes, but that Mr. Behrens indicated that he was not there and did not know (Tr. 308). Mr. Coffield also testified that he was "fairly certain" that he asked mine foreman Zamski about the abatement work but that "he really didn't know how much was done either" (Tr. 308).

Mr. Coffield conceded that Mr. Dominick did make a statement to him that he needed "as much time as possible" to abate the citation (Tr. 346). He also conceded that in determining that the conditions cited could have been abated by 8:00 p.m., October 29, on two working shifts, what he had in mind was the balance of the afternoon shift on Friday, October 26, and the then the midnight shift on Monday, October 29 (Tr. 347). He also confirmed that resin bolts had to be added to the entries that were included in his citation, but he did not know whether they were available on the section on the afternoon of October 26 (Tr. 347), nor was he aware of any inoperative bolting machine on the October 29 midnight shift (Tr. 354). He also alluded to the fact that he observed at least four individuals from mine management on the section on the morning of October 29, including an engineer who was measuring bolts (Tr. 353-354), and he confirmed that Mr. Behrens did state that the section was down and would remain down for production until further work was done (Tr. 365).

Mr. Dominick testified that when Inspector Coffield asked him how much abatement time would be required to correct the roof spacing problems, he replied "all the time I can get" (Tr. 17). Mr. Dominick also testified that the roof bolters were removed from the area because of the lack of resin bolts, and that the section was closed down after the citation issued because he suspected that other areas also needed attention and that mine management wanted to check the area to ascertain the extent of the abatement work which had to be performed (Tr. 20). Mr. Dominick also confirmed that upon Mr. Stovash's instructions he returned to the mine on Monday, October 29, at the day shift which began at 8:00 a.m., and was accompanied by two company mining engineers and a safety inspector. The purpose of the visit was to check out the section to determine the spacing of the roof bolts and he prepared a report which he submitted to Mr. Stovash (Exhibit A-3; Tr. 23-34).

In the prior adjudication of these proceedings Judge Laurenson granted contestant's contest concerning Inspector Coffield's refusal to extend the abatement time when he issued section 104(b) Order No. 0808606 on November 5, 1979. In vacating that order Judge Laurenson found that

while contestant failed to totally abate the violation noted in the underlying section 104(a) citation No. 0808599, issued on October 30, 1979, contestant established that the period of time for abatement should have been further extended by the inspector. Judge Laurenson's rationale in this regard appears at pg. 10 of his decision of October 7, 1980, and he concluded that the inspector failed to give the contestant proper credit for its abatement activities. Judge Laurenson found credible contestant's assertions that work was performed every shift between the time the citation issued and the time the order issued, except for three shifts on Sunday, November 4, 1979, and he took particular note that contestant had installed more than 400 roof bolts, that contestant was obligated to abate more than the 350 widely spaced roof bolt violations noted by the inspector, added a total of 1,000 roof bolts before the citation was terminated, and otherwise established that it was making a diligent and bona fide effort to abate the citation in a timely manner. It seems obvious to me that Judge Laurenson was particularly impressed by the extensive efforts made by the contestant to abate a citation which required a great deal of work and effort by the contestant, and this is the reason why he vacated the withdrawal order and found that the abatement time should have been extended further by the inspector.

In the instant case, Judge Laurenson gave contestant no credit for voluntarily closing the section down and ceasing production after the citation issued on Friday, October 26. Further, although he found that part of the cited area required resin bolts and there were no such supply of bolts available on the section, he also found that contestant ordered the roof bolting crew out of the section because of a management determination that the resin bolts should be installed first but found that contestant offered no explanation for this action. Judge Laurenson also concluded that contestant could have called in additional roof bolters during the intervening Saturday and Sunday but opted not to do so because of a management determination that abatement could be achieved on the Monday, October 29th midnight shift. He also found that contestant did not inform Inspector Coffield of any mechanical or supply problems prior to the issuance of the order, that such information was hearsay, and that on Monday only 15 roof bolts out of more than the required 100 had been installed.

After careful review and consideration of the entire record in this case, including the testimony which has been characterized as "hearsay" I conclude and find the that the initial period of abatement fixed by Inspector Coffield on Friday, October 26th when he issued the citation was not unreasonable or arbitrary. As a matter of fact, the record reasonably supports a conclusion that at that time mine management had no reason to believe that abatement could not be achieved during the subsequent afternoon shift and the mindight shift on Monday, October 29. As a matter of fact, Inspector Coffield testified that while he believed abatement could be achieved in two shifts, what he had in mind was the remainder of the Friday shift and the Monday midnight shift and not Saturday or Sunday shifts. However, I further find and conclude that the inspector acted unreasonably in failing to extend the abatement time on Monday, October 29, and my reasons for this follow.

Contrary to MSHA's arguments that the walkaround representative said nothing to the inspector when he issued the citation and fixed the abatement time, Mr. Domenick testified that he advised Mr. Coffield that he could use all the time that he could get. Further, I find credible Mr. Domenick's testimony that he closed the section down because he suspected other areas in the section may have needed roof bolt attention, and this is further substantiated by the fact that Mr. Domenick, a company safety representative, and two mining engineers returned to the section on Monday, October 29, for the purpose of surveying and measuring the roof bolt spacing, and Mr. Domenick reported his findings to the mine superintendent. Mr. Coffield confirmed that these individuals were there.

With regard to the excluded hearsay, I take note of the fact that when contestant's witnesses testified as to certain mechanical and supply problems, MSHA's counsel interposed no objections, nor did he pursue the matter further on cross examination. Judge Laurenson found that contestant had not "documented" these asserted "problems" and failed to communicate them to the inspector. Mr. Zamski's direct testimony makes specific references to a malfunctioning roof bolter which was subsequently repaired, and problems with the DC power required to power the equipment bringing supplies into the section, and the testiomny still remains unrebutted. While it is true that the supply and mechanical problems were not directly communicated to Mr. Coffield before he decided to issue a withdrawal order and hung up the closure sign, Mr. Matkovich testified that he spoke with Mr. Coffield that very same morning over the telephone after Mr. Behrens notified him of Mr. Coffield's decision to issue a closure order, that he specifically asked the inspector for an extension of time, and advised him that the section had been closed down since Friday for the specific purpose of bolting. Mr. Coffield responded "okay". Mr. Coffield confirmed that Mr. Matkovich asked for an extension but he could not recall whether the had given him any reasons for this request.

With regard to Judge Laurenson's finding that contestant failed to offer any explanation as to why the roof bolters were taken off the section after the citation issued any why resin bolts had to installed first, Mr. Domenick's testimony which appears at pages 19-20, 37-38, and 45-46, explains the differences between the use of mechanical and resin roof bolts, and Mr. Domenick specifically indicated that the two can not be mixed, that some of the areas cited by Mr. Coffield required resin bolts, and in response to a specific question asked by Judge Laurenson, Mr. Domenick detailed why resin bolts are required in a certain area and not in others (Tr. 45-46). Further, the record reflects that Mr. Coffield confirmed that he was aware of the fact that resin bolts had to be added in the entries that were included in his October 26th citation (Tr. 347).

I cannot conclude that the fact that contestant failed to bring in additional bolters during Saturday and Sunday supports a conclusion that contestant was indifferent or otherwise unmindful of the fact that it had to abate the citation. It seems obvious to me from the testimony presented in this case that neither Inspector Coffield nor mine management

initially believed that this was required to abate the conditions cited. Mr. Coffield believed that abatement could have been achieved during two subsequent shifts, namely on Friday and Monday midnight, and so to did mine management. The fact that mine management's belief that Mr. Coffield would somehow automatically extend the time for abatement proved to be wrong has to be considered in light of all of the circumstances and subsequent events which transpired after the citation issued.

On the facts presented in this case, I find contestant's explanations as to why additional bolters were not brought in Saturday and Sunday to be credible and I accept them. The citation was issued Friday afternoon, regular work schedules had already been established, and mine management voluntarily shut the section down and ceased production. It then made a complete assessment of the prevailing conditions which existed in the section; and while it may be argued that part of its motivation for doing so was to "cover all bets" and to insure that additional citations would not be issued, I do not believe that it should be unduly penalized for this. The section was down, production had ceased, and I believe that contestant was making a diligent attempt to achieve abatement. Simply because only 15 bolts had been installed cannot, in my view, serve as a basis for any conclusion that nothing was being done.

In view of the foregoing findings and conclusions, I find that the record before me supports a conclusion that the contestant made a good faith effort at timely abating the citation in question, established valid reasons warranting an extension of time to totally abate the citation, and that the time should have been extended by the inspector. Accordingly, the section 104(b) Order No. 0808596, issued on October 29, 1979 IS VACATED.

Findings and Conclusions

Docket Nos. WEVA 80-117-R and WEVA 80-659

These consolidated dockets concern the question as to whether a section 104(d)(1) "unwarrantable failure" citation (no. 0808599) issued by Inspector Coffield to the contestant on October 30, 1979, was properly issued, and if so, the appropriate civil penalty which should be assessed for the violation, taking into account the six statutory criteria found in section 110(i) of the Act.

In the prior adjudication of contest Docket No. WEVA 80-117-R, Judge Laurenson found that MSHA had established the required findings of unwarrantability at the time the citation issued, rejected contestant's defense in this regard, and found that the contestant had failed to exercise due diligence and reasonable care to correct the conditions cited by the inspector prior to the issuance of the citation for a violation of mandatory safety standard 30 CFR 75.200. He concluded that the violation was the result of an unwarrantable failure by contestant and affirmed the inspector's finding in this regard.

With regard to the inspector's further findings that the citation constituted a "significant and substantial" violation, Judge Laurenson found that the violation could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, and in so doing he relied on the then applicable case precedent in Alabama By-Products, 7 IBMA 85 (1976).

As noted earlier in this case, following an appeal to the Fourth Circuit, the Court vacated and remanded Judge Laurenson's decision because Commission precedent on the element of "significant and substantial" had changed during the time the case was before the Court. The recent decision of the Commission which changed the required burden of proof on the "significant and substantial" issue is Cement Division, National Gypsum Company v. Secretary, 2 BNA MSHRC 1201 (1981), 3 FMSHRC 822 (1981). In that case, the Commission outlined the new definition of the term "significant and substantial" as follows:

> . . . 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 on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Emphasis added.)

The Commission also made the following pertinent comment in National Gypsum:

> 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. In other words, the contribution to cause and effect must be significant and substantial."

In support of their respective arguments applying the National Gypsum "significant and substantial" standard, the parties have submitted the arguments which follow below.

MSHA's arguments

MSHA asserts that the record in this case reflects that in the subject four right five north section of contestant's Shoemaker Mine, MSHA Inspector Charles Coffield found approximately 350 widely spaced bolts in the intake escape entry, three adjoining rooms (numbers 31, 32 and 33) adjacent to that entry, and in the supply track entry (Tr. 308-309, 311).

In the intake escape entry and adjoining rooms, Mr. Coffield found that the range of spacing for the bolts were from four feet seven inches to five feet eleven inches (Tr. 310). In the supply track entry the range was from four feet seven inches to seven feet six inches (Tr. 311). Union walkaround representative Charles Pyle testified that some of the bolts were spaced six feet wide and he remembers one in the vicinity of seven feet (Tr. 267, 274). Generally the spacing between bolts was wider in the supply track entry than in the other cited areas (Tr. 313). The applicable roof control plan required roof bolt spacing of four feet six inches.

Conceding that the roof was basically sound, MSHA argues that there were three different locations in the aforementioned areas where Mr. Coffield observed that the roof was loose or unsupported between the bolts and could have fallen at any time (Tr. 373, 405, 407). There were a number of miners in the section who were potentially exposed to the hazards. At least two mechanics were in the section on October 30 (Tr. 119, 124, 167). Although contestant's superintendent Ronald Stovash testified that the mechanics were in the section simply to wait for maintenance problems to arise on the roof bolter, MSHA points out that miner Charles Pyle testified that the mechanics were working on a feeder and on a shuttle car (Tr. 265-266). Normally seven to eight people work in a mine section (Tr. 444). All members of the crew could be expected to pass under the seven foot six inch spacing, which was in the vicinity of the dinner hole (Tr. 267, 312-313).

In analyzing the test enunciated in the National Gypsum decision, MSHA suggests that the following questions need to be addressed in this case:

1. What is the hazard contributed to by the violation?

2. Is there a reasonable likelihood that the hazard contributed to will result in an injury or illness?

3. Would that injury or illness be of a reasonably serious nature?

In its arguments in support of the first two questions, MSHA asserts that the hazard contributed to by the violation in this case is the increased possibility of a roof fall, either or a major portion of the roof or of a small fall of roof material from between the bolts. In answer to the second question, MSHA argues that given the facts in this case, there was a reasonable likelihood that the hazard contributed to would result in an injury, and in support of this conclusion advances six reasons why a roof fall was reasonably likely to occur and lead to injury and these are as follows:

1. In three different locations in the cited area roof was loose or unsupported between the bolts and could have fallen at anytime.

2. The widest spacing documented by Mr. Coffield, seven feet six inches, was in the vicinity of the dinner hole. During normal operations, every person on the section could be expected to pass in the vicinity of that violative condition.

3. As the roof control plan itself specifies, it is a minimum plan. Even when roof control plans are followed to the letter, falls occur on occasion. Noncompliance with a roof control plan certainly increases the likelihood of a fall.

4. The area with the greatest concentration of wide spacing was the supply track entry. The vibration caused there by the operation of supply motors increases the possibility of a roof fall even under situations where the plan is followed.

5. The supply entry was frequently traveled.

6. As contestant's witness Peter J. Dominick testified, "pretty nice sized" pieces of roof, measuring up to two feet by three feet, had fallen to the floor in the four right, five north section. (Tr. 36).

Regarding the final question posed in its analysis, MSHA argues that if a roof fall had occurred and included a major portion of the roof (e.g., above the anchorages of the roof bolts), crippling or fatal injuries would afflict anyone in the vicinity not fortunate enough to be protected by a cab or canopy. Further, MSHA suggests that even small falls from between the bolts likely would cause anyone contacted by the roof material to suffer serious injuries, and points to miner Charles Pyle's testimony that a piece of roof material the size of a brief case which fell from the foor of the Shoemaker Mine could break a man's back (Tr. 276-277).

Contestant's arguments

Contestant submits that taking into account the definition of "significant and substantial" as set forth in the National Gypsum case, there did not exist, on October 30, 1979, any reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonable serious nature. Conceding that the citation alleges many roof bolt spacing violations in approximately 350 different locations, contestant notes that Inspector Coffield acknowledged that he only measured approximately 200 different locations and that he "eyeballed" the rest (approximately 150) of the alleged violations (Tr. pp. 358-59). Moreover,

contestant asserts that Mr. Coffield did not recall and had no notes to indicate how many of the alleged violations were in excess of five feet (Tr. p. 359), and therefore maintains that it is difficult to determine the actual extent of roof bolt spacing violations that existed on October 30, 1979. Although contestant does not dispute the fact that some violations were present on the day in question, it makes the latter points only to show that the extent of the violation was definitely not as serious as Inspector Coffield made it appear in his citation. Citing Mr. Coffield's testimony at pages 313-314 and 370-376 of the transcript, contestant maintains that it becomes clear that his only basis for finding a "significant and substantial" violation was his generalized belief or assumption that any roof bolt spacings that are not in complete compliance with the roof support plan can cause a significant and substantial hazard of a roof fall. Contestant submits that a generalized assumption of this nature, without specific factual findings, is inadequate to support a conclusion that a particular condition can significantly and substantially contribute to a mine safety hazard so as to justify a section 104(d)(1) citation.

Contestant points to the fact that in National Gypsum, the Commission made it clear that in a 104(d) citation there must be something more than just a violation, which itself presupposes at least a remote possibility of an injury. Instead, the inspector "is to make significant and substantial findings in addition to a finding of violation." Contestant asserts that it is apparent that Inspector Coffield did not make such findings and that he improperly assumed that all roof bolt spacing violations were significant and substantial since there is a possibility that the roof could fall between the bolts. Contestant maintains that this theoretical possibility is not sufficient to sustain a 104(d) citation, and that the evidence simply does not support a finding that there existed a reasonable likelihood that the alleged hazard contributed to would result in an injury or illness of a reasonably serious nature.

In support of its argument, contestant notes that every witness who testified on the matter acknowledged that roof conditions in the 5 North, 4 Right section of the Shoemaker Mine were good, and that most of the witnesses described the roof conditions as being very good or excellent (Tr. pp. 26, 55-56, 110-11, 133-34, 165), and Inspector Coffield himself acknowledged that the roof conditions in the 4 Right section were "basically sound" in October of 1979 (Tr. p. 374). Moreover, contestant asserts that except for one fall which had occurred due to a clay vein in the area of the juncture of 5 North, 4 Right when the section was initially being advanced in September of 1978, there had been no roof falls in the 4 Right section up to and including the time of the hearing (Tr. pp. 26, 56-57, 110-11, 133-34, 165). Thus, contestant concludes it is clear that we are dealing with a situation wherein the alleged hazard of a roof fall cannot be presumed, as Inspector Coffield obviously did, and that some specific facts must exist to justifiy a finding of a substantial and significant risk of a hazard on October 30, 1979.

Contestant points to the fact that Inspector Coffield acknowledged that he issued a section 104(a) citation on October 26 with respect to roof support spacing violations in the same section of the mine where

he subsequently issued the section 104(d)(1) citation. Recognizing the fact that an inspector has sole discretion in determining when and what citations he will issue, contestant nonetheless asserts that an inspector cannot examine a section, find roof support violations in large areas of that section, select only a small area of the section for a Section 104(a) citation one day and then several days later come back and issue section 104(d)(1) unwarrantable failure citation for the larger area. Contestant maintains that Inspector Coffield's waiting until Tuesday, October 30, to issue the unwarrantable citation for the larger area of the section simply does not justify a finding that the condition could substantially and significantly contribute to a mine safety hazard.

Contestant submits that no hazard existed in the 5 North, 4 Right section of the mine on October 30, 1979, and points to the fact that no coal was being produced in the section on Tuesday morning, October 30, when the unwarrantable failure citation was issued. Further, contestant argues that since the only employees in the section were the roof bolters and mechanics who were required to be there for the purpose of abating the previous citation and order issued by Inspector Coffield, there was only a limited and necessary exposure of employees. In addition, contestant maintains that there had been no roof falls in the section since it had been developed in September of 1978, that Inspector Coffield acknowledged there had been no fatalities or injuries related to roof falls in the section, that Judge Laurenson concluded that the roof conditions were good and that there was no evidence of recent roof falls or any cracks, splits or loose bolts, and that employees had been working in and walking through the same area of the section for at least six months before October 1979 without any incident and there is no evidence that anything usual or different existed on that day with respect to the conditions of the roof.

Finally, contestant maintains that Judge Laurenson sustained the section 104(d) citation because he felt that the evidence established that the "possibility of a roof fall injury in the cited area was neither remote nor speculative", citing Alabama By-Products. However, since the Alabama By-Products test has been overruled by the Commission, contestant submits that Judge Laurenson himself would not have sustained the citation if he had been using the standard later adopted by the Commission in the National Gypsum case. Further, contestant observes that in National Gypsum the Commission noted that the violation of any health or safety standard presupposes the possibility of it contributing to an injury or illness. However, since the language in section 104(d) of the 1977 Act makes it clear that a significant and substantial finding is to be made in addition to a finding of a violation, contestant asserts something more than the possibility of an injury or illness must exist; there must be a "reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." Contestant concludes that there simply were no facts to justify such a finding in this case and the 104(d) citation should therefore be vacated.

After careful consideration of the entire record adduced in this proceeding, including the arguments presented by the parties in support of their respective positions, I conclude and find that MSHA has the better part of the argument in support of its conclusion that the citation issued by Inspector Coffield on October 30, 1979, was in fact "significant and substantial", even under the test enunciated by the National Gypsum decision. Although it may be true that employees had been working and walking through the section for at least six months prior to October 1979 without incident, the fact is that on October 30, the roof conditions were different. At least 140 additional roof bolts had been added in the section since the first citation issued on October 26, and mechanics and roof bolters were in the section performing abatement work. Further, at pg. 23 of its brief, contestant concedes that on October 30 the risk of hazard on the section was less than it had previously been since the section was closed down and fewer workers were exposed and mine management was in the process of checking out the section and doing abatement work. Therefore, contrary to its earlier argument that no hazards existed on October 30, from the record and arguments presented in this case I conclude that a hazard did exist on the section and that is precisely why the inspector issued the citation citing a violation of section 75.200, and that is precisely why the abatement work was going on. I also take note of contestant's admission at pg. 23 of its brief that there was in fact a "limited and necessary exposure of employees". In summary, contrary to contestant's suggestions that no hazards existed and that no employees were exposed to a potential roof fall injury because the section had been shut down, I conclude and find that employees were in fact working in the section and that a hazard did exist. The crucial question is whether or not the prevailing hazards on the section on October 30 were "significant and substantial".

Contrary to contestant's assertion that there had been no roof falls in the section since it was developed, Judge Laurenson specifically noted at page 9 of his decision of October 7, 1980, that "there was evidence of at least one prior fall of supported roof in this section". As a matter of fact, Judge Laurenson took particular note of the fact that contestant's own mine foreman Zamski conceded that wide spaced roof bolts increased the possibility of roof falls. Further, in finding No. 18, at page 5 of his decision, Judge Laurenson specifically found that in the supply track entry cited by Inspector Coffield "all persons who walked under the wide spaced roof bolts were exposed to the danger of a roof fall". Although Judge Laurenson observed that the roof in question was generally acknowledged to be in good condition, contestant's assertion that he made a finding that there was no evidence of roof cracks, splits, or loose bolts is taken our of context. Judge Laurenson's sequential finding No. 4 which appears at page 3 of his decision appears to be related to citation no. 0808594, which does not include the track entry area which is the subject of the instant "significant and substantial" citation. In addition, the official transcript of the hearings contains testimony by the inspector that in at least three different locations in the section the roof was loose, cracked, or unsupported between the bolts and could fall at any time (Tr. 406-407). There is also testimony by Mr. Coffield that his determination that the roof was basically sound was made by "observation and sounding the roof", but that this does not guarantee

that there will be no falls of roof material from between the bolts (Tr. 409). Further, as noted by Judge Laurenson at pg. 9 of his decision at some locations the roof bolts were seven feet apart. This is two and one-half feet further apart than required by the approved control plan.

In view of the foregoing, I conclude and find that the roof conditions cited by Inspector Coffield which resulted in the issuance of the citation in question presented a reasonable likelihood that the hazards presented by the widely spaced roof bolts, as well as the areas described by the inspector as being loose between the bolts at several locations, constituted a significant and substantial hazard to those miners working and traveling through the cited areas. The danger presented was a roof fall, particularly in the track entry where the roof bolt spacing was the widest, and the real potential for a fall in any of these locations was the direct result of the violation.

Contestant's suggestion that Inspector Coffield somehow acted arbitrarily by including an additional area of the mine as part of the section 104(d)(1) citation which he had not included in his previous section 104(a) citation, is rejected. As correctly pointed out by Judge Laurenson at pg. 8 of his decision, the validity of a citation must stand or fall on its own merits. Having considered the instant citation on its own merits, and taking into account the aforesaid findings and conclusions made by me in this case, the section 104(d)(1) Citation No. 0808599, issued by Inspector Coffield on October 30, 1979, IS AFFIRMED and the contest is DISMISSED. I also reaffirm Judge Laurenson's prior finding of a violation of section 75.200, as well as finding that the citation resulted from the contestant's unwarrantable failure to comply with the cited mandatory safety standard.

Civil Penalty Assessment - WEVA 80-659

In determining the amount of civil penalty assessments, section 110(i) of the 1977 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 violation; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

With respect to item 2, the parties have stipulated that Consol is a large operator. With respect to item 4, the parties have stipulated that the assessment of an appropriate civil penalty will not affect Consol's ability to remain in business. With respect to item 1, concerning the respondent's history of prior violations, although the parties advised me that MSHA would submit a computer print-out reflecting prior assessed violations levied against the respondent's Shoemaker Mine for the 24-month period preceding the issuance of the citation in question, no such

information has been filed with me, nor does MSHA address this issue in its brief. Accordingly, I have no basis for making any finding in this regard.

Good faith abatement

The inspector fixed the abatement time for citation 0808599 as Friday, November 2, 1979, at 8:00 a.m. Judge Laurenson found that Consol protested the termination due date at the time the citation issued, and that the inspector did not return to the mine on November 2, 1979. When he returned the following Monday, November 5, 1979, he found that only 155 new roof bolts had been installed, and refused to extend the abatement time further. He then issued a section 104(b) withdrawal order for failure to abate the conditions (Order No. 0808606).

Consol successfully challenged Order No. 0808606, and Judge Laurenson vacated the order after finding that the inspector failed to give proper credit to Consol for its abatement activities and erred in refusing to extend the time for abatement of this violation (Docket WEVA 80-118-R). Judge Laurenson found that Consol made a bona fide effort to abate the citation in a timely manner, and that 1,000 roof bolts were added to the section before the citation was terminated. Although the inspector cited 350 roof bolts in violation of the roof plan on October 30, 1979, Judge Laurenson took note of the fact that Consol had installed more than 400 roof bolts by November 5, 1979, and that except for Sunday, November 4, 1979, roof bolters worked every shift between the time the citation issued and the time the order was issued November 5, 1979.

In view of the foregoing, I conclude and find that respondent exhibited good faith compliance in correcting the conditions cited and this fact is reflected in the civil penalty assessment made by me in this matter.

Gravity

I conclude and find that the violation concerning the widely-spaced roof bolts in the areas cited by the inspector in the citation presented a potential hazard for a roof fall which could have resulted in injuries to miners and that this violation was serious.

Negligence

I conclude and find that the record supports a conclusion that the widely-spaced bolts were inserted some time prior to the day the citation in question issued. Even considering the fact that the record in these consolidated proceedings contains information concerning an MSHA "guideline" dealing with a so-called "spacing tolerance", this issue is not further addressed by the parties and I consider it irrelevant. On the facts and record here presented, particularly the fact that a mine operator is

expected to know the requirements of his own approved roof control plan, I conclude that the violation resulted from the respondent's failure to exercise reasonable care to prevent the cited conditions or practices which caused the violation, and that this amounts to ordinary negligence.

Penalty Assessment

I take note of the fact that MSHA's proposal for assessment of civil penalty in this civil penalty docket seeks an assessment of $1,000 for the violation in question. Taking into account the aforementioned findings and conclusions, and the requirements of seciton 110(i) of the Act, I find that this proposed asssessment is reasonable and I adopt it as my penalty assessment in this case.

ORDERS

Docket No. WEVA 80-116-R

Section 104(b) Order No. 0808596, October 29, 1979, IS VACATED.

Docket No. WEVA 80-117-R

Section 104(d)(1) Citation No. 0808599, October 30, 1979, IS AFFIRMED.

Docket No. WEVA 80-659

Respondent Consolidation Coal Company IS ORDERED to pay the civil penalty assessed by me in this case, in the amount of $1,000, within thirty (30) days of the date of this decision and order, and upon receipt of same by MSHA, this matter is DISMISSED.

Docket No. WEVA 80-118-R

By agreement and consent of the parties, this case is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 28 1982

LOCAL UNION 1889, DISTRICT 17, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	Complaint for Compensation
	:	Docket No. WEVA 81-256-C
v.	:	Order No. 668337 § 103(j) November 7, 1980
WESTMORELAND COAL COMPANY, Respondent	:	Order No. 668338 § 107(a) November 7, 1980
	:	Ferrell No. 17 Mine

SUMMARY DECISION

The original complaint in this proceeding was filed on February 5, 1981, under section 111 of the Federal Mine Safety and Health Act of 1977. An amended complaint was filed on November 9, 1981. The amended complaint first requests that the miners at Westmoreland's Ferrell No. 17 Mine be paid for 1 week of compensation under section 111 of the Act because of the issuance on November 7, 1980, of Order No. 668338 under section 107(a) of the Act, even though that order did not allege a violation of any mandatory health or safety standard. Alternatively, the amended complaint requests that the miners scheduled to work on both the day shift and the afternoon shift of November 7, 1980, be paid compensation because of the issuance on November 7, 1980, of Order Nos. 668337 and 668338 under sections 103(j) and 107(a), respectively. Finally, if both of the aforesaid requests are denied, the amended complaint requests that the miners scheduled to work on the day shift on November 7, 1980, be paid 4 hours of compensation because of the issuance on November 7, 1980, of Order No. 668337, irrespective of the fact that they have already been compensated for 4 hours of pay.

Westmoreland filed on May 1, 1981, a motion for summary decision pursuant to 29 C.F.R. § 2700.64(a). Thereafter, I issued on June 12, 1981, an order providing for clarification in which I pointed out that applicable law required that a decision be issued denying UMWA's request for 1 week of compensation, but I noted in my order (p. 4) that the former Board of Mine Operations Appeals in its decision in Southern Ohio Coal Co., 4 IBMA 259 (1975), aff'd, District 6, UMWA v. Interior Board of Mine Operations Appeals, 526 F.2d 1260 (D.C. Cir. 1977), had held that although the miners in that case were not entitled to a week of compensation, it appeared that they might be entitled to compensation for the shift on which the order was issued and for 4 hours of the "next working shift". Therefore, I requested that the parties submit additional information with respect to whether the orders involved in this proceeding had been modified or terminated and whether UMWA was seeking compensation of less than 1 week, assuming that its request for 1 week would be denied in my contemplated order granting Westmoreland's motion for summary decision.

Several additional pleadings were filed by UMWA and Westmoreland in response to my order of June 12, 1981. The additional pleadings raised issues as to which the parties' positions were somewhat unclear. Therefore, I issued on October 9, 1981, a procedural order which specifically requested the parties to stipulate the facts on which their arguments were based and also asked that the parties submit additional arguments in support of their positions. In response to my order of October 9, the parties submitted on February 5, 1982, some joint stipulations. Thereafter, UMWA on February 19, 1982, filed a motion for partial summary decision which Westmoreland answered on March 10, 1982, by filing a cross motion for summary decision. Finally, UMWA filed on April 6, 1982, a reply to Westmoreland's cross motion for summary decision.

Section 2700.64(b) of the Commission's rules provides that a summary decision should be rendered when the pleadings show that there are no genuine issues as to any material facts. Although Westmoreland and UMWA make some arguments which show a difference in interpretation of the attachments to UMWA's motion for partial summary decision, there are no disputed issues as to the facts upon which my rulings will be based. Therefore, I find that the parties have shown that a summary decision should be issued in this proceeding pursuant to section 2700.64(b) of the Commission's rules.

The joint stipulations, upon which my decision will be based, are set forth below:

1. The Ferrell No. 17 Mine is owned and operated by the Westmoreland Coal Company.

2. The Ferrell No. 17 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the Act).

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. At all times relevant herein, Westmoreland Coal Company, at its Ferrell No. 17 Mine, and Local Union 1889, UMWA, were bound by the terms of the National Bituminous Coal Wage Agreement of 1978 (the Contract). A copy of the Contract is submitted with these stipulations as Exhibit A.

5. In the early morning hours of November 7, 1980, an explosion occurred inside the Ferrell No. 17 Mine.

6. At 7:30 a.m. on November 7, 1980, MSHA Inspector Eddie White issued Withdrawal Order No. 0668337 pursuant to section 103(j) of the Act. The order applied to all areas of the mine.

7. Order No. 0668337 provided in full as follows:

> An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure, smoke was encountered in the 2-South section. Five

> employees in the mine could not be accounted for. [The area or equipment involved is] the entire mine. The following persons are permitted to enter the mine: Federal coal mine inspectors, West Virginia Department of Mines coal mine inspectors, responsible company officials, and United Mine Workers of America miner's representatives.

8. At 8:00 a.m. on November 7, 1980, MSHA Inspector Eddie White issued Order No. 0668338 to the Westmoreland Coal Company pursuant to section 107(a) of the Act. The order applied to all areas of the mine.

9. Order No. 0668338 did not allege a violation of any mandatory health or safety standards. It stated that the following condition existed:

> All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

10. Subsequent to the issuance of the above withdrawal orders, the 2 South area of the mine was sealed off.

11. Miners who were working on the 12:01 to 8:00 a.m. shift on November 7, 1980, were withdrawn from the mine when Westmoreland management became aware that an explosion had occurred.

12. The miners who were withdrawn from the mine during the 12:01 to 8:00 a.m. shift on November 7, 1980, were paid for their entire shift.

13. Exhibit B is a list of the miners who were scheduled to work the day shift (8:00 a.m. to 4:00 p.m.) on November 7, 1980. Exhibit B also identifies each such miner's daily wage rate and the amount of compensation received by such miner for the day shift on November 7, 1980. Each such miner received at least four hours of pay.

14. Westmoreland management did not contact any of the miners scheduled to work on the 8:00 a.m. to 4:00 p.m. shift (day shift) of November 7, 1980, in order to notify them not to report to work.

15. On December 10, 1980, Order No. 0668337 and Order No. 0668338 were modified to show the affected area of the mine was limited to the seals and the area inby such seals.

16. Orders Nos. 0668337 and 0668338, as modified, have not been terminated and remain in effect.

17. Westmoreland Coal Company has not contested the issuance of Order No. 0668337 by initiating a proceeding under section 105(d) of the Act.

18. Westmoreland Coal Company has not filed an Application for Review of Order No. 0668338 under section 107(e) of the Act.

The Issue of the Day-Shift Miners' Entitlement to 4 Additional Hours of Compensation

The first argument in UMWA's motion for partial 1/ summary decision is that the miners who were scheduled to work the day shift after Order No. 668337 was issued should receive 4 additional hours of compensation (Joint Stipulation No. 6, supra). UMWA bases its request for 4 hours of additional compensation on the fact that the miners who were scheduled to work the day shift following the issuance of Order No. 668337 received no notification that the Ferrell No. 17 Mine had been closed (Joint Stipulation No. 14, supra). Therefore, they reported for work as usual, but were turned away from the mine by State policemen (Exhibit No. 1 attached to UMWA's motion). Under the National Bituminous Coal Wage Agreement of 1978 (Exhibit A, Joint Stipulation No. 4, supra), Westmoreland was obligated to compensate the miners for 4 hours of pay because they had reported for work without having been given any notification that the mine was closed. 2/ Westmoreland

1/ The reason that UMWA's motion requests "partial" summary decision is that UMWA is contending that the miners are entitled to a week of compensation under section 107(a) Order No. 668338, but that order did not allege that Westmoreland had violated any mandatory health or safety standard, the latter allegation being a prerequisite under section 111 of the Act for the miners' entitlement to 1 week of compensation. Order No. 668338 has never been terminated and it is UMWA's position that, before the order is terminated, the inspector who wrote it will modify the order to cite one or more violations of the mandatory health or safety standards. Until the inspector does modify the order to cite one or more violations, UMWA asks that I permit it to introduce evidence to show that the order should have cited a violation so that the miners may receive 1 week of compensation without further delay. If I deny UMWA's request to introduce evidence, UMWA, in the alternative, requests that I rule on the issues which are now ripe for decision and that I retain jurisdiction over the subject matter in this proceeding until such time as MSHA has completed its evaluation of its investigation of the ignition which occurred on the day the imminent-danger order was issued (Exhibit No. 3 attached to UMWA's motion).

2/ Article IX, Section (c), page 39, of the contract reads as follows:

Unless notified not to report, when an Employee reports for work at his usual starting time, he shall be entitled to four (4) hours' pay whether or not the operation works the full four hours, but after the first four (4) hours, the Employee shall be paid for every hour thereafter by the hour, for each hour's work or fractional part thereof. If, for any reason, the regular routine work cannot be furnished, the Employer may assign the Employee to other than the regular work. Reporting pay shall not be applicable to any portion of the four hours not worked by the Employee due to his refusal to perform assigned work. Notification of Employees not to report means reasonable efforts by management to communicate with the Employee.

compensated the miners on the day shift with 4 hours of pay (Joint Stipulation No. 13, supra). UMWA says that the miners were entitled to the 4 hours of pay already received under the Wage Agreement and that they are entitled to an additional 4 hours of compensation under the second sentence of section 111 3/ of the Act because they were the "next working shift" after Order No. 668337 was issued. UMWA argues that even though the miners have received 4 hours of compensation under the Wage Agreement, they would normally have worked an 8-hour shift if the mine had not been closed because of the issuance of Order No. 668337. UMWA argues that since the miners were idled by the order they should be paid for the remaining 4 hours of the "next working shift" as required by the second sentence of section 111.

Westmoreland's cross motion (p. 6) refers to UMWA's claim for 4 additional hours of pay as "startling" in view of the fact that section 111 expressly states that the miners on the "next working shift" are entitled to "not more than four hours of such shift". Westmoreland acknowledges that my decision in Local Union 1374, District 28, UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004 (1981), sustained UMWA's claim for 4 additional hours of compensation in circumstances nearly identical to those involved in this proceeding. Westmoreland seeks to distinguish my holding in the Pocahontas case by observing that the operator in that case had a period of 5 hours within which to notify the miners on the "next working shift" that the mine was closed, but failed to do so. Westmoreland also points out that the operator in the Pocahontas case kept the miners on the "next working shift" at the mine site for 1-1/2 hours before advising them that there would be no work for them on that shift. In such circumstances, Westmoreland concedes that there may have been some merit in my agreeing with UMWA's contentions in that case that the miners were not idle during the first part of their shift and should therefore receive extra compensation over and above the 4 hours of reporting pay to which they were entitled under the Wage Agreement (Cross Motion, p. 10).

Westmoreland's cross motion (p. 11) seeks to distinguish its situation from that of the operator in the Pocahontas case by emphasizing that Order No. 668337 was issued at 7:30 a.m., or only 1/2 hour before the midnight shift ended. Therefore, it is contended, Westmoreland's management did not have sufficient time, as the operator in the Pocahontas case did, within which to notify the miners not to report for work. Additionally, Westmoreland

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3/ The first two sentences of section 111 of the Act read 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 was 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. * * *

emphasizes that it did not require the miners to remain at the mine for any length of time so that there are no facts in this proceeding which would support a finding that the miners were other than idle during the first part of their shift.

Westmoreland is correct in some of its observations about differences in the facts between this proceeding and those which occurred in the Pocahontas case, but I do not find the factual differences to be great enough to cause me to rule differently in this proceeding from the way I ruled in the Pocahontas case. As to the non-idle argument, it is a fact that the miners on the day shift reported to work as usual (Exhibit No. 1 attached to UMWA's Motion). When employees get into their vehicles and drive to work with the expectation of working 8 hours, they cannot be considered to be idle at that time. Undoubtedly, the miners obtained the "reporting pay" provision in the Wage Agreement after hard bargaining on the basis that it was unfair for them to expend time and money driving to work only to find that no work is available because the mine has been closed through no fault of the miners. The purpose of the "reporting pay" provision is to require operators to make "reasonable efforts" to notify the miners not to report for work (Footnote 2, supra).

It is undoubtedly true that Westmoreland did not have sufficient time in this instance to notify the miners on the day shift that no work would be available because Order No. 668337 was issued at 7:30 a.m. on the midnight shift which ended at 8:00 a.m., but that is one of the reasons for the miners' entitlement to receive 4 hours of reporting pay. No one at this time knows whether Westmoreland's management was at fault for the fact that an ignition occurred on November 7, 1980, but the miners who got up and reported for work at 8:00 a.m. can hardly be held to be at fault for an ignition which occurred during "the early morning hours of November 7, 1980" (Joint Stipulation No. 5, supra).

Westmoreland's cross motion (p. 12) also contends that upholding UMWA's claim for an additional 4 hours of compensation will result in having the Act interpreted differently at a mine where UMWA is the miners' representative from the way the Act will be interpreted at a non-union mine. There is no merit to that argument because the Act is being interpreted to provide exactly what its language states, that is, the miners on the "next working shift" following the shift on which a withdrawal order is issued will be entitled to receive 4 hours of pay for the time they are idled by the withdrawal order. While it is true that the miners at a mine where the Wage Agreement is in effect will receive 4 hours of "reporting pay" if they are not notified that the mine is closed, that is a pay obligation which Westmoreland knows it will have to meet any time it fails to notify miners not to report for work. I do not believe that the miners on the day shift should be deprived of "reporting pay" under the Wage Agreement just because they also happen to be entitled to 4 hours of compensation for the 4 hours they were idled by issuance of Order No. 668337.

Each of the parties in this proceeding has requested a summary decision, but Westmoreland states on page 11 of its cross motion that "* * * many of

them did not even report for work that day". Exhibit No. 1 to UMWA's motion, on the other hand, states (Paragraph 6):

> There were a lot of cars being turned back by the police and it seemed to me that most people scheduled to work my shift had driven to work as usual. November 7 was payday and there are not usually too many people absent on payday.

This case would have been scheduled for hearing if the parties had not assured me that the case could be decided on the basis of stipulations. Therefore, my order will require Westmoreland to pay the miners on the day shift for 4 hours of compensation. My order is awarding pay under the second sentence of section 111 which does not depend on the question of whether the miners actually reported for work on the day shift on November 7, 1980. Westmoreland's cross motion (p. 11) contends that the 4 hours of pay which the miners have already received was a discharge of its obligation under both the Wage Agreement and section 111 of the Act. Westmoreland further states that the Commission has indicated that it will not intrude into and interpret contractual relationships between miners and operators, citing Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). The Commission, however, amplified its Youngstown holding in Eastern Associated Coal Corp., 3 FMSHRC 1175, 1179 (1981), to note that "* * * we are occasionally obliged to examine the parties' collective bargaining agreement which fixes pay rights".

I have examined the Wage Agreement, as the Commission did in the Eastern Associated case, solely to rule upon the arguments which have been presented to me. It is up to UMWA to enforce the provisions of its Wage Agreement. My decision simply holds that the miners are entitled to 4 hours of compensation under section 111 because they were idled by Order No. 668337 and that the payment by Westmoreland of 4 hours of compensation under section 111 does not prohibit the miners from claiming that they are also entitled to be paid 4 hours of "reporting pay" by virtue of the fact that they were not notified to stay at home on November 7, 1980, under Article IX, Section (c), of the Wage Agreement. In resolving their claim for payment under the Wage Agreement, the miners and Westmoreland will have to use their normal method of determining which employees are entitled to payment for having reported to work on the day shift on November 7, 1980.

The Issue of the Miners' Entitlement Under Section 107(a) Order No. 668338, Exclusive of Arguments as to 1 Week of Compensation

UMWA's motion for partial summary decision (pp. 6-8) contends that the miners who were scheduled to work the day shift on November 7, 1980, are also entitled to compensation under the first two sentences of section 111 of the Act because of the issuance of section 107(a) Order No. 668338 at 8 a.m. on November 7, 1980, notwithstanding the fact that the miners on the midnight shift had already been withdrawn from the mine because of the issuance at

7:30 a.m. of section 103(j) 4/ Order No. 668337 on November 7, 1980. In support of its compensation claims under the section 107(a) order, UMWA argues that it is a well-settled principle that miners are idled, for purposes of section 111, by the issuance of a section 107(a), or imminent-danger order, regardless of the fact that the miners may have been previously withdrawn from the mine. It is contended that the aforesaid principle has been applied regardless of whether the prior removal resulted from a voluntary action on the part of the operator or whether it resulted from a withdrawal order issued prior to the imminent-danger order. UMWA cites five cases in support of the foregoing argument, but I find that they do not really support its arguments.

The first case cited by UMWA is Clinchfield Coal Co., 1 IBMA 31 (1971). In that case the operator voluntarily withdrew its miners after an explosion had occurred. On the succeeding shift, an inspector issued an imminent-danger order under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act). The operator argued that since it had voluntarily withdrawn its miners before the withdrawal order was issued, the miners were not withdrawn by the order and that the compensation provisions of section 110(a) of the 1969 Act did not apply. The former Board of Mine Operations Appeals rejected the operator's argument and held that the purpose of a withdrawal order is not only to remove miners but also to insure that they remain withdrawn until the dangers have been eliminated. The Board said that "* * * [r]egardless of the sequence of events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104, and the miners are officially idled by such order" (1 IBMA at 41).

In this proceeding, the miners were "officially idled" by the issuance of the 103(j) order at 7:30 a.m. and the provisions of section 111 began to apply at 7:30 a.m. when the 103(j) order was issued. The miners on the day shift were, therefore, the "next working shift" under the second sentence of section 111 and were entitled to 4 hours of compensation for the period they were idled by the 103(j) order.

UMWA also cites Consolidation Coal Co., 1 MSHC (BNA) 1668 (1978), in which Judge Broderick held that miners were entitled to 4 hours of compensation on the "next working shift" even though the operator had voluntarily withdrawn the miners before an imminent-danger order was issued. UMWA's

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4/ Section 103(j) reads as follows:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

motion cites another Consolidation case, 1 MSHC (BNA) 1674 (1978), in which Judge Fauver also held that the miners on the "next working shift" were entitled to 4 hours of pay despite the fact that the operator had voluntarily withdrawn the miners before the withdrawal order was issued. Neither of the Consolidation cases supports UMWA's claim in this proceeding because the miners in this proceeding were withdrawn by a 103(j) order which was still outstanding when the "next working shift" was scheduled to work.

UMWA next cites Valley Camp Coal Co., 6 IBMA 1 (1976), in support of its argument that the miners on the day shift are entitled to 8 hours and the miners on the "next working shift" are entitled to 4 hours as a result of the issuance of the 107(a) order at 8 a.m. In the Valley Camp case, a mine fatality occurred about 7:30 a.m. on January 10, 1975, and the miners withdrew from the mine under their Wage Agreement. An inspector issued a section 103(f) order on January 10, 1975, at 11:15 a.m. On the same day, between 12:30 p.m. and 1:30 p.m., the inspector issued three withdrawal orders under section 104(c)(2) of the 1969 Act. Valley Camp argued that the 103(f) order had idled the miners and that the other three orders had no effect. The former Board held that the sequence of issuance of the orders was not important because, for purposes of interpreting section 110(a) of the 1969 Act, "[t]he essence is the effective date of the issuance of the section 104 order of withdrawal" (6 IBMA at 6). The Board then stated that (6 IBMA at 7):

> * * * Idlement for purposes of section 110(a) began on January 10, 1975, when the first 104(c) order was issued, and continued beyond January 14, 1975, when the 103(f) order was terminated, until January 15, 1975, the date of the termination of the three 104(c) orders of withdrawal.

The former Board's holdings in the Valley Camp case completely refute UMWA's contentions as to payment of compensation under the imminent-danger order issued in this proceeding. It should be noted that the compensation provisions of section 110(a) of the 1969 Act differ from the compensation provisions of section 111 of the 1977 Act in that withdrawal orders issued under section 103 of the 1969 Act did not trigger the compensation provisions of section 110(a) of the 1969 Act, whereas withdrawal orders issued under section 103 of the 1977 Act do trigger the compensation provisions of section 111 of the 1977 Act. Consequently, if the facts involved in the Valley Camp case had occurred after the 1977 Act became effective, the 103(f) order would have been the order which officially idled the miners and that would have been the order under which they would have received compensation for the balance of the day shift and for 4 hours of the "next working shift".

Since the 104(c) orders in the Valley Camp case were issued during the same shift as the 103(f) order, the miners' compensation rights under the first two sentences of section 111 of the 1977 Act would be the same as they were under the 1969 Act, but the former Board's holding that the "essence of the applicability of" of the compensation provisions "is the effective date

of the issuance of the" first order which triggers the compensation provisions, when applied to the facts in this proceeding, would require that the miners working on the midnight-to-8-a.m. shift be paid for the balance of their shift and that the miners on the "next working shift", or day shift, be paid for the period they were idled, not exceeding 4 hours (disregarding the "reporting pay" provisions of the Wage Agreement).

It should also be noted that since the miners in the Valley Camp case withdrew voluntarily under the Wage Agreement after the occurrence of a fatality, the miners would, under the Commission's holding in Eastern Associated Coal Corp., 3 FMSHRC 1175 (1981), be entitled to no compensation whatsoever under the first two sentences of section 111 of the Act. In short, the Valley Camp case does not support any of UMWA's arguments in this proceeding.

Finally, UMWA relies on the Commission's decision in Peabody Coal Co., 1 FMSHRC 1785 (1979), which also dealt with issues raised under the 1969 Act. In the Peabody case, the inspector issued a 103(f) order which withdrew miners before an imminent-danger order was issued several days later. The Commission affirmed a judge's decision which had awarded the miners compensation for the balance of the shift during which the imminent-danger order was issued and for 4 hours of the "next working shift". Here again, if the facts involved in the Peabody case had arisen under the 1977 Act, the miners would have been paid for the balance of the shift on which the section 103(f) order was issued and for 4 hours of the "next working shift". In view of the differences between the 1969 Act and the 1977 Act, none of the cases cited by UMWA really support its argument that the miners on the day shift are entitled to be paid for the balance of their shift (8 hours) because the imminent-danger order was issued at 8:00 a.m. at the beginning of the day shift while the 103(j) order issued on the preceding shift was still in effect.

UMWA's motion (p. 7) also argues that the validity of the imminent-danger order has not been challenged in any review proceeding under section 107(e) of the Act (Joint Stipulation No. 18, supra). UMWA cites Itmann Coal Co., 1 FMSHRC 1573 (1979), in which Judge Kennedy held as follows (1 FMSHRC at 1578):

> The premises considered, I must conclude that the section 107(a) order No. 0660641 was not defective merely because it was issued in an area and on equipment already covered by a section 103(k) control order.

I fail to see the significance that the imminent-danger order's validity has to do with the merits of UMWA's contentions with respect to the imminent-danger order here at issue insofar as the first two sentences of section 111 are concerned. UMWA's argument is that the miners on the day shift are entitled to 8 hours of pay, or "the balance of such shift" and that the miners on the afternoon, or "next working shift", are entitled to 4 hours of pay. UMWA's argument is based on the first two sentences of section 111

(Footnote 3, page 5, supra). The first sentence specifically provides that the provisions of the first two sentences apply "* * * regardless of the result of any review of such order". Therefore, even if Order No. 668338 were to be found to be invalid in a review proceeding instituted under section 107(e) of the Act, the miners would, nevertheless, be entitled to the compensation provided for by the first two sentences of section 111.

UMWA's motion for partial summary decision and its reply to Westmoreland's cross motion for summary decision never address the crucial question raised by its contentions as to imminent-danger Order No. 668338. That question is whether the miners may continually reinvoke the compensation provisions of the first two sentences of section 111 each time a new withdrawal order has been issued while the order which originally withdrew the miners is still in effect. The cases which UMWA cites and which have been discussed above arose under the 1969 Act which did not trigger the compensation provisions of section 110(a) of the 1969 Act when withdrawal orders were issued under section 103. As I have already shown, those cases are inapplicable to an interpretation of section 111 which is triggered by a withdrawal order issued under section 103.

It is a fact that the miners were withdrawn in this proceeding when the inspector issued the first withdrawal order under section 103(j). The section 103(j) order has never been terminated and the miners received all the compensation to which they are entitled under section 111 because the miners on the midnight-to-8-a.m. shift received payment for the balance of their shift and the miners on day shift, or "next working shift" received 4 hours of compensation (or will receive 4 hours under this decision). As the Commission pointed out in its Eastern Associated decision, supra, 3 FMSHRC at 1177, if "* * * Congress [had] intended section 111 to create a source of independent pay or damages, it would not have so limited the compensation to only a portion of pay". I find that once the inspector issued his 103(j) Order No. 668337 at 7:30 a.m. on November 7, 1980, the compensation provisions of section 111 were triggered and that the miners are not entitled to any pay under the first two sentences of section 111 other than the pay for the balance of the midnight shift on which the 103(j) order was written and for 4 hours of the "next working shift", subject to whatever UMWA may be able to obtain additionally under Article IX of its Wage Agreement.

In UMWA's reply (p. 2) to Westmoreland's cross motion for summary decision, UMWA cites legislative history to the effect that when Congress added section 103 orders to those orders which trigger the compensation provisions of section 111, it was stated that the amendment was intended to be "a remedial provision which also furnishes added incentive for the operator to comply with the law". UMWA's reply (p. 3) argues further that Westmoreland's attempt to escape any liability for payment under the imminent-danger order makes the amendment of section 111 to provide compensation for orders issued under section 103 a restrictive interpretation of section 111 which was not intended by Congress. UMWA again cites the Valley Camp case, supra, for the proposition that miners are considered to be idled by each order and

that each order has to be terminated or modified before the miners may return to work.

I have already shown that the Valley Camp case does not support UMWA's arguments because the former Board held in that case that the first 104(c) order triggered the compensation provisions of section 110(a). Since that case was decided under the 1969 Act which did not provide for compensation to be paid for the 103(f) order which preceded the issuance of the 104(c) orders, the Valley Camp decision is inapplicable for interpreting section 111 of the 1977 Act which does provide for compensation to be paid when orders are issued under section 103 of the Act.

It is obvious that UMWA benefits by the amendment of section 111 to add section 103 orders to those which trigger the compensation provisions of the Act. In all circumstances in which an inspector issues a section 103 order, the miners get paid for the balance of the shift on which the 103 order is issued and for 4 hours of the "next working shift" if the order remains in effect for more than one working shift. The fact that the 1977 Act provides for compensation to be paid under section 103 orders is an "added incentive for the operator to comply with the law", just as Congress intended, but that "added incentive" is not a sufficient reason to hold that every time an additional order is issued, the provisions of section 111 may be reinvoked just as if the section 103 order had never been issued in the first instance.

UMWA's reply (p. 4) to Westmoreland's cross motion also argues that there was a "nexus 'between the underlying reasons for the idlement and pay loss and the reasons for the order'" which the Commission held to be necessary for invoking the pay provisions of section 111 in its decision in the Eastern Associated case, supra, 3 FMSHRC at 1178. The Commission's decision in the Eastern Associated case denied a compensation claim because there was not a nexus between the miners' withdrawal under their Wage Agreement and the issuance of an order under section 103(k) of the Act. Although the nexus existed between the issuance of the imminent-danger order involved in this proceeding and the reason for the miners' withdrawal with respect to the imminent-danger order, that nexus also existed with respect to the preceding section 103 order which withdrew the miners in the first instance. The occurrence of more than one nexus with respect to two withdrawal orders does not, however, twice trigger the compensation provisions of the first two sentences of section 111 with respect to a single mine closing.

I have not specifically referred in this portion of my decision to the well-reasoned arguments advanced by Westmoreland in its cross motion (pp. 12-19) in opposition to UMWA's request for additional compensation under the first two sentences of section 111 with respect to imminent-danger Order No. 668338, but my decision reflects that I am in agreement with most of Westmoreland's arguments. I do not believe that I should further extend this lengthy discussion just to summarize arguments with which I am in general agreement.

The Issue of UMWA's Claim for 1 Week of Compensation

UMWA's motion for partial summary decision (pp. 9-11) seeks to have the

miners compensated under the third sentence of section 111 5/ for 1 week of pay because of the issuance on November 7, 1980, of imminent-danger Order No. 668338. Before the miners can seek 1 week of pay when a mine is closed by an imminent-danger order, the order must cite the operator for failure to comply with a mandatory health or safety standard. Inasmuch as imminent-danger Order No. 668338, here involved, does not cite Westmoreland for failure to comply with any mandatory health or safety standard (Joint Stipulation No. 9, supra), the obvious conclusion is that the miners cannot claim compensation for 1 week of pay under section 111 of the Act.

UMWA, nevertheless, requests that it be permitted to introduce evidence at a hearing, based on MSHA's investigation of the ignition which occurred on November 7, 1980, to show that the ignition was the result of Westmoreland's failure to comply with one or more mandatory health or safety standards. UMWA contends that MSHA's investigation will eventually result in the citing of Westmoreland for one or more violations, but UMWA explains that completion of MSHA's investigation has been delayed by the complicated nature of the explosion which resulted in the sealing of the 2 South Mains. UMWA's motion is accompanied by Exhibit No. 3 which is a letter from an MSHA official who states that Westmoreland does not plan to recover the 2 South Mains until about July 1983. Because of MSHA's inability to complete the underground portion of its investigation prior to July 1983, the MSHA official states that MSHA "* * * has determined that appropriate action under the Federal Mine Safety and Health Act of 1977 will go forward on the preliminary record [of its investigation]".

Imminent-danger Order No. 668338 has never been terminated (Joint Stipulation No. 16, supra), and UMWA argues that, before it is terminated, it will be modified by MSHA to allege a failure of Westmoreland to comply with one or more mandatory health and safety standards. In such circumstances, UMWA argues that it should be permitted to introduce evidence now to prove that MSHA's investigation of the ignition will eventually show that the imminent-danger order is coupled with an allegation that Westmoreland has failed to comply with a mandatory health or safety standard. UMWA contends that failure to allow it to prove Westmoreland's violations prevents the miners from being paid for at least a week of the time during which they were idled because of issuance of the imminent-danger order.

In support of its argument that it be permitted to introduce evidence about the conditions surrounding the issuance of the imminent-danger order,

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5/ The first two sentences of section 111 of the Act are quoted in footnote 3, page 5, supra. The third sentence of section 111 reads as follows:

* * * 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. * * *

UMWA cites Judge Melick's decision in Royal Coal Co., 3 FMSHRC 1738 (1981), in which Judge Melick ruled that evidence pertaining to whether a violation had occurred could be introduced in that proceeding. UMWA argues that if it is permissible for the operator to present evidence in a compensation case as to whether a violation had occurred, UMWA should be permitted to introduce evidence in this compensation case to show that a violation has occurred.

The Royal Coal case does not support UMWA's arguments for a number of reasons. First, the judge in the Royal Coal case had consolidated the compensation case with a civil penalty proceeding in which MSHA was seeking assessment of a penalty for the violation cited in the inspector's imminent-danger order. The judge could hardly prevent the operator and MSHA from presenting evidence with respect to whether a violation had occurred since that is the primary fact which must be proven by MSHA in a civil penalty case before a civil penalty may be imposed. Additionally, the violation had been cited by an MSHA inspector and he was present at the hearing to testify in support of the violation which he had alleged in his order.

In this proceeding, the inspector has not yet cited Westmoreland for any violation. Although UMWA argues that permitting it to introduce evidence, based on MSHA's investigation of the ignition, will not be substituting UMWA for MSHA in the enforcement of the Act, there could be no other result if I were to permit UMWA to introduce evidence to show that Westmoreland should be cited for one or more violations of the mandatory health and safety standards. Moreover, even if I were to permit UMWA to introduce such evidence, there is no way that such evidence could be used under the provisions of section 111 to require Westmoreland to compensate its miners for 1 week of pay because of the issuance of imminent-danger Order No. 668338.

The basis for the foregoing conclusion is that the third sentence of section 111 provides that the week of compensation can be awarded only after "such order is final". Inasmuch as Order No. 668338 is still in effect, it cannot become a "final" order until MSHA has terminated it after finding that the imminent danger no longer exists. Therefore, if a hearing were held and UMWA were to prove that Westmoreland ought to be cited for a violation of one or more mandatory health or safety standards, Westmoreland could not be ordered to pay a week's compensation until the order has become final. Consequently, UMWA's contention that it should not have to wait to obtain a week's compensation until MSHA has completed an evaluation of its investigation of the ignition is a futile complaint which no one can grant because section 111 simply does not provide for miners to be compensated for 1 week's pay until the order has become final.

As Westmoreland points out in its cross motion for summary decision (p. 23), the former Board of Mine Operations Appeals held in three cases (Clinchfield Coal Co., 1 IBMA 33 (1971), Southern Ohio Coal Co., 4 IBMA 259 (1975), aff'd, District 6, UMWA v. Interior Board of Mine Operations Appeals, 526 F.2d 1260 (D.C. Cir. 1977), and Consolidation Coal Co., 8 IMBA 1 (1977)), that miners could not enlarge their right to compensation under section 110(a)

of the 1969 Act by introducing evidence to alter the statutory basis on which the orders were originally issued by the inspectors who wrote them. Specifically, the former Board held in those three cases that UMWA could not be allowed to prove at a hearing that the imminent-danger orders in those cases were the result of an operator's unwarrantable failure to comply with mandatory health and safety standards.

The only difference between the cases decided by the former Board and the instant case is that the third sentence of section 111 of the 1977 Act no longer requires, as the 1969 Act did, that an operator be cited for an unwarrantable failure before the miners idled by an unwarrantable-failure order could be awarded up to 1 week of compensation. Section 111 of the 1977 Act has been broadened to permit recovery of up to 1 week of compensation if any order issued under either section 104 or section 107 cites a violation of a mandatory health or safety standard. UMWA's motion for partial summary decision (p. 11) argues that the equities require an exception to be made as to the requirement that an inspector's order cite a violation of a mandatory health or safety standard as a prerequisite for recovery of 1 week of compensation if, as alleged in this proceeding, the hazardous conditions existing at the time the imminent-danger order was issued prevent the inspector from making the necessary investigation to determine whether the imminent danger was caused by the oeprator's violation of a mandatory health or safety standard.

In addition to the obvious legal barriers discussed above which require denial of UMWA's complaint for a week of compensation, there are many practical reasons for refusing to permit UMWA to present evidence of the type it seeks permission to introduce in this proceeding. In the first place, Order No. 668338 is still in effect as to the 2 South Mains. In other cases, I have known inspectors to modify their orders to cite violations which were not known to exist at the time the orders were first issued. When MSHA's evaluation of the preliminary investigative record, which includes the testimony of 70 individuals (Exhibit No. 3 attached to UMWA's motion), has been completed, the inspector may modify Order No. 668338 to cite a violation of a mandatory health or safety standard. If Order No. 668338 is eventually modified to cite a violation, UMWA's claim for a week of compensation may then be considered. 6/

6/ I do not agree with the argument in footnote 10, page 22, of Westmoreland's cross motion to the effect that the third sentence of section 111 requires the week's compensation to be paid on the basis of the order as issued. The third sentence of section 111 simply requires that an order be issued under either section 104 or section 107 citing an operator for failure to comply with a mandatory health or safety standard. If the miners are idled for a week or more by such an order, the miners are entitled to claim 1 week's compensation. Both Westmoreland and UMWA are entitled to seek review of modifications of orders. Those applications or complaints may be filed within the same time limits which exist with respect to the original orders. Westmoreland cites no case and no provision in the Act which would bar UMWA from filing a complaint for compensation if the inspector eventually modifies Order No. 668338 to cite a violation of a mandatory health or safety standard.

A second practical reason for denying UMWA's request that it be allowed to prove that Order No. 668338 ought to have cited one or more violations, is that both sections 104(a) and 107(a) provide for inspectors to issue citations and imminent-danger orders, respectively, regardless of whether they are engaged in inspections or investigations. If the inspectors' investigation of the ignition in this proceeding should disclose that some or all of any violations they may observe during their investigation are unrelated to the cause of the ignition, they would write the violations as ordinary citations under section 104(a) of the Act. If the inspectors should determine that any violations they observe contributed to the cause of the ignition, they would then modify Order No. 668338 to cite the violation or violations as a part of the imminent-danger order. Consequently, it is not necessarily true, as UMWA alleges, that Order No. 668338 will eventually be modified to allege that the miners were withdrawn by an order which charged Westmoreland with failure to comply with a mandatory health or safety standard.

A third practical consideration for not permitting UMWA to introduce evidence to prove that Order No. 668338 should have cited one or more violations is that MSHA would eventually have to propose a civil penalty for such violation. 7/ MSHA's civil penalty program is influenced by such matters as whether a given violation is associated with occurrence of one or more fatalities, as was the case in this proceeding. If the inspectors cite violations during the investigation of the ignition, but allege them in ordinary citations, the Assessment Office will be unlikely to propose civil penalties for such violations as large as it would propose if those same violations had been cited as a cause of the ignition and associated fatalities. Moreover, permitting UMWA to introduce evidence to prove that imminent-danger Order No. 668338 should have cited violations could result in a judge finding violations different from those which the inspectors may eventually allege.

Request for Reservation of Decision as to 1 Week of Compensation

UMWA's motion for partial summary decision (p. 11) asks, if I deny UMWA's request for permission to introduce evidence to prove that imminent-danger Order No. 668338 should have cited a violation of a mandatory health or safety standard, that I reserve a final decision on UMWA's request for 1 week of compensation until such time as MSHA has completed its evaluation of

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fn 6 (continued)
Sections 105(d) and 107(e)(1) of the Act specifically provide for the review of modifications of orders by both UMWA and an operator. Section 111 does not bar a complaint for compensation based on a modification of an order. In fact, as already observed, the week of compensation cannot be ordered to be paid until the order has become "final".

7/ As noted above, the judge in the Royal Coal case, supra, cited in UMWA's motion for partial summary decision (p. 9), consolidated the civil penalty proceeding with the compensation case.

its investigation of the cause of the ignition and has terminated imminent-danger Order No. 668338 with or without modifying it to allege a violation of a mandatory health or safety standard.

There are many legal and practical reasons for denying UMWA's request for reserving my decision on the issue of the miners' request for 1 week of compensation. First, even UMWA is requesting that I rule upon MSHA's requests for compensation under the first two sentences of section 111. When my decision on UMWA's requests under the first two sentences of section 111 is ready to be issued, the decision must be forwarded to the Commission for issuance by the Commission's executive director. The Commission has already reversed me once for assuming that I could issue a decision which failed to dispose of all pending issues (Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (1980)).

Additionally, section 113(d)(2)(C) of the Act requires that when a decision is ready for issuance, the judge will forward to the Commission all of the record which is before him at the time he decides to issue the decision so that, if a petition for discretionary review is thereafter filed with respect to the decision, the Commission will have before it the complete record which was before the judge when he rendered his decision. In short, the Commission and I cannot simultaneously have jurisdiction over the record or subject matter in a given proceeding.

Finally, as I have already observed, there is nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify outstanding imminent-danger Order No. 668338 to allege one or more violations of the mandatory health and safety standards by Westmoreland. For the foregoing reasons, UMWA's request for deferral or reservation of my decision with respect to any compensation which the miners may eventually be entitled to receive under the third sentence of section 111 must be denied.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) UMWA's motion for partial summary decision filed February 19, 1982, is denied insofar as it seeks any compensation under section 111 of the Act with respect to imminent-danger Order No. 668338, including UMWA's request that it be permitted to introduce evidence to prove that Order No. 668338 should have cited one or more violations of the mandatory health or safety standards by Westmoreland.

(B) UMWA's motion for partial summary decision is denied insofar as it requested me to defer or reserve my decision with respect to UMWA's alleged right to compensation for 1 week of pay under the third sentence of section 111 because of the issuance of imminent-danger Order No. 668338.

(C) UMWA's motion for partial summary decision is granted to the extent that it seeks 4 hours of compensation for the miners who were scheduled to work the day shift on November 7, 1980, following the issuance

of Order No. 668337 on the preceding midnight-to-8:00-a.m. shift under section 103(j) of the Act.

(D) The grant of 4 hours of compensation in paragraph (C) above is made with the express understanding that payment by Westmoreland of 4 hours of compensation under the second sentence of section 111 does not preclude the miners from any compensation they may be due under Article IX, Section (c), of the National Bituminous Coal Wage Agreement of 1978.

(E) The grant of 4 hours of compensation in paragraph (C) above should be made with payment of interest at 12 percent per annum from November 7, 1980, to the date of payment for the reasons given in my decision in Beatrice Pocahontas Co., 3 FMSHRC 2004 (1981) at 2013, provided that the parties do not ultimately agree that the 4 hours of compensation already paid because of the issuance of Order No. 668337 was paid under section 111 instead of under Article IX of the Wage Agreement. If the parties agree that the additional compensation is due under the Wage Agreement, the question of payment of interest is to be determined by the parties under applicable labor law instead of pursuant to any directions by me in this proceeding.

(F) The miners to whom additional compensation is due under either section 111 or under the Wage Agreement are those who are listed in Exhibit B of Joint Stipulation No. 13, supra.

(G) Westmoreland's cross motion for summary decision filed March 10, 1982, is granted to the extent that it sought denial of UMWA's request for compensation under imminent-danger Order No. 668338 and denied insofar as it opposed UMWA's request for additional compensation which has been granted in paragraph (C) above.

(H) UMWA's amended complaint filed on November 9, 1981, is denied except with respect to the last prayer in the complaint which is granted in paragraph (C) above.

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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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Complainant	:	Complaint of Discrimination
	:	Docket No. SE 80-31-DM
v.	:	Florida Mining & Concrete Co.
METRIC CONSTRUCTORS, INC., Respondent	:	

DECISION

Appearances: William H. Berger, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Complainant MSHA; Richard A. Vinroot, and J. Dickson Phillips, Esqs., Fleming, Robinson, Bradshaw & Hinson, Charlotte, North Carolina, for Respondent;
Sidney L. Matthew, Esq., Tallahassee, Florida, for individual Complainants.

Before: Judge Lasher

PROCEDURAL BACKGROUND AND STATEMENT OF THE CASE

This proceeding was initiated on November 19, 1979, by the filing of a discrimination complaint by Ray Marshall, Secretary of Labor on behalf of seven alleged discriminatees, Joe Brown, Johnny Denmark, Jerry McGuire, Van T. "Dago" McGuire, AKA "Terry" McGuire, David Mixon, John Parker, and Wesley Parker (herein collectively the Complainants). The Secretary's complaint, as amended, alleges that the seven individual Complainants were discharged in violation of section 105(c)(1), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Supp. III 1979) (herein the Act) and seeks as a remedy therefor reimbursement of all wages and benefits lost together "with interest from the time of their discharge" at the rate of 9 percent per annum, and expungement of pertinent personnel records. In addition, the Secretary prays that a civil penalty be assessed against Respondent pursuant to section 110 of the Act.

Respondent's motion to dismiss filed November 28, 1979, for the reason the complaint "was not based upon a written determination within 90 days of the (miner's) complaint, nor filed immediately thereafter, as required by the

Act, or within 30 days thereafter as required by the regulations" was denied at the hearing (I Tr. 34-59). 1/ The bench ruling that such rules of limitation are not jurisdictional is here affirmed. Local Union No. 5420, UMWA v. Consolidation Coal Company, 1 FMSHRC 1300 (September, 1979). Respondent neither established or contended that any prejudice resulted from any delay of the Secretary in processing the complaint of the seven alleged discriminatees.

Although Respondent initially challenged the jurisdiction of the Commission both over the subject matter and over the Respondent as a party, at the commencement of hearing the parties stipulated such jurisdiction (I Tr. 23, 28).

The Secretary asks that a penalty be assessed against Respondent should a violation be found to have occurred. Section 110(a) of the Act requires that, in addition to the remedies provided in section 105(c), a penalty be assessed if the mine operator is found to be in violation of section 105(c). The parties were notified on numerous occasions that all aspects of this matter, including penalty assessment if appropriate, would be heard and decided at the same time. While certain procedural regulations, 29 C.F.R. § 2700.25 through 29 C.F.R. § 2700.30, require initial administrative processing of proposed penalty assessments by the Secretary, such seem to apply only to violations of health and safety standards determined after issuance of orders and citations during inspections and investigations pursuant to section 104 of the Act. These regulations are the procedural implementations of sections 105(a) and (b) of the Act. It is thus found that such regulations are not applicable to discrimination proceedings arising under section 105(c) of the Act. Otherwise piecemeal litigation and resultant inconvenience and unnecessary costs to the parties will result. All facets of the cause of action pleaded in the Secretary's complaint were litigated and are decided herein.

To establish a prima facie case of discrimination under section 105(c) of the Act a complainant must establish by a preponderance of the evidence (1) that he engaged in a protective activity and (2) that the adverse action was motivated in part by the protected activity. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980); rev'd on other grounds, 663 F.2d 1211 (3rd Cir. 1981). Complainant must establish these elements by a preponderance of the evidence, Secretary of Labor v. Richardson, 3 FMSHRC 8 (January, 1981).

PRELIMINARY FINDINGS

The seven Complainants, journeyman welders, were hired as temporary employees to work the night shift at Respondent's repair project at a cement plant (mill) owned by Florida Mining and Materials Corporation, Cement Division, located 10 miles north of Brooksville, Florida. They were to work

1/ A bifurcated hearing was held on December 15, 16, 1980, and May 5, 6, 1981. References to the December hearing transcript will be "I Tr. ___" and the May transcript "II Tr. ____."

12 hours a day, 7 days a week for a period of 4 weeks commencing February 27, 1979, on a "pre-heater" and a kiln located at the plant which had been shut down while the repairs were being made. Their shift commenced at 7:00 p.m. and ended at 7:00 a.m. The seven Complainants were hired, and did in fact work, as a crew.

The Respondent, Metric Constructors, Inc., is a subcontracting firm which performs work in several states. At the times and places material herein, its supervisory structure consisted of: Russ Jones, project superintendent; Thelbert Simpson, night superintendent; Fox Simpson, night foreman; Bob Davis, night foreman; Arnold Crotts, day foreman; Dan Buie, day foreman; and Norman Graham, day foreman.

During the first three nights of their employment (February 27, February 28, and March 1, 1979) the seven Complainants welded on and around the kiln (a large cylinder located about 30 feet off the ground). The first three nights were uneventful. On their fourth night, March 2, they and about 14 others were assigned to perform welding work on the pre-heater (a large vertical, silo-like structure) at locations known as "vortex ducts," which were 180-200 feet above the ground. Complainants were to weld on Vortex "A". Welding on the three other Vortexes, "B," "C," and "D" had been completed and was accomplished during the daytime.

After reporting to work prior to 7:00 p.m., the Complainants were told by Thelbert Simpson to report to Bob Davis, who was their foreman for that shift. 2/ Their duties were to weld on inlet feed shoots near the top of the pre-heater approximately 180 feet above the ground.

The seven Complainants proceeded with Night Foreman Davis to inspect their working area by climbing a set of stairs to it. Their working area was pointed out by Bob Davis from a platform. The Complainants could not reach it, however, because there was a gap of at least 6 to 8 feet between the platform where they were standing and the actual working area.

It was then determined that four of the Complainants (Joe Brown, Terry McGuire, Jerry McGuire and John Parker) would weld on the duct work, while the other three would pull leads (power supply for the welding machines) and act as relief when the welders got tired. Since there was no direct access to the duct work, the four welders were lifted to the work site in a basket by a crane. The other three Complainants pulled leads to within 6 to 8 feet of the duct work and stood on a platform handing supplies to the welders as needed. The platform had no fence or handrail around it. Once the four Complainants reached the duct work in the basket, they found there were no scaffolding or handrails around the work site nor were there any padeyes on

2/ Two of the Complainants did not testify. David Mixon was killed in an automobile accident in November 1980 and Johnny Denmark was serving overseas in the United States Navy at the time of the hearings.

which to hook their safety belts. They were thus required to weld padeyes before they could attach their safety belts. Terry McGuire and Joe Brown went inside the inlet feet shoot that was being welded onto the pre-heater, while Jerry McGuire went on top of the duct, and John Parker worked from an unsecured one-board scaffold below the duct. 3/

The four Complainants in question worked for approximately 2 hours under conditions which they considered unsafe. Jerry McGuire, who was on top of the duct, was being blown about by heavy winds (I Tr. 99, 234 315, 317, 334). John Parker, who was below the duct on the one-board scaffold, was being "burned" by the welding fire from above (I Tr. 91, 150-151, 155) as were Terry McGuire and Joe Brown inside the duct (I Tr. 90-91, 233-234, 314-315). The lighting at the work site was insufficient and by 7:30-8:00 p.m. on March 2, 1979, it was dark outside (I Tr. 92, 101-102, 231; II Tr. 118). The four welders working on the duct were able to reach the platform where the other three were standing only by walking around on a ring which encircled the pre-heater (I Tr. 318).

Shortly after 9:00 p.m., all seven Complainants went on break. They decided that because of what they believed to be unsafe and hazardous working

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3/ The lack of scaffolding and handrails were verified by Bob Davis, the crew foreman (Exhibit C-17B), Louis Shaw (II Tr. 117), Robert Porter (II Tr. 124), and Thelbert Simpson (II Tr. 91). Respondent attempted to establish the existence of scaffolding and handrails by introducing photographs of its 1980 project (II Tr. 65). No photographs of the 1979 project were introduced although they were available (II Tr. 65-66). Terry McGuire testified in this connection that:

"Joe and I had talked about it needing some more scaffolding, that we needed a lot more scaffolding. We needed a fire blanket in there and we were going to see if we could get some. . . I know that my brother had to come off of the duct work because the wind was blowing, and he almost got blown off of it. There was no scaffold on top of the duct work at all." (I Tr. 315).

Foreman Davis, in his written statement, described the situation as follows:

"I told them that the only way they could do the welding would be to hook up or hang out with their safety ropes. I think one of the welders mentioned something about there being no scaffold. I didn't know any of the seven welders by name but they are the seven men that left at one time, March 2, 1979. I told them that we didn't have a scaffold when we welded the other 3 (B, C, and D) vortexs. I personally supervised the welding in B, C, and D vortexs. However, the welding on B, C, and D vortexs was done during the day. The only scaffolding on the preheater was a ring about a foot from the top of vortex A. The other ring of scaffolding was only temporary and had been taken down prior to March 2, 1979."

Significantly, Davis also made this admission: "I told the welders before they left on the evening of March 2, that I wouldn't do the job now either because I'm too old, I am 53 years old. I also told them that I had done jobs that risky and even more risky over the years."

conditions Terry McGuire and Joe Brown would talk to Bob Davis about improving the conditions by getting additional lights, fire blankets, scaffolding, cables for handrails and jacks for scaffolding boards at the work site.

Once on the ground, and after their break, Joe Brown, Terry McGuire and Jerry McGuire, on behalf of all seven men (I Tr. 99, 137, 139, 153, 235, 336, 348-349), sought out Night Foreman Bob Davis and registered their complaints about the unsafe and hazardous working conditions, i.e., no handrails, no scaffolding, and no lights and to request angle irons, scaffold jacks, scaffold boards, fire blankets, cable for handrail and lighting (I Tr. 101-103, 315, 319, 325, 336, 348). While they were so engaged, the other four Complainants returned to the platform located 6 to 8 feet from the duct.

After receiving the safety complaints from the three Complainants Bob Davis found Night Superintendent Thelbert Simpson in the office trailer and advised him that the welders wanted a scaffold and handrails before they would weld Vortex "A." Simpson and Davis then agreed that Russ Jones, the project superintendent, should be called. Davis, in a written statement (Exhibit 17-B) gives this account of the telephone conversation:

> "I called Jones and told him that the welders wanted a scaffold and handrails before they welded vortex A. I told Jones that the welders didn't want to hang out on a safety rope because they didn't feel like it was safe. Jones said that it was safe on the other three vortexes and that we didn't have any scaffolding then. I asked Jones what if the welders didn't want to weld hanging on the ropes. Jones said that if I didn't have any other welding for them to do, to tell them to go home. I dialed the phone, talked to Jones, and hung up, while just Thelbert Simpson and I were in the office trailer. Thelbert Simpson never talked to Jones during my call to Jones." 4/

With respect to this same conversation, Project Superintendent Russ Jones testified that he had the conversation with Simpson, not Davis:

> Q. Now I want to get to the statement that you had with Thelbert Simpson that you testified to. What time was it again that you got a call?
>
> A. It was somewhere around nine or just a little bit after nine. I don't recall what time it was.

4/ A direct and material conflict appears in the record between Respondent's witnesses as to this conversation. Both Thelbert Simpson and Russell Jones testified that the conversation in question was between Simpson and Jones, not Davis and Jones. Davis did not testify. His version appears in an unsworn statement. This conversation is critical to the resolution of the ultimate issues in this matter because it was in the process of this conversation that Respondent decided what to do about the safety complaints.

Q. And as best as you can recall, what did Mr. Simpson say to you?

A. He told me that Terry -- I believe it was Terry -- and Joe Brown and refused -- they said they was not going to work on that pre-heater tower, and then I asked him, I said, "Thelbert, do you have anything else on the ground that they can do." He said, "I have nothing on the ground. No work at all. I have two men working on the downcomer duct and that's all I've got," and I said, "Well, explain to them that's all the work that we have for them to do."

* * * * * * *

Q. Well, is that what you were told, somebody wanted to quit?

A. Yeah, he said they had quit.

Q. Oh, he said they had quit?

A. Yeah, and he said if he quit, then he was going to take the rest of them with him.

Q. Who's that?

A. Terry and I believe -- I'm not saying whether Joe Brown was in there or not.

Q. I'm getting a little confused. Now go back and tell me what Thelbert Simpson said to you.

A. He told me the two men, Terry and Joe Brown, if it was -- I'm not sure -- said they were not going to work on that tower up there and they was going to quit.

Q. Let me ask you something. Did you ask why they didn't want to work?

A. No. Why should I ask my superintendent why he didn't want to work when he called and told me the man was going to quit?

(II Tr. 75-77).

Thelbert Simpson, the third management witness to testify for Respondent, gave this account of the pertinent events:

Q. Tell the Court in your own words what happened that night as between you and Mr. Terry McGuire and who ever approached you that night?

A. Well, after nine o'clock, the break, Bob Davis brought Joe Brown, Terry, and I believe Jerry was with him, too --

Q. Jerry McGuire?

A. Jerry McGuire.

Q. Yes, sir, go ahead and proceed.

A. Brought them right under the pre-heater, just right beside the pre-heater and said that they wasn't going back up there to do no more welding, and I said, "Why," and they complained about not enough light, and I said "I'll get you more lighting up there," and when I told them that, they said they weren't going back up there unless I build them a scaffold, and weld -- and I build it up as they weld it up, and I told them it would take me longer to build the scaffold then it would for them to do the welding.

Q. All right, sir. Then what happened?

A. They said they wasn't going back up there. Terry or Jerry one asked me were they fired, and I told them No, they wasn't fired, and Bob said, "We might as well call Russ." So I told Russ -- I told Bob if he would call Russ -- I don't know if it was long distance or not -- get through the operator, I would talk to Russ, so Bob dialed the phone and got Russ, and I talked to Russ.

Q. What did you say and what did Russ say?

A. I told Russ that Jerry and them refused to do the work and wouldn't go back up there to do the work on the pre-heater. And Russ asked him did he have anything to do on the ground for him to do. I told him I didn't have anything else on the ground to do, or nothing else, but just those two guys that were on the ground. And he said, "Let them go home and tell them to come back in the morning and I'll give them the checks."

Q. All right, sir. Did Russ say anything to you about firing them or terminating them?

A. No.

Q. What did you say to the men after talking to Russ Jones?

A. I told them Russ said to tell them to go home and come back and pick up their checks the next morning.

Q. Did you tell them they couldn't do the work or that you would not permit them to continue to do the work?

A. No, I did not tell them they couldn't do the work.

Q. Did you make it clear to them that they could go do that work as far as you were concerned?

A. Yeah.

Q. How did you tell them that?

A. Well, they asked me three times and I told them I didn't have anything else for them to do, and they asked me three times before I went to the office were they fired, and I told them no, but I didn't have any work for them to do on the ground.

Q. Were you willing for them to go back up and do the work where they had come from?

A. Yeah.

Q. Were they willing to do it?

A. No, they said they wasn't going back.

Q. Did they said anything to you about safety?

A. One of them I believe said it was unsafe.

* * * * * * *

Q. Am I correct that you testified, Mr. Simpson, that you did not actually physically see the area where the seven men were supposed to work that night?

A. No, I did not.

* * * * * * *

Q. Did you tell Russ why these men didn't want to work?

A. Yeah.

Q. Why? What did you tell them?

A. I told them that they asked me, and I said, "They refused to work," and Russ said, "Ask if they didn't have anything else to do on the ground, anything else for them to do."

Q. Well, did you explain to him at any time why they didn't want to do the work?

A. No.

Q. Did you mention to him about the scaffolding?

A. No.

Q. Or about the lighting?

A. No.

* * * * * * *

THE COURT: * * *

In the telephone conversation with Russ, why didn't you tell Russ the reason why these welders refused to work?

THE WITNESS: Well, actually I actually didn't exactly know why they refused to work. They just told me they wasn't going back out there on there to do it. The only thing they complained about to me was the lighting and for me to build them a scaffold.

(II Tr. 85-94).

Following the telephone conversation between Simpson and Jones, Davis told the Complainants that Russ Jones had said that "they would have to weld the vortex like the other three were welded by hanging off of the safety ropes." Davis also told the Complainants that if they refused to do the work as it was, they "would have to go home" and they "could come back in the morning and get their money.'

Jerry McGuire then returned to the platform to retrieve the four other Complainants who were waiting to find out what would be done about the working conditions and to tell them they had been fired or words to that effect. (I Tr. 109, 125, 154-155, 158, 188, 237). On the way from the platform to the stairs or elevator, Dave Mixon slipped on an unsecured plank that was being used as a walkway and nearly fell 180 feet to the ground (I Tr. 170-176, 189, 340).

While Jerry McGuire was retrieving the other four Complainants, Joe Brown and Terry McGuire requested that Bob Davis pay them immediately for the work they had done that week. Bob Davis could not find the timekeeper and Complainants were instructed to return the following morning.

On the morning of March 3, 1979, the seven Complainants returned to the work site and received their checks. They were asked to sign a termination slip (Exhibits C-18A-G), on which "voluntary quit" had been checked. Each Complainant refused to sign the slip.

The Respondent had no other welding or alternate work available for Complainants on the night of March 2, 1979, and so informed them. On March 3, all of Respondent's temporary welders were assigned to work on the pre-heater and all remained there until the last three or four days of their four-week term when some were brought down to weld on the kiln. During that four-week term, there were no accidents, no other complaints, no investigations and no citations arising from the conditions that the complaining miners considered unsafe.

The temporary welders hired by Respondent completed their work during the four-week period for which they had been employed (II Tr. 66) and most were terminated at the end of that term [II Tr. 60]. Several, who were also "iron workers," were retained for one or two weeks thereafter to perform structural iron work which the Respondent performed for Florida Mining [II Tr. 66-69]. The Complainants were not hired for this work and would not have been retained for its performance under any circumstances [II Tr. 59-60].

The Complainants filed charges with MSHA on April 27, 1979, alleging that the events of March 2, 1979, constituted "discriminatory discharges" under the 1977 Act. MSHA conducted an investigation of the Complainants' charges which concluded on July 12, 1979. That investigation made no determination as to the merits of the Complainant's contentions or whether the conditions they complained of violated MSHA standards. MSHA notified Complainants of its determination by letter dated October 18, 1979.

DISCUSSION, ULTIMATE FINDINGS AND CONCLUSIONS

The Respondent, while conceding in its brief that the refusal of the seven Complainants to perform work was a protected activity because based on a reasonable and good faith belief that unsafe conditions existed, contends that Respondent's only duty to them was not to take adverse action or discriminate against them on account of that refusal. Respondent correctly argues that there was no automatic legal duty imposed on it to agree with the miners, to change work conditions to their satisfaction, or to continue to pay them where alternative work was not available while a safety dispute was in the process of being resolved. Respondent maintains that a "standoff" occurred on the night of March 2, 1979, in which both sides, in good faith disagreement, acted within their rights. 5/

5/ Which of Respondent's versions of the critical telephone conversation is to be credited, the Davis version or the Jones-Simpson version is of considerable importance. Since both Jones and Simpson testified under oath and were subject to cross-examination their account of the conversation carries more weight than does that of Davis, which appears in an unsworn written

While Respondent argues that a mine operator has no duty to an employee (1) to investigate allegedly dangerous conditions, or (2) to attempt to dispel the miner's fears through explanation or through changing job conditions to the miner's satisfaction, it also alleges that holding such view is unnecessary to the disposition of this case because the Respondent had a reasonable, good faith belief that the conditions were safe based on its prior knowledge of the working conditions. 6/

The Respondent then urges the view be adopted that where the complaining miners exercised their rights in refusing to perform the work which they considered unsafe and the mine operator exercised its corresponding right in refusing to make the changes demanded by the miners, that each side had the option to act as it did, and the right of neither superseded that of the other. In such equipoise, according to Respondent, no liability should be imposed upon the mine operator unless it commits an "adverse action" or "discriminates" against the miners in that process. As Respondent points out, the Supreme Court, in Whirlpool Corp. v. Marshall, 100 S. Ct. 883, 894 (1980), in interpreting an antidiscrimination provision of the Occupational Safety and Health Act has held that "an employer discriminates against an employee only when he treats that employee less favorably than he treats others similarly situated." According to Respondent, there is no basis for finding that it took adverse action or discriminated against the seven Complainants since:

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fn 5 (continued)
statement. The numerical logic that two witnesses testifying under oath are less likely to be mistaken than one witness giving a written statement compels acceptance of the Jones-Simpson version.

From the testimony of both of Respondent's supervisory personnel who testified, Simpson and Jones, it appears that at the time that Jones made the decision to give Complainants the option of returning to work or being terminated he had only been told by Simpson that the men were quitting and he had not been advised that they had made safety complaints.

The implausibility of and conflict in the testimony of Respondent's witnesses is particularly damaging to its case. It was in this telephone conversation that Project Superintendent Jones decided on what action should be taken with respect to Complainants. According to both Jones and Simpson, the merits of Complainant's list of unsafe conditions was not discussed, nor was the subject even brought up. This detracts from Respondent's contention that its belief that the working conditions were safe was a reasonable one.

6/ Respondent relies on the rather tenuous testimony of Project Superintendent Jones and Night Superintendent Simpson for this proposition (II Tr. 34-37; 93-95). This testimony, for the most part, is to the effect that prior to the "shutdown" for repairs Respondent prepared the areas where welding was to be performed by installing scaffolding. Due to its quality and generality, Respondent's evidence in this regard is not sufficient to overcome the more precise description of unsafe conditions existing on March 2 by Complainants.

(1) The only welding work that was available on March 2, 1979, was that which the seven miners refused to perform;

(2) All but two of the other welders employed that night worked under similar conditions; and

(3) The seven Complainants were given the option and encouraged to continue to perform that work but refused to do so.

Nevertheless, the testimony of Complainants concerning the various hazards which existed on the evening of March 2, 1979, was consistent, credible and detailed, and I find it sufficient to establish that such hazards resulted in an unsafe working environment. As further noted below, the testimony of Respondent's witnesses was neither as plausible or reliable as that of Complainants. Although Respondent contends that others worked under similar conditions without complaint, the record among other things, (a) reflects no comparison between Complainants' working conditions and that of other welders on other vortexes, nor (b) does it indicate that other welders had been asked to work that night without adequate lighting and scaffolding. Respondent's rebuttal for the most part was oblique and did not directly meet Complainant's evidence which credibly established the hazardous nature of the conditions complained of. The five Complainants who testified all considered the conditions unsafe and Respondent presented no challenge to their good faith in entertaining such belief. Indeed, Project Superintendent Jones conceded that he did not perceive the seven Complainants "as individuals who wanted to go out and just get a couple of days' work and buy a bottle" as had been the case with others he had encountered (II Tr. 78).

Respondent's position is undermined considerably by its failure to investigate any of the specific complaints lodged. Respondent's position that its supervisors were already aware of the working conditions prior to the time the complaints were made and thus had no need to investigate was not sufficiently developed and was too general to account for this failure. Thus, the Complainants' testimony with respect to insufficient lighting, the need for fireblankets, etc., were not satisfactorily addressed by Respondent's witnesses-possibly because the complaints were not investigated and evaluated at the time. This failure may also explain why foreman Simpson, if his account of events is accepted, did not inform Project Superintendent Jones that such complaints had been made.

The belief of the Complainants that the various conditions previously described were unsafe and their consequent refusal to work is found to be reasonable and fully justified by the circumstances. Their refusal to work is found, independent of Superintendent Jones' concession as to their sincerity, to constitute an activity protected under the Act. Consolidation Coal Company (David Pasula), supra.

The means employed by Complainants to have three of their member communicate their safety complaints and refusal to work under unsafe working conditions to Respondent's management personnel at approximately 9 p.m. on March 2, 1979, was sufficient to invoke the protection of the Act. The communication by three of Complainants on behalf of the other four is sufficient to protect the rights of those who did not themselves speak directly to management. Not every miner involved in a work refusal need make or attempt to make such a complaint. A communication from one may be deemed to be on behalf of all concerned, even if not announced in such terms. Northern Coal Company, 4 FMSHRC 126 (1982); Local Union 1110, UMWA v. Consolidation Coal Company, 2 FMSHRC 2812 (1980).

There being substantial evidence in the record that Complainants' working conditions were unsafe, that Complainants were reasonable in their belief that such conditions were unsafe, that Complainants properly complained to Respondent about such conditions, and that Complainants refused to work because of such conditions, absent some affirmative defense, a prima facie case under Pasula, supra, is completed by a showing that Complainants were discharged or otherwise discriminated against because of such protected work refusal.

Respondent's defense is that a state-of-mind equilibrium existed and that both parties were reasonable and sincere in their conflicting views of the condition of the workplace. In the Commission's ongoing process of formulating rules to implement its holding in Pasula the rights and duties of a mine operator-whose belief that the complained-of conditions are safe is equally reasonable to that of the complaining miners-have as yet to be fleshed out. Where the evidence is substantial one way or the other that the working conditions are either safe or unsafe, such state of the record ordinarily would be dispositive as to which party is reasonable in their belief. To determine whether there is substantial, probative evidence in this record to support Respondent's contention it is first necessary to more precisely state the rule it urges as gleaned from its arguments: Where a mine operator reasonably believes working conditions are safe and a miner reasonably believes the conditions are unsafe, and no alternative work is available, the mine operator has no obligation (a) to change the conditions to the miner's satisfaction, or (b) to continue the employment of the complaining miner who refuses to work under existing conditions. Such a rule appears fair and sound where there are no contractual procedures to be followed and where the record is not sufficient to permit a determination whether the working conditions were safe or not. However, as previously noted, the preponderance of the reliable evidence in the record indicates that the conditions Complainants were asked to work under were unsafe. Respondent's efforts to be seen as reasonable in its view that the conditions were safe are undermined by its actions: it not only failed to investigate the complaints to determine their validity but its foreman, Simpson, failed to advise Project Superintendent Jones that safety complaints had been registered and were the reason for the work refusal. Jones, who made the ultimate decision to inform Complainants to either return to work or pick up their paychecks, was unaware that safety complaints had been registered. Even by viewing the evidence in

the light most favorable to Respondent, it is clear that the Respondent, because of communications failure within its own supervisory structure, incorrectly concluded that Complainants were insincere in their concern for safety hazards and merely desired to quit. Acting on such erroneous assumption, and on the unjustified belief that the working conditions complained of were safe, Respondent gave Complainants the unacceptable alternative of working under unsafe conditions or being terminated. Although perhaps not in abject bad faith, Respondent's out-of-hand rejection of the complaints was also unreasonable. The option given Complainants to either work at considerable risk or be terminated was tantamount to discharging them for their engagement in a protected activity. See NLRB v. Ridgeway Trucking Company, 622 F.2d 1222 (5th Cir. 1980). The effect, not the particular form, of the language used by the employer determines whether an employee has been discharged. Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980).

In short, Respondent's affirmative defense--based on theoretical rights not yet considered or delineated by the Commission-was not supported by the confused, sometimes implausible, sometimes contradictory evidence presented by its own supervisory personnel.

It is concluded that the Complainants engaged in a protected work refusal and that adverse action, in the form of termination of their employment, occurred as a result. In these circumstances, where the mine operator's belief that the working conditions are safe is unreasonable and the miners' belief that such conditions are unsafe is reasonable, the discharge of complaining miners for such work refusal is discriminatory and a violation of the Act.

BACK PAY

General Principles

Specific principles governing the determination of back pay in proceedings arising under section 105(c) of the Act and the allocation of burdens of proof are in the process of formulation. In Secretary v. Northern Coal Company, supra, the Federal Mine Safety and Health Review Commission noted that the Mine Act's provisions are modeled largely on section 10(c) of the National Labor Relations Act and adopted the National Labor Relations Board's definition of back pay as it has been developed over the years. The Commission also noted its prior rulings that so long as the remedial orders employed effectuate the purposes of the Act, both it and its judges possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances. Since both the pleadings and the evidentiary record, insofar as they relate to the remedies available to Complainants including back pay are imprecise, the necessity to exercise considerable discretion and make reference to NLRB burden of proof principles has arisen. 7/

7/ From the beginning of this proceeding great emphasis was placed on developing the record with respect to all aspects of a discrimination proceeding including back pay issues. Further efforts to obtain additional evidence would appear to be futile.

The amount of back pay properly awarded is ordinarly the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings. Northern, supra.

One of the fundamental principles of evidence having particular applicability in this proceeding is that the burden of going forward normally falls on the party having knowledge of the facts involved. See United States v. New York, N. H. & H. R. R. CO., 355 U.S. 253, 256 n. 5, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957). In the context of this case the Complainants, who were temporary employees to begin with, after their discharge returned to the area where they resided some 120 miles distant from the site of the Brooksville project (II Tr. 137-138). Knowledge of their attempts to obtain employment in that area would be exclusive to them.

While the sole burden on the government is to show the gross back pay due the Complainants, J.H. Rutter Rex Mfg. Co. v. N.L.R.B., 473 F.2d 223 (5th Cir. 1973); Marine Welding & Repair Works v. N.L.R.B., 492 F.2d 526 (5th Cir. 1974), where an employer raises the affirmative defense, as here, that the discharged employees failed to mitigate their loss by refusing to search for other employment 8/ the discriminatees are required to establish that they engaged, as a minimum, in "reasonable exertions" to find interim employment. N.L.R.B. v. Arduini Mfg. Corp. 394 F.2d 420, 423 (1st Cir. 1968); O. C. & Atomic WRKS INT. UNION, AFL-CIO v. NLRB, 547 F.2d 575 (D.C. Cir., 1976).

Where the employer contends that several discriminatees did not all make the required effort to mitigate their damages, the willful idleness issue must be determined with respect to each employee separately considering the record as a whole. N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966). This individualized, rather than group, approach is dictated by the nature of the mitigation rule which is generally recognized today. N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972). Once the gross amount of back pay has been established the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability. N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963). An employee who has been discriminated against is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason. N.L.R.B. v. Madison Courier, Inc., supra; N.L.R.B. v. Maestro Plastics Corp., 354 F.2d 170, 174 n. 3 (2d Cir. 1965), cert denied, 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966).

8/ Failure to mitigate damages by refusal to search for alternative work or by refusal to accept substantially equivalent employment is an affirmative defense. N.L.R.B. v. Mooney Aircraft, Inc., 366 F.2d 809 (5th Cir. 1966). What proof Respondent presented on this question was obtained through cross-examination of the Secretary's witnesses.

General Evidence Applicable to All Complainants

At the time of their discharge, Complainants were working a 12-hour day, 7 days a week, and were expected to work an additional 24 days and 9 hours.9/ Van Terry McGuire was paid $11.25 per hour and the six remaining Complainants were paid $10.25 per hour (I Tr. 24, 144). Although the Secretary, in his brief, asks for an award of overtime pay, I find no evidentiary support in the record therefor and none is cited by the Secretary.

John Robinson, project manager at E. M. Watkins Company, Perry, Florida, testified that E. M. Watkins was the only company in the Perry, Florida, area (home of the seven Complainants) that engaged in industrial construction and had a need for this type of welder (II Tr. 133). He also testified that during March and April 1979, there were no jobs for welders in the Perry area and that the area was saturated with available welders.

JOE E. BROWN

This Complainant was unable to obtain work after being discharged (II Tr. 133, 144-145, 149) and after taking a second mortgage on his home on April 16, 1979, went into the crabbing business. I find that after his first week of unemployment he made reasonable efforts to obtain other employment but was unable to do so because of the negative employment situation in the area of his residence (II Tr. 133-134). Complainant Brown, however, testified that he did not look for work until one week after he returned home from the Brooksville (Metric Constructors) project. Since a discharged employee must make some reasonable, if not diligent, efforts to mitigate his backpay claim by seeking equivalent work, J.H. Rutter Rex Manufacturing Co., Inc., v. N.L.R.B., supra, I conclude that Brown did not sufficiently engage in such effort by waiting one week before looking for work. 10/ Accordingly, a period of 7 days is deducted from the maximum period (24 days and 9 hours) Brown would have continued to work at Respondent's Project had he not been discharged. Complainant Brown is therefore found entitled to back pay for 213 hours (17 12-hour days plus an additional 9 hours on March 2) at the rate of $10.25 per hour, or a total award of $2,183.25.

JOHN WALLY PARKER

This Complainant applied for work at E.M. Watkins Company, Perry, Florida, the day following his discharge (I Tr. 166). He went to work there commencing August 16, 1979, (II Tr. 136). Other than the foregoing, the

9/ Complainants were temporary employees hired to work 4 weeks. They worked and were paid for 3 days and 3 hours.

10/ The employer is not under the severe burden of establishing that a particular discriminatee would have located suitable interim employment had he only made the required effort, before the back pay liability may properly be reduced. "[W]ith such diligence lacking, the circumstances of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant." American Bottling Co., 116 NLRB 1303, 1307 (1956).

record is barren in connection with the back pay issue. While the Secretary has carried its burden of showing the back pay due this Complainant, i.e., his regular hourly wages for 24 12-hour days and 9 hours, Respondent has failed to carry its affirmative burden of establishing any facts which would either negative the existence of such liability or mitigate it. The only inference which can be drawn from the paucity of evidence available is that Complainant immediately sought work after being discharged. 11/

Accordingly, he is found entitled to an award of $3,044.25 in back pay (297 hours at the rate of $10.25 per hour).

JAMES WESLEY PARKER

This Complainant, a resident of Perry, Florida, testified that he was drawing unemployment benefits when he went to work on the Metric job at Brooksville, Florida, that he "didn't work enough to drop it" and that he made no efforts to obtain other employment for a period of "a month, maybe three or four weeks" after he left the Metric job. He testified at another juncture in his testimony, however, that he did notapply for other work until July, 1979, (I Tr. 200-204). 12/ It is concluded that this Complainant failed to make sufficient efforts to obtain other employment after being discharged to qualify for an award of back pay. To be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience." N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966); Southern Silk Mills, Inc., 116 NLRB 769, 773 (1956), remanded, 242 F.2d 697 (6th Cir.), cert. denied, 355 U.S. 821, 78 S.Ct. 28, 2 L.Ed.2d 37 (1957).

"We do not * * * [believe] that it must appear that [the discriminatee] could have procured such a job (i.e., suitable interim employment) before he can be found to have incurred a willful loss by the failure to apply for it. It is incumbent on a claimant to seek a job for which he has extensive experience." Knickerbocker Plastic Co., 132 NLRB 1209, 1219 (1961).

Accordingly, an award of back pay for this Complainant is denied.

11/ While the liable employer may attempt to demonstrate that a particular employee failed to make the requisite "reasonable efforts to mitigate [his] loss of income * * * [the employee is] held * * * only to reasonable exertions in this regard, not the highest standard of diligence." N.L.R.B. v. Arduini Mfg. Co., supra. "[T]he principle of mitigation of damages does not require success; it only requires an honest good faith effort * * *." N.L.R.B. v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955).

12/ After a recess, Mr. Parker changed his testimony and indicated that he had inquired about employment at one firm on the Monday morning following his discharge. After careful scrutiny of this portion of his testimony (I Tr. 211-221), I conclude that it is not sufficiently trustworthy to be credited.

DAVID MIXON

This Complainant was killed in an accident in November, 1980 (II Tr. 152). The only evidence bearing on the back pay issue is that Mr. Mixon commenced employment at White Construction Company on or about April 9, 1979 (II Tr. 154). I infer therefrom, there being no showing to the contrary, that Mr. Mixon had no other employment prior to April 9, 1979, and is thus entitled to an award of back pay for the full period remaining on his original term, i.e., 3 weeks, 3 days, and 9 hours. See N.L.R.B. v. Pilot Freight Carriers, Inc., 604 F.2d 375, 378 (5th Cir. 1979), reaffirming the principle that "'when an employer's unlawful discrimination makes it impossible to determine whether a discharged employee would have earned backpay in the absence of discrimination, the uncertainty should be resolved against the employer.'"

Although no challenge was made to Mixon's entitlement based on the theory that any back pay entitlement was extinguished by his death (I Tr. 28, 29), some consideration of this question appears in order. The Federal Mine Safety and Health Act contains no provision with respect to whether the claim of an employee for back pay survives his subsequent death. With some few exceptions the federal statutes contain no express provisions for survivability of causes of action in the federal courts, (1 Am.Jur. 2d, Abatement, Survival and Revival, § 112, p. 128), and where no specific provision for survival is made by federal law the cause survives or not according to the common law. At common law the basic principle of survivability is that survivable actions are those in which the wrong complained of affects principally property and property rights, including monetary interests, and in which any injury to the person is incidental, whereas nonsurviveable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental. Pierce v. Allen B. Du Mont Laboratories, Inc., 297 F.2d 323 (3d Cir. 1961); 1 Am. Jur. 2d Abatement, Survival and Revival, S 51, p. 86.

It is axiomatic that the Act is remedial and clothed in the public interest. Since the remedy provided for a discriminatee represents reimbursement of a lost property right, i.e., back pay, it is found to survive his death and to be subject to an award in an action brought by the appropriate government agency on his behalf.

Accordingly, the deceased, David Mixon, is found entitled to an award of gross back pay of $3,044.25 (24 12-hour days and 9 hours, or 297 hours, at the rate of $10.25 per hour). Said amount with interest and other entitlements shall be paid to decedent's estate or heirs as determined by the Secretary.

JOHNNY DENMARK

The only evidence in the record, other than the general information applicable to all Complainants, is that he was hired by the E.M. Watkins Company of Perry, Florida, on September 4, 1979, and that this was the first

time he was employed after March 2, 1979 (II Tr. 136). As noted previously, Mr. Denmark was in military service on overseas duty and was unavailable to testify when the hearings were conducted. As to this Complainant, the Secretary carried his burden by showing the gross back pay due, but the Respondent failed to present evidence in mitigation.

Accordingly, Mr. Denmark is awarded the sum of $3,044.25 representing 297 hours at the rate of $10.25 per hour, the amount he would have earned during the remainder of his 4-week employment term had he not been discharged.

JAMES JERROLD McGUIRE

Mr. McGuire testified that he applied for work at E.M.Watkins the Monday or Tuesday following his discharge and was told work would be avilable for him in two or three weeks. During the interim he worked for his brother welding trailers and was earning sufficient money that he did not look for other work. Neither his actual earnings or hourly rate was shown but his hourly rate was less than $10.00 per hour for an unspecified number of hours. Thus, a precise interim earnings figure cannot be calculated, necessitating the exercise of the broad discretion approved in Northern Coal Company, supra. Accordingly, based on Mr. McGuire's entire testimony (I Tr. 243-248) it is concluded that he worked for a period of 3 weeks during the interim period at the rate of $5.00 per hour for 40 hours per week. 13/ These interim earnings totalling $600.00 will be deducted from the gross back pay ($3,044.25) he would have earned during the remainder of the four-week term for which he was employed.

Respondent contends that the Secretary is barred from recovery on Mr. McGuire's behalf because he refused a position with equal or higher pay in Louisiana during the interim period (II Tr. 247-249). When asked why he was unwilling to go to Louisiana for two or three weeks, McGuire replied that he saw no reason to expend the money "to go out there (and) to rent a place for two or three weeks" and "lose that much money." (I Tr. 248) A discharged employee is not necessarily obliged to accept employment which is located an unreasonable distance from his home. See N.L.R.B. v. Madison Courier, Inc., supra, and cases cited therein. McGuire's refusal to go to Louisiana is found to be reasonable in view of the distance involved, the fact that he had another, even though less-remunerative, job, and his belief that a job opening would occur at E.M. Watkins Company in the near future. McGuire's failure to accept employment in Louisiana is not found to be a wilfull refusal to mitigate his damages so as to extinguish his entitlement to back pay.

Accordingly, this Complainant is found entitled to an award of net back pay in the sum of $2,444.25.

13/ The rate of $5.00 per hour was paid to another Complainant who obtained welding work in the area of Perry, Florida, after being discharged (I Tr. 342-343).

VAN TERRY McGUIRE

This Complainant made reasonable effort to obtain employment after being discharged (I Tr. 342-343) and obtained a welding job at Shawls Welding in Perry, Florida, approximately 2 weeks after being discharged where he was paid $5.00 per hour. The number of hours he worked per week was not established. It is found that he worked 40 hours per week and that he received such interim earnings for the last week and 4 days of the 4-week employment period he was hired for by Respondent. Mr. McGuire's interim earnings are therefore calculated to be $360.00 which is to be deducted from the gross back pay ($3,341.25) he would have earned from Respondent at the rate of $11.25 per hour during the remainder of the 4-week term for which he was employed.

Accordingly, this Complainant is awarded net back pay in the sum of $2,981.25.

BACK PAY AWARD

Complainants are awarded back pay in the amount shown below with interest thereon at the rate of 12 percent per annum 14/ compounded annually from March 3, 1979, until paid.

JOE E. BROWN	$2,183.25
JOHN WALLY PARKER	$3,044.25
JAMES WESLEY PARKER	NONE
DAVID MIXON	$3,044.25
JOHNNY DENMARK	$3,044.25
JAMES JERROLD McGUIRE	$2,444.25
VAN TERRY McGUIRE	$2,981.25

EXPENSES OF HEARING

The Secretary has neither pleaded, argued, briefed, or presented evidence with respect to an award reimbursing Complainants for their expenses in attending the hearing. 15/ However, in Northern Coal Company, supra, which it should be noted was decided after the hearing and after briefs were filed, it was held that an award for hearing expenses is an appropriate, and I believe required, form of relief and that the failure to pray for such relief is no bar to an award therefor. Having considered the circumstances in which the hearings were held, after reviewing the award of the administrative law judge which was upheld in Northern, and in view of the past difficulty of obtaining precise information from the parties by stipulation or otherwise

14/ See 12 percent interest award of Judge James A. Broderick in Bradley v. Belva Coal Company, 3 FMSHRC 921 (April 10, 1981); North Cambria Fuel Co., Inc. v. N.L.R.B. 645 F.2d 177 (3rd Cir. 1981).

15/ The Complaint does contain the standard catch-all prayer for "such other and further relief as may be appropriate."

during the hearing process, it is concluded (1) a reasonable approach is called for, (2) that further hearing would be unproductive and also counter-productive in view of the additional costs which would be incurred by all parties, and (3) an award of $125.00 for each day of hearing attended by a Complainant is fair and reasonable reimbursement.

Accordingly, hearing expenses are awarded to each of the following Complainants for the number of days and in the amounts indicated after their names:

Joe E. Brown (3 days)	$375.00
Van Terry McGuire (2 days) 16/	$250.00
John Parker (3 days)	$375.00
James Wesley Parker (3 days)	$375.00
James Jerrold McGuire (3 days)	$375.00

ASSESSMENT OF PENALTY

Based on prior findings, the discharge of Complainants on March 2, 1979, is found to be a violation of section 105(c)(1) of the Act. The action of Respondent in discharging the seven Complainants is found to constitute one violation for which one penalty will be assessed.

The Respondent is a construction contractor which does business in several states. On the Florida Mining and Materials Corporation repair project involved in these proceedings, Respondent employed approximately 22 welders. Respondent which has no previous history of committing violations under the Act, has made no contention that payment of a penalty would jeopardize its ability to continue in business.

Based on my findings that Respondent failed to investigate the various safety complaints registered by Complainants, I conclude that under all the circumstances including the fact that working at high altitude at night is intrinsically hazardous to begin with, such failure constituted reckless disregard of the safety of the miners involved. The malfunction in Respondent's communications process at the management level which resulted in the safety complaints not being reported to the Project Superintendent resulted, in turn, in his decision to order Complainants to return to unsafe work or be discharged. This latter failure constituted the process by which Complainants were discharged in violation of the Act. In total, Respondent is found to have taken a negligent, unreasonable approach to the safety matters in question.

The violation is found to be serious since, in giving Complainants the option to return to unsafe working conditions or be discharged, an unusual exposure to hazard was created. The hazards posed included death or serious injury from falling 180 or more feet to the ground. The clarity of the choice given the Complainants, no wages or danger, is especially pernicious.

16/ Mr. McGuire did not attend the 1st day of hearing, December 15, 1980.

From the Respondent's standpoint, its management personnel who testified left the distinct impression of a lack of sophistication and experience in safety matters. Their lack of diligence in pursuing the safety complaints-once raised to a clear-cut decision to force Complainants back to work or be discharged-resulted more from a focus on getting the job done than from a callous disregard for Complainants' safety or safety matters in general.

In further mitigation of the amount of penalty which should be assessed, is the considerable amount of back pay which has been awarded here. The D.C. Court of Appeals in Madison Courier, Inc. pointed out that one of the purposes of an award of back pay is the furtherance of the public interest by deterrence of illegal acts in the future. See also Northern Coal Company, supra. Since approximately $17,000.00 in back pay liability has been levied, the deterrent effects here of a larger penalty are rendered nugatory.

Balancing the above factors, a penalty of $1,000.00 seems appropriate and is assessed.

ORDER

1. All proposed findings of fact and conclusions of law not incorporated in this decision are rejected.

2. On or before 30 days from the date of this decision, Respondent is directed to pay to the Secretary of Labor:

a. The sums of $16,740.40 with interest thereon after Federal and State withholding at the rate of 12 percent per annun from March 3, 1979 until paid, and $1,750.00, representing the total back pay and hearing expenses, respectively, due the individual Complainants, said sums to be disbursed by the Secretary in accordance with the instructions previously indicated.

b. The sum of $1,000.00 as a civil penalty for the violation found to have occurred.

3. Respondent shall expunge from its personnel records and files any and all reference to the discharge of Complainants and the circumstances attendent thereto.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 29 1982

UNITED STATES STEEL CORPORATION, Contestant,	CONTEST OF CITATION PROCEEDING
v.	DOCKET NO. WEST 80-386-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	MSHA Order No. 339479
	Mine: Atlantic City Ore Operation
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
	DOCKET NO. WEST 81-58-M
	MSHA Case No. 48-00145-05014
v.	DOCKET NO. WEST 80-160-M
	MSHA Case No. 48-00145-05008 H
UNITED STATES STEEL CORPORATION, Respondent.	Mine: Atlantic City Ore Operation

DECISION AND ORDER

APPEARANCES:

Phyllis K. Caldwell, Esq.
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For the Petitioner

Louise Q. Symons, Esq.
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For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Pursuant to the provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act"), United States Steel Corporation (hereinafter "USS") was issued Citation No. 338867 on May 15, 1979. (Case No.

WEST 80-160-M). A violation of 30 CFR § 55.12-14[1/] was alleged. The citation stated that the high voltage power cable to the No. 4 shovel was being moved by hand. No protective equipment or personal protection was used.

On June 12, 1980, Citation No. 339479 was issued alleging a violation of the same regulation. Specifically the citation stated "... an employee was observed handling an energized 4,160 volt power cable to company drill #6. The employee was wearing leather gloves only." In connection with this citation USS timely filed a "Notice of Contest." (Case WEST 80-386-R). Subsequently, the Secretary filed a "Proposal for Penalty" for the alleged violation (Case No. WEST 81-58-M).

On both Citations "Order of Withdrawal" was designated pursuant to section 107(a) [2/] of the Act, and the violations were designated as "significant and substantial." By Order dated October 7, 1981, the above three cases were consolidated for hearing.

At the commencement of the hearing counsel for the Secretary withdrew the section 107(a) Withdrawal Order allegation in connection with Citation No.339479. USS had no objection, but argued that the section 107(a) withdrawal order designation in Citation 338867 was still a valid issue. However, USS had not filed an application for review of the withdrawal order designated in that Citation. Commission Procedural Rule 21 requires that the application for review be filed within 30 days of receipt of the order by the applicant.

1/ 30 CFR 55.12-14 states in pertinent part as follows:

... When such energized cables are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for persons is provided by other means. ...

2/ Section 107(a) reads in pertinent part:

If, upon any inspection ... of a ... mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall ... issue an order requiring the operator of such mine to cause all persons ... to be withdrawn from ... such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which cause such imminent danger no longer exists ...

I find that there was no prejudice to USS in that the Secretary elected not to proceed on the withdrawal order designation on either citation. In Citation No. 338867, Case No. WEST 80-160-M, an application for review of the order was not timely filed by USS pursuant to Procedural Rule 21. In Citation No. 339479, the subject of the "Notice of Contest", Case No. WEST 80-386-R, and also the proposal for penalty, WEST 81-58-M, the withdrawal order was not an issue because USS had no objection to the Secretary withdrawing that designation prior to the hearing.

Counsel for the Secretary elected to present evidence only on the alleged violations of the cited regulation and proposed penalties in cases No. WEST 80-160-M and WEST 81-58-M.

FINDINGS OF FACT

1. Atlantic City Ore Operations is large. It employs 530 employees and there are three working shifts daily. The imposition of proposed penalties will not affect Respondents ability to continue in business.

2. USS had 112 assessed violations in the preceding two year period at its Atlantic City Ore Operations, and this is average for an operation of that size.

3. Approximately four drills and eight shovels which are electrically powered through trailing cables are used in daily operations at the Atlantic City Ore Operation.

4. As the equipment is in operation, the trailing cables which weigh approximately 2.2 pounds per foot are moved manually by crews of laborers and Pit utility men on a regular basis.

5. The trailing cables which are approximately two and a half inches in diameter are rated at 5,000 volts although they ordinarily carry 4,160 volts of electricity. The cables consist of three copper phase wires encased by a braided wire mesh which in turn is in physical contact with the two ground wires. There is also a separate insulated ground wire in the system that can be used as a continuous ground monitor, although the Atlantic Ore Operation does not have a continuous ground monitor system in use.

6. The trailing cables attached to the equipment run to a switch house, one for each unit. If there is a disruption or break in the electrical system and current is carried on the ground wire, the current will follow the ground wire back to the switch house and substation and trip a circuit breaker. The resistor limits the ground fault to a maximum of approximately 25 amps, however, 4 amps of current is sufficient to open the circuit and stop the flow of electricity to the machinery.

7. The current must run through the ground fault system to the breaker for approximately one second in order for the breaker to trip and shut off the electrical power running to the equipment.

8. Current of less than one amp can seriously injure or electrocute a person.

DISCUSSION

Before each citation was issued an MSHA inspector had observed a miner manually moving trailing cable without the use of insulated hooks, tongs, ropes, or slings. Thus, there was a violation of the cited regulation "unless suitable protection for persons is provided by other means." USS utilized a ground fault tripping system built into the trailing cable, and the Secretary contends that this system is not "suitable protection" within the requirements of the cited regulation. The Secretary also contends that the ground fault tripping system does not protect miners but was designed to protect equipment.

It was undisputed that the current needed to trip the breaker switch is more than is necessary to seriously injure or kill a person. A phase to phase fault was described as an occurrence when the current flows from one conductor wire to another in the trailing cable. A phase to ground fault is the passage of electricity from the conductor wire to the ground wire. If the ground wire is interrupted, broken, cut or severed for some reason, there is no effect on the breaker at the switch house. Thus, even though the ground fault system depends on the ground being connected at all times in order to trip the breaker, under some circumstances the system would not offer that protection. Once the stray current has reached the metal shielding outside of the cable and inside the jacket of the trailing cable, the current can be conducted down the entire length of the cable endangering anyone who might touch it without protective equipment required by the regulation. Damage to the cable can exist in the form of pin hole leaks which cannot be detected by eye.

The trailing cable can accidentally be damaged. They are subject to adverse weather and operating conditions. The evidence showed that the cables sometimes get frozen into snow banks and are chipped loose with picks or shovels. They are sometimes run over by heavy equipment, and they are subject to tension by the machinery dragging them over rocks and ridges. Heavy rocks may fall on them from higher in the open pit.

An electrician for USS testified that the ground faults system is designed to protect the equipment powered by the trailing cable and is not designed to protect persons who handle the cables. I find this evidence, along with the statements of other witnesses, convincing on that point,

even though the assistant superintendent of maintenance testified that this was not the case. The electrician also testified "I have seen cables that had a fault and blown a hole in the jacket. The switch house has failed to trip and you can see current carrying conductors [wires] visible."

There are five to six miles of trailing cable in the open pit mine which must be energized when the drills and shovels are operating. A cable can be up to three quarters of a mile in length and have as many as 15 splices every 500 to 700 feet. At one time there were over 500 splices in the entire length of cable. Generally, a splice is applied where leakage of current has occurred due to damage. An MSHA inspector discovered five defective splices in one day's inspection at the mine. This condition presented a hazard to miners who manually moved the cable.

The assistant superintendent of maintenance for USS tesified that the ground fault system depended on the ground being connected for the system to perform properly. However, loss of ground continuity can occur in the system and the breaker at the switch house would not "trip". The current needed to trip the switch house or to interrupt the current can be more than the amount required to injure or kill a person. The evidence shows that a miner may be exposed to more than one amp of current for a period of approximately one second, which is sufficient to seriously injure or kill him if he comes into contact with the cable with his bare hands. Although one miner was observed wearing leather gloves while handling the cable, there was no evidence produced to show that these gloves provided "suitable protection." The Citation No. 338867 was terminated by the inspector after USS obtained electrical hazard gloves for use by the cable handlers.

I also find the testimony of the electrical engineer called to testify for the Secretary to be credible. He testified that possible injuries which could result from bare hand touching of a trailing cable which is leaking current of less than one amp could result in severe physical harm or death. Although a miner cannot be expected to be provided work in a completely risk free environment, the evidence is convincing that when the energized power cables are moved manually the ground fault system is not suitable protection from the electrical hazards provided by means other than insulated hooks, tongs, ropes, or slings as called for in the cited regulation.

I find that the designation of "significant and substantial" in connection with the gravity of the violations was proper. This conclusion is based on the principles set forth in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), as follows:

> " ... 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 violations could significantly and substantially contribute to the cause and effect of a mine safety hazard, namely, that of electrical shock. There exists a reasonable likelihood that electrical shock will result in an injury of a reasonably serious nature.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the parties and subject matter of these proceedings.

2. The Secretary has proven by a preponderance of the evidence that USS violated 30 CFR 55.12-14, as alleged in Citations No. 339479 and 338867.

ORDER

Citations No. 339479 and 338867 are affirmed, the notice of contest in WEST 80-386-R is dismissed, and USS is ordered to pay a civil penalty in the sum of $250 for each violation for a total of $500 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEST 81-238-M
	:	A.O. No. 42-00716-05012
v.	:	Magna Concentrator
KENNECOTT MINERALS CO., UTAH COPPER DIVISION, Respondent	:	Docket No. WEST 81-239-M
	:	A.O. No. 42-00712-05017
	:	Arthur Concentrator

DECISIONS

Appearances: James Barkley, Attorney, U.S. Department of Labor, Denver, Colorado, for the petitioner; John B. Wilson, Esquire, Salt Lake City, Utah, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These 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), proposing civil penalties for three alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations. The citations and proposed penalty assessments are as follows:

Docket No. WEST 81-238-M

Citation No.	Date	30 CFR Section	Assessment
0584162	11/13/80	55.9-2	$114
0584163	11/14/80	55.18-25	$140

Docket No. WEST 81-239-M

Citation No.	Date	30 CFR Section	Assessment
0583701	11/28/80	55.14-1	$240

Respondent filed timely answers in these proceedings denying that it had violated any of the safety standards detailed in the petitioner's proposals for assessment of civil penalties. In addition, in Docket WEST 81-238-M, respondent filed a motion to dismiss on the ground that MSHA lacks jurisdiction to enforce any mandatory safety and health standards governing working conditions of employees working at respondent's power plant. The citations in question were issued at the power plant, and while conceding that respondent's Magna Concentrator is a "mine" subject to the provisions of the Act, respondent asserted that the Act does not apply to the power plant. Respondent argued that pursuant to the provisions and terms of an MSHA-OSHA Interagency agreement, 44 Fed. Reg. 22827, April 17, 1979, effective March 29, 1979, MSHA does not, should not, and cannot exercise enforcement jurisdiction over a power plant facility.

Petitioner filed a response and opposition to the motion to dismiss and by Order issued October 7, 1981, I denied the respondent's motion to dismiss without prejudice to its reassertion at a scheduled hearing where the parties would have a full opportunity to present additional facts and evidence in support of their respective jurisdictional arguments.

These proceedings were initially docketed for hearing in Salt Lake City, Utah, October 22-23, 1981, but the hearings were cancelled and continued because of certain budgetary travel restrictions placed on the Commission. The hearings were subsequently rescheduled for hearings in Salt Lake City, March 30, 1982, and the parties were so advised by notice of hearing issued on January 4, 1982. The hearings were convened and the parties appeared and participated therein.

Discussion

Docket WEST 81-238-M

The 104(a) Citation No. 058162, November 13, 1980, cites a violation of 30 CFR 55.19-123, states that the violation is snginficant and substantial, and describes the following condition or practice:

> The wire hoist rope on the north crane, west hoist, was dry and not lubricated according to manurfacuter's specifications. This could cause excessive wear on the hoist rope, creating a hazard to persons working around it.

The 104(a) Citation No. 0584163, November 14, 1980, cites a violation of 30 CFR 55.18-20, */ states that the violation is significant and substantial, and describes the following condition or practice:

---

*/ The citation as issued cites section 55.18-25. However, the proposal for assessment of civil penalty cites the correct section 55.18-20, and the parties agreed that this was an apparent typographical error since there is no section 55.18-25.

A person assigned as coal conveyor operator was working alone without adequate communications being available. Part of the conveyor ran through a long inclined tunnel. In the event that he was caught in a section of machinery, or otherwise injured or trapped, his cries for help could not be heard. A periodic check by another person was not made.

Petitioner's counsel advised that upon further investigation of this case in preparation for trial, he has concluded that MSHA cannot now establish the fact of violations with regard to the citations in issue. Under the circumstances, counsel moved for leave to withdraw the proposed civil penalty assessments, to vacate the citations, and to dismiss Docket No. WEST 81-238-M.

With regard to citation no. 0584162, petitioner's counsel stated that upon further consideration of the facts presented, MSHA cannot prove that a violation existed.

With regard to citation no. 0584163, counsel stated that further investigation of the facts connected with the issuance of the citation revealed that there were no dangerous conditions present at the time the citation issued, that the walkways adjacent to the conveyor in question were clear, that the lighting was adequate, and that the inspector overlooked the fact that an emergency stop-cord was installed along the conveyor and that it could have been used to stop the belt in the event of an emergency. Given these circumstances, counsel asserted that MSHA could not establish that a violation existed.

Petitioner's counsel asserted that he consulted with the inspector who issued the citations and that he was in agreement with the proposed disposition of the citations in question. Respondent's counsel stated that did not oppose the dismissal of the citations and the withdrawal of the proposed civil penalty assessments. However, counsel does not waive the jurisdictional arguments advanced in his answer, but agreed that the issue is moot in light of MSHA's withdrawal of the proposed civil penalties and vacation of the citations.

Findings and Conclusions

Docket No. WEST 81-239-M

In this case the parties advised me that they had reached an agreement for disposition of the case without a trial on the merits. Respondent does not now dispute the fact of violation and indicated a desire to pay the full amount of the proposed civil penalty assessment and to withdraw its "notice of contest." The parties were advised that I would consider the case as a proposed settlement disposition, and pursuant to Commission Rule 30, 30 CFR 2700.30, the parties were afforded an opportunity to present oral arguments in support of their proposed settlement disposition of the case.

Fact of violation

Respondent conceded that citation no. 0584701, issued on November 28, 1980, citing a violation of mandatory safety standard 30 CFR 55.14-1, was properly issued and that the conditions or practices cited therein by the inspector consituted a violation of the cited standard. Under the circumstances, respondent opted to waive its right to assert any affirmative defense in this matter.

History of prior violations

Petitioner presented a computer print-out reflecting 57 prior violations for which respondent paid civil penalties totalling $7,051 for the period December 8, 1978 through December 7, 1980, for citations issued at its Arthur Concentrator. Three of these are for prior violations of mandatory standard section 55.14-1.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business.

The parties agreed that respondent is a large mine operator and that the Arthur Concentrator facility employs 853 miners working three shifts seven days a week. Respondent does not assert that the civil penalty assessment made in this case will adversely affect its ability to remain in business.

Gravity

The parties agreed that the violation was serious and I adopt this as my finding in this case.

Negligence

The parties agreed that the violation resulted from the failure by the respondent to exercise reasonable care and that this amounts to ordinary negligence. I adopt this as my finding in this case.

Good Faith Compliance

Petitioner asserted that the respondent exercised normal good faith complinace in abating the violation and I accept this conclusion as my finding in this case.

ORDER

Petitioner's motion to withdraw its proposals for assessment of civil penalties in Docket No. WEST 81-238-M, is GRANTED, and the citations are VACATED.

With regard to Docket No. WEST 81-239-M, in view of the fact that the respondent does not now contest the citation, it is AFFIRMED. Further, taking into account the six statutory factors found in section 110(i) of the Act, and the arguments presented by counsel during the hearing, I conclude and find that the proposed civil penalty of $140 is appropriate for citation no. 0583701, and respondent IS ORDERED to pay the penalty within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. WEVA 81-234-P
v.		A.C. No. 46-04949-03012F
		No. 2 Mine
GAMBLE COALS, INC.,	Respondent	
and		
GAMBLE COALS, INC.,	Applicant	Contest of Citations
v.		Docket No. WEVA 81-68-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Respondent	No. 2 Mine

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; John E. Busch, Esq., for Respondent.

Before: William Fauver, Administrative Law Judge

These proceedings involve the same two citations. In WEVA 81-234-P, the Secretary seeks a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. In WEVA 81-68-R, the company seeks review and vacation of the citations under section 105(d) of the Act. The cases were consolidated and heard at Charleston, West Virginia. Both parties were represented by counsel, who have submitted 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, Gamble Coals, Inc., operated a coal mine known as the No. 2 Mine in Randolph County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce. The mine produced about 83,000 tons of coal per year and employed about 65 miners.

2. The No. 2 Mine was developed in a block system. Entries were developed on 87-1/2 foot centers and crosscuts were mined on 90 degree angles and developed on 55 foot centers. Entries were designed to be 26 feet wide. Coal was mined at the No. 2 Mine with a Wilcox Mark 20 PJ continuous miner with a bridge conveyor and a universal advance conveyor was attached to a belt conveyor. Mining involved developing a center entry, breaking crosscuts to the right and left of a site line in the center entry, and then advancing outside entries. The miner, universal advance conveyor, and bridge conveyor moved from side to side during the process and an 8-foot free travel area at the end of the bridge conveyor allowed the conveyor belts to slide back and forth.

3. Supports, usually posts and 8 x 12-inch wooden headers, were placed in two rows along the sides of the conveyor. Normally, as the machine moved toward or away from the face, the bridge conveyor would also shift positions, requiring posts to be removed from its path and immediately replaced on the other side of the bridge.

Respondent's roof-control plan required the following inter alia :

> Temporary support . . . shall be installed from tail of miner to within 4 feet of the face as coal is removed. Due to construction and operation of machine, the temporary posts must be repositioned several times. Before a support is repositioned, equivalent support shall be set.

4. On August 13, 1980, the site line in the No. 5 entry was accidentally moved off center. As a result, the entry was driven off center to the left. When the problem was discovered, it was remedied, but the width of the entry exceeded the approved 26-foot width in the roof-control plan for about 40 feet. The excessive width ranged from 32 to 39 feet, and in the break was 38 to 39 feet.

5. The coal seam in the No. 5 Entry was 38 to 40 inches. Bad roof conditions were observed in the No. 5 entry in the early part of August, requiring extensive roof-bolting and timber support.

6. On August 14, 1980, Respondent's day shift was mining in a crosscut between the No. 5 Entry and the No. 6 Entry. Before the start of the shift, there was a visible crack in the roof in the No. 5 Entry, running from right to left just outby 5 Cross Right and extending to the rib on the left side of the entry. The crew installed some additional timbers in this area, but additional roof bolts were not installed around the crack. The shift foreman,

Percy Lanham, directed the crew to mine just outby the corner of the 5 Cross Right and to continue to the face of 5 Headway. The crew backed the miner out and turned 5 Left at Cross Right. During this move, timbers were moved and replaced to permit travel of the conveyor.

7. The crew moved the bridge conveyor four to five times and each time removed and replaced posts as the conveyor was moved. The section foreman observed roof cracks outby the crosscut. When he left the area, at about 2:55 p.m., the area was well-timbered and he observed timbers within 2 feet of and inby the crack mentioned in Finding 6, above.

8. The day shift foreman left the crew about 1:30 p.m., 1 hour before the end of the shift, to begin his preshift examination before the next shift arrived. His crew had mined four to five cuts of coal (16 to 18 feet) inby the crack before he left. There were four to five timbers around the crack when he left. During his examination, he observed bad top in the No. 5 Entry from right to left just outby 5 Cross Right and extending to the rib on the left side, and a slip on the outby edge. The rock was loose with water around its edges. He tested the roof by the sound and vibration method.

9. When the day shift ended, he told the section foreman to prepare a preshift report to include a warning of bad top in the No. 5 heading. The day-shift section foreman told the section foreman for the next shift that there was good top in 5 Crosscut Right, but that, on the left side of the No. 5 Entry, there were two visible cracks that he considered dangerous. This section foreman discussed these conditions with his crew before they started working, and told them how and where timbers were to be set.

10. As of the start of the second shift (about 5 p.m.), the area was well-timbered. There were additional supports to compensate for the excessive width in the entry and to support the two cracks on the left side. Ed Ware and Don Taylor tested the roof inby the cracks by the sound and vibration method and it sounded good. The mining machine was about 40 feet in the crosscut on the right side toward the No. 6 entry. The bridge conveyor unit was about 35 feet from the universal advance conveyor and the two units joined at an angle less than 90 degrees. The bridge conveyor extended from the universal advance conveyor and passed by the right rib to the mining machine.

11. The second shift crew normally consisted of seven miners: two facemen, two bridgemen, two timberman, and a miner operator. On August 14, the two front timbermen were Richard Daniels and Tom Barrackman. Walter Eckard was one of the bridgemen.

12. The crew had a dinner break about 7 p.m. Before they resumed work, extra supports were brought to the section. At about 8 p.m., Ed Ware walked up the left side of the bridge and told the operator, Danny Ware, that one cut remained to be mined in this area. Upon returning toward the No. 5 Entry, he removed one row of posts along the conveyor, using an ax. Originally there were two rows of posts in this area--one row along the bridge conveyor,

which Ed Ware removed, and one row along the rib. As he removed the timbers, he threw them across the bridge to Walter Eckard so that they could be replaced. Ed Ware then signaled the operator to start moving back. As the miner started back toward the No. 5 Entry, the conveyor knocked out the other row of posts. At that moment, while Mr. Eckard was installing posts on the right side, one or two of the 8 x 12 wooden headers fell on the bridge. Ed Ware went to remove them but, before doing so, he noticed the top begin to dribble and flakes of rock begin to fall. He shouted a warning to Mr. Eckard, turned, and ran. Mr. Eckard was setting posts on the right side of the bridge. Don Taylor had just come around the corner of the crosscut and gone behind the brattice when he heard Ed Ware shout the warning. Mr. Taylor immediately threw himself against the rib and the roof fell, killing Mr. Eckard.

13. Just before the fall, the miner operator, Danny Ware, had backed the miner away from the face and saw Ed Ware remove a row of posts. The machine continued back 3 to 4 feet and Danny Ware looked back and saw Walter Eckard setting timbers on the right side. Mr. Ware continued back a few more feet and, before he tightened the wire rope, the machine knocked out the second row of posts on the left side. At that instant, Danny Ware turned around and pulled the righthand jack setter to pull the miner closer to the rib and, within about 20 seconds, the roof fell in.

14. Two roof cracks were visible before the fall. The roof section that fell extended from the roof crack closer to the face to the right rib; the rock that crushed Mr. Eckard was 32 feet wide, 14 feet long, and tapered from 1 to 30 inches.

15. Federal Inspector Robert L. Wilmoth received a telephone call from Merle McManus, the Assistant District Manager, notifying him of the fatalilty. and arrived at the mine at about midnight, when he issued a section 103(k) investigative order of withdrawal.

16. At about 9:30 p.m., on August 14, Federal Inspector Paul H. Moore also was notified by phone of the accident at the No. 2 Mine. On August 15, at about 9 a.m., he arrived at the mine with Richard Vasicek, the chief of the special investigation group, District 3, and met three other MSHA inspectors and a state inspector. Inspector Wilmoth interviewed Ed Ware, the bridgeman, Don Taylor, the section foreman, and Danny Ware, the miner operator. Also present were Grant King from the State Department of Mines, the Inspector-at-Large, the Assistant Inspector-at-Large, and Mr. Gamble. Inspector Moore sat in during these interviews for about 20 minutes.

17. Inspector Moore left the interviews after about 20 minutes and went underground with Mr. Vasicek. They arrived at the section at about noon. The Respondent's engineers were already taking measurements and, when they finished, the inspector took his own measurements with the help of Mr. Vasicek and two state inspectors. They took the measurements by stretching a steel tape along the universal advance conveyor to serve as a center line and, at various points along the center line, they measured right and left with another tape to the roof supports and ribs.

18. On August 20, 1980, Inspector Moore charged Respondent with a violation of 30 C.F.R. § 75.200 (violation of approved roof-control plan). The citation (No. 805484) reads in part:

> On the 001 section, widths in excess of 30 feet were mined in the No. 5 entry for a distance of approximately 40 feet. The width ranged from 32 to 39 feet. The maximum width allowed by the roof-control plan approved on 12/16/79 is 26 feet.

The cited condition was proved by a preponderance of the evidence. This condition was abated by training all underground personnel at the No. 2 Mine.

19. Also on August 20, 1980, Inspector Moore charged Respondent with another violation of 30 C.F.R. § 75.200 (violation of approved roof-control plan). This citation (No. 805485) reads in part:

> During the investigation it was revealed that supports (temporary supports) were not set to provide equivalent support before removing installed posts during operation of the mining machine. The approved roof-control plan specifies that equivalent support be set before supports (posts) are repositioned.

The cited condition was proved by a preponderance of the evidence. This condition was found to be abated by training all underground personnel at the No. 2 Mine.

On August 28, 1980, Citation No. 805485 was modified as follows:

> Citation No. 805485 dated 8/20/80 is modified to read and include the following: The accident investigation further revealed that a slicken slided formation approximately 32 feet long and 14 feet wide was present in the intersection of No. 5 entry with the cross cut 5 to 6 on the 001 section where a fatal roof fall occurred. Additional supports had not been installed. An adverse roof condition was known to exist. The section was under the supervision of Don Lee Taylor, section foreman. Type of action of citation No. 805485 dated 8/20/80 shows 104(a), should show 104(d)(2).

The above factual allegations were proved by a preponderance of the evidence. The citation was changed to include "unwarrantable failure" and "significant and substantial" findings. The inspector modified the citation because he believed through subsequent investigation that not only had timbers been removed without being replaced, but additional supports, including roof bolts, were not provided in an area that had bad roof conditions.

DISCUSSION WITH FURTHER FINDINGS

Respondent is charged with two violations of 30 C.F.R. §75.200, which provides:

> 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.

With reference to Citation No. 805484, the Secretary contends that Respondent violated its approved roof-control plan by allowing the No. 5 Entry width to exceed 26 feet. The Secretary contends that, for a distance of about 40 feet in the entry, the width ranged between 32 and 39 feet and the excessive width created overburden pressures on the roof, contributing to the roof fall and fatality on August 14, 1980. The Secretary proposes a penalty of $2,500 for this alleged violation.

With reference to Citation No. 805485, the Secretary contends that Respondent violated its approved roof-control plan by failing to set equivalent support before removing posts during mining activities in the No. 5 Entry on August 14, and by failing to provide additional supports on the right side of the crack in the entry. The Secretary contends that Respondent had too few timbermen and failed to supervise adequately the movement of the conveyors to prevent an accidental bumping of a row of posts supporting the crack in the entry. The Secretary also contends that Respondent was aware of bad roof in the No. 5 Entry, but failed to install roof bolts along the right edge of the crack. The Secretary argues that the sound and vibration method of testing the roof is not foolproof and greater precautions should have been taken. The Secretary argues that it was customary to bolt both sides of a crack or slip, especially with this type of conveyor

system, because the posts installed near the crack would have to be removed to move the conveyor. The Secretary proposes a penalty of $10,000 for this alleged violation.

Respondent admits that the No. 5 Entry was driven off-center with excessive widths for about 40 feet, but argues that the excessive widths in the entry did not contribute to the roof fall on August 14. Respondent also admits that it failed to install equivalent supports as the conveyor was moved, and that this probably contributed to the roof fall; however, Respondent argues that it tested the roof in the No. 5 Entry by an approved method (sound and vibration) and placed supports around a visible crack in accordance with standard procedure. Respondent contends that, although the area to the left of the crack was dangerous, there was no proof that the area to the right of the crack was also dangerous. Respondent contends that its approved roof control plan required additional timbering and spot bolting where required in the discretion of the supervisor and that, in his discretion, the roof to the right of the crack appeared visually sound and sounded good.

Although conceding certain violations of the roof-conrol plan, Respondent contends that forseeability of the violations was not proven and, therefore, the allegation of "unwarrantable failure" to comply should not be sustained and penalties should not be premised on a finding of an unwarrantable failure.

I conclude that the government proved the excessive-width violation as alleged in Citation 805484, and that such violation was serious in that it created a substantial risk of roof fall and could significantly contribute to a mine hazard. I also conclude that this violation could have been prevented by the excercise of reasonable care, including better mine supervision and training. It was due, therefore, to an unwarranted failure to comply with the standard.

I also conclude that the government proved the violations alleged in Citation 805485 and its modification, # 805485-2. The evidence showed that supports were not set to provide equivalent support before moving installed posts during operation of the mining machine, and that, additional supports were needed but not installed to the right of the roof crack in the No. 5 entry intersection with 5 cross right. These violations constituted a serious hazard of roof fall and could have been prevented by the exercise of reasonable care, including better mine supervision and training. They were due, therefore, to an unwarranted failure to comply with the standard.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceedings.

2. In Docket No. WEVA 81-234-P, Respondent violated its roof control plan and 30 C.F.R. § 75.200 by exceeding the width requirements of the roof control plan as alleged in Citation 805485 and by failing to provide and maintain necessary roof support as alleged in Citation 805484 and its modification, # 805484-2.

3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $2,500 for the violation found as to Citation 805485 and $5,000 for the violations found as to Citation 805484 and its modification, # 805484-2.

ORDER

WHEREFORE IT IS ORDERED that in Docket No. WEVA 81-234-P, Gamble Coals, Inc., shall pay the Secretary of Labor the above-assessed civil penalties, in the amount of $7,500, within 30 days from the date of this decision.

IT IS FURTHER ORDERED that, in Docket No. 81-68-R, the citations and modification involved are AFFIRMED and the contest proceeding is DISMISSED.

William Fauver

WILLIAM FAUVER, JUDGE

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